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NOTES

ON THE

CALIFORNIA REPORTS

SUPPLEMENTARY TO THE 1906 EDITION OF
NOTES ON CALIFORNIA REPORTS

SHOWING THE PRESENT VALUE AS AUTHORITY OF EACH
CASE AS DISCLOSED BY THE

CITATIONS

OF THOSE CASES, IN ALL THE REPORTS, BOTH FEDERAL
AND STATE, NOT INCLUDED IN EITHER THE
1899 OR THE 1906 EDITIONS OF NOTES
ON CALIFORNIA REPORTS

WITH

PARALLEL REFERENCES TO AMERICAN STATE REPORTS,
LAWYERS' REPORTS ANNOTATED, AND THE
REPORTER SYSTEM

BY

CHAS. L. THOMPSON
of the San Francisco Bar

SUPPLEMENT ONE

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1912

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With parallel references to cases found in such reports in the Am. Dec., Am. Rep., Am. St. Rep., Am. Ann. Cas., L. R. A., and National Reporter System.

PREFACE.

The great mass of the members of the Bar and of the judiciary in California are so familiar with the plan and scope of Notes on California Reports, that no word of explanation seems necessary. For the benefit of those few, however, who may not be familiar therewith, a few words of explanation may properly be addressed.

This publication is intended as a series of annotations of California cases arranged in a chronological order; that is, in the order in which they appear in the official reports. In these supplementary volumes are included all California cases which have been reported officially since the publication of the last edition of Notes on California Reports in July, 1906. The annotations include all citations of California cases in the reports of sister states and territories and in the federal reports, that have cited the decision to which they are appended, since the publication of the 1906 edition of California Notes. In the hurry and bustle incident to the compilation and publication of the 1906 edition it has been found that many citations were omitted therefrom—principally from reports from sister states whose reports were unavailable in San Francisco in 1906. In these supplementary volumes an effort has been made to include each and every citation of all of the California cases, as found in any report of any case of a court of last resort, whether such decision was published since the 1906 edition, or prior thereto, and which was for any reason omitted therefrom. These citing cases have been carefully examined and analyzed so as to bring out the precise bearing of each upon the case cited. By the use of these Notes it is aimed to show at a glance how far each case may be relied upon as an authority at the present day. The annotations are arranged in separate paragraphs, so that the investigator may learn at once whether any particular case has been subsequently approved, distinguished, criticised, disapproved or overruled. They show the various circumstances or conditions to which

any principle laid down has been applied, enabling the investigator in this way to follow the legal history of the cases, with their expansion, limitations or restrictions as shown by subsequent citations.

A new feature in these supplemental volumes is the citations from cases which are not officially reported, and which are to be found only in the Pacific Reporter. These citations open up a wealth of useful legal lore which heretofore has been practically unavailable. Another feature which is not found in the other editions of California Notes is the addition of the cumulative references to the Reporter system, and to the various reports of selected cases. It would not be amiss in this connection to remind the members of the Bar that the reference in all citations, both in the official reports and in the Reporter system, is to the exact page upon which the citation is to be found, and not to the initial page, thus saving to the busy lawyer much valuable time.

The references to the notes in American State Reports, Coffey's Probate, and Lawyers' Reports Annotated open up a veritable mine of legal knowledge. In very many instances the very brief which is necessary for a successful termination of particular litigation is to be found in toto in such notes, and may be the means of saving much valuable time and labor.

The preparation of these volumes has necessarily involved a vast amount of labor, and it would perhaps be expecting too much to expect that they should be free from errors. However, it has been the aim of the editor to include each and every citation, to the end that the members of the Bar may have available every case which in any way has mentioned any California case.

May, 1912. CHAS. L. THOMPSON.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 1 CALIFORNIA.

1 Cal. 9–15, PEOPLE v. SMITH.

After Commitment It is Too Late to raise objection to affidavit or warrant of arrest.

Approved in State v. McLain, 13 N. D. 371, 102 N. W. 408, holding defendant waived all objection to magistrate's jurisdiction to proceed with preliminary examination, by giving bail, procuring continuances and taking change of venue.

Prisoner's Right to Discharge on Habeas Corpus after commitment and before trial. See note, 100 Am. St. Rep. 33, 35.

Magistrate may Commit for Any Felony of which prisoner shown to be guilty, though it be different from that specified in warrant.

Approved in People v. Gregory, 8 Cal. App. 741, 97 Pac. 913, motion to set aside information is unavailing to review objection that complaint sworn to by defendant's wife.

On Return to Writ of Habeas Corpus, court may examine evidence taken before committing magistrate to ascertain probable cause.

Approved in Packenham v. Reed, 37 Wash. 261, 79 Pac. 787, upholding supreme court's power over habeas corpus for bail when lower court has denied bail after appeal.

Distinguished in Winnovich v. Emery, 33 Utah, 359, 93 Pac. 993, habeas corpus does not lie to review sufficiency of evidence adduced before committing magistrate.

Denied in Hyde v. Shine, 199 U. S. 84, 25 Sup. Ct. 760, 50 L. Ed. 97, holding rule contra in federal courts.

Complaint or Information on Information and Belief as basis for warrant or examination preliminary thereto. See note, 25 L. R. A. (n. s.) 62.

1 Cal. 33–37, PAYNE v. PACIFIC MAIL STEAMSHIP CO.

Power of Appellate Court Over Verdict for excessive damages. See note, 26 L. R. A. 388.

1 Cal. 42–45, 52 Am. Dec. 286, FROTHINGHAM v. JENKINS.

To Whom may Delivery be Made under bill of lading, See note, 38 L. R. A. 364.

What Contracts will Support Maritime Lien. See note, 70 L. R. A. 369.

1 Cal. 51–54, 52 Am. Dec. 288, COLE v. SWANSTON.

On Sale of Chattels, Where No Time of Payment or of delivery are agreed upon, delivery and payment are concurrent acts.

Distinguished in Pearson v. McKinney, 160 Cal. 660, 117 Pac. 923, where buyer of trees demanded delivery at seller's office, stating he was prepared to pay on delivery, but delivery refused, buyer not required to actually produce money to make demand for delivery effectual.

1 Cal. 55–75, VON SCHMIDT v. HUNTINGTON.

Miscellaneous.—Cited in Culver Lumber etc. Co. v. Culver, 81 Ark. 113, 118 Am. St. Rep. 17, 99 S. W. 395, to point that owner of majority of stock is entitled to control business of corporation; Spotswood v. Morris, 12 Idaho, 380, 85 Pac. 1100, 6 L. R. A. (n. s.) 665, to point that constitutional provisions as to incorporations do not interfere with organization of limited partnerships.

1 Cal. 75–84, LINEKER v. AYESHFORD.

To Whom Delivery may be Made under bill of lading. See note, 38 L. R. A. 366.

1 Cal. 85–90, PEOPLE ex rel. THE ATTORNEY GENERAL, EX PARTE.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 836, 838, 844.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 74.

1 Cal. 92–94, SANTILLAN v. MOSES.

Position of Priest in Mission Dolores is like corporation sole who can sue in own name.

Distinguished in Bishop of Zeugma v. Paahao, 16 Haw. 349, Roman Catholic bishop in Hawaii is not corporation sole and cannot take by succession from predecessor in office so as to maintain ejectment.

1 Cal. 106–108, PEOPLE v. DANIELS.

Where One Indicted for Murder prior to admission of state, his conviction cannot stand, and he will be ordered in custody to await judgment of regular grand jury.

Cited in Higgins v. Brown, 20 Okl. 378, 1 Okl. Cr. 54, 94 Pac. 712, indictment for murder committed pending before federal court for northern district of Indian Territory on admission of state is cognizable in state court.

1 Cal. 108–119, RINGGOLD v. HAVEN.

Court must Nonsuit Plaintiff when evidence is such that it must set aside verdict if found in his favor.

Approved in Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 624, 91 Pac. 116, upholding grant of nonsuit in action for wrongful death where deceased's contributory negligence was clear.

Measure of Damages Against Common Carrier for loss of goods is their value at port of delivery.

Approved in Northern Commercial Co. v. Lindblom, 162 Fed. 255, 89 C. C. A. 230, applying rule in action against vessel for loss of miners' outfits destined to port in Alaska.

1 Cal. 119–123, 52 Am. Dec. 291, HOEN v. SIMMONS.

Defendant Entering into Possession claiming under plaintiff and in subordination to his title is estopped from questioning it.

Approved in Gervaise v. Brookins, 156 Cal. 107, 103 Pac. 331, following rule.

1 Cal. 132–133, JOHNSON v. PENDLETON.

Appellate Court will not Disturb Verdict on question of fact where evidence is conflicting.

Approved in dissenting opinion in Kerns v. Dean (Cal.), 6 Pac. 706, majority granting new trial.

1 Cal. 134–143, BELT v. DAVIS.

Final Judgment is a Final Determination of particular suit.

Approved in Dobson v. Holmes, 83 Kan. 480, 112 Pac. 133, decision of probate court denying application for order for additional inventory is final appealable order; Railroad Commission of Texas v. Weld, 95 Tex. 283, 66 S. W. 1097, judgment in action under Revised Statutes, article 4564, by person dissatisfied with decision of railroad commission, is final and appealable.

1 Cal. 143–151, 52 Am. Dec. 295, PEOPLE v. TURNER; S. C., 1 Cal. 190.

Where Attorney is Proceeded Against for disbarment he is entitled to notice and hearing.

Approved in People v. Amos, 246 Ill. 302, 138 Am. St. Rep. 239, 92 N. E. 859, following rule.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 899.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 836.

1 Cal. 152–156, PEOPLE v. TURNER.

Order of Judge Adjudging One Guilty of contempt should show on face facts on which adjudication is based.

Approved in In re Shortridge, 5 Cal. App. 375, 90 Pac. 479, commitment reciting merely that attorney interrupted proceedings against order of court to cease, without stating what he said or did, is insufficient.

Necessity for Finding Facts before adjudging one guilty of contempt. See note, 30 L. R. A. (n. s.) 565.

Contempts Committed in Presence of Court may be punished summarily.

Approved in In re Clark, 208 Mo. 146, 106 S. W. 997, absence from courtroom of attorney, to the delay and embarrassment of a trial, is an indirect contempt.

Legislative Power to Abridge Power of courts to punish for contempt. See note, 36 L. R. A. 255.

1 Cal. 158–160, GROGAN v. BUCKLE.

In Action on Note by Special Indorsee against maker, plaintiff must prove genuineness of indorsement though it is not denied under oath.

Approved in Youngs v. Bell, 4 Cal. 202, a party need not deny an indorsement under oath, and indorsee must prove indorsement before notes are admissible.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 524.

1 Cal. 160–162, LEDLEY v. HAYS.

Possession of Servant is Possession of master for purpose of maintaining trespass.

Approved in Michaelson v. Fish, 1 Cal. App. 119, 81 Pac. 662, applying rule where servant claimed lien for unpaid labor in manufacturing brandy.

Where Original Possession is Unlawful, no demand is necessary before action.

Approved in Daggett v. Gray (Cal.), 40 Pac. 961, complaint in action by receiver for conversion of property which fails to show taking was unlawful must aver previous demand; Aber v. Twichell, 17 N. D. 233, 116 N. W. 97, giving of notice prescribed by Revised Codes of 1905, section 6951, is not necessary where sheriff attaches and sells property in possession of and owned by one not named in writ.

1 Cal. 167–179, ROWE v. CHANDLER.

Where Two Persons are Sued Jointly on joint contract, judgment may be rendered against one of defendants and in favor of one of them against plaintiff.

Approved in Duncan v. Capehart, 40 Colo. 448, 90 Pac. 1034, following rule; Dobbs v. Purington, 136 Cal. 71, 68 Pac. 324, upholding judgment against one of two joint defendants alone; Morgan v. Righetti (Cal.), 45 Pac. 260, where two persons sued on alleged firm debt and it is found they are not partners but that debt is individual debt of one, judgment may be rendered against him.

1 Cal. 183–186, WALKER v. HAUSS-HIJO.

Mechanic's Lien Law must be Strictly Construed.

Approved in Lucas v. Redward, 9 Haw. 25, under mechanic's lien law of 1888, lien does not exist until notice thereof is filed.

1 Cal. 188–189, PEOPLE v. TURNER.

Miscellaneous.—Cited in Ex parte Bradley, 74 U. S. 379, 19 L. Ed. 219, to point that mandamus is proper remedy to restore an attorney wrongfully removed.

1 Cal. 190–191, PEOPLE v. TURNER.

Mandamus Lies to Restore to office an attorney of supreme court whom district court has removed from office, though party may have remedy by action.

Approved in Ex parte Bradley, 74 U. S. 379, 19 L. Ed. 219, following rule.

1 Cal. 193–197, GROGAN v. RUCKLE.

Rehearing may be Had at Any Time prior to remittitur, but after remittitur issued jurisdiction of supreme court ceases.

Distinguished in Jackson v. Barrett, 12 Idaho, 466, 86 Pac. 271, where motion to dismiss appeal is confessed and appeal dismissed without prejudice, second appeal may be perfected at any time irrespective of filing of remittitur.

1 Cal. 200–202, MICKLE v. SANCHEZ.

A Written Contract must be Construed so as to give effect, if possible, to all parts of it.

Approved in Welch v. British-American Assur. Co., 148 Cal. 227, 113 Am St. Rep. 223, 82 Pac. 965, applying rule in construing mortgage clause in insurance policy.

1 Cal. 206–207, DE BOOM v. PRIESTLY.

Action on Implied Contract Lies where there has been an express contract which has been deviated from.

Approved in Castagnino v. Balletta (Cal.), 21 Pac. 1098, assumpsit lies to recover balance due on special contract to erect building without alleging performance of all conditions to be performed before payment was due.

Where Special Contract is Deviated from, it may be used to determine value of work done.

Approved in City Street Imp. Co. v. Kroh, 158 Cal. 323, 110 Pac. 940, applying rule where plans for street work changed so as to reduce amount of work.

1 Cal. 213–214, HART v. SPALDING.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 155.

1 Cal. 221–232, 52 Am. Dec. 303, MATEER v. BROWN.

Declarations of a Servant are Admissible against the master only when they form part of the res gestae.

Approved in Durkee v. Central Pac. R. Co. (Cal.), 9 Pac. 101, in action for injuries by train, declarations of engineer concerning accident made five minutes after accident are res gestae. See note, 131 Am. St. Rep. 329, on declarations and acts of agents.

If Evidence Given by Plaintiff would not authorize verdict for him or if court would set it aside if so found, as contrary to evidence, nonsuit must be granted.

Approved in Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 624, 91 Pac. 116, upholding grant of nonsuit in action for wrongful death where deceased's contributory negligence was clear.

Liability of Innkeepers for Injury to or loss of guest's property. See note, 99 Am. St. Rep. 578.

1 Cal. 232–254, 52 Am. Dec. 312, PEOPLE v. NAGLEE.

Uniform Tax Clause of Constitution does not apply to license laws.

Approved in Los Angeles v. Los Angeles Ind. Gas Co., 152 Cal. 767, 93 Pac. 1007, license tax on right to carry on particular trade in a city is not tax on property within constitution, article 13, section 1.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 250.

Constitutional Right of Aliens to engage in lawful occupation. See note, 11 L. R. A. (n. s.) 800.

1 Cal. 254–294, SUNOL v. HEPBURN.

Legal Capacity in Grantor to convey and in grantee to receive are essential to validity of deed.

Approved in Rixford v. Zeigler, 150 Cal. 438, 119 Am. St. Rep. 229, 88 Pac. 1094, holding void deed to an unincorporated "church community" for "school and church purposes" not naming its members or other grantee, under which no possession taken.

Deed from Indian to White is void on face.

Denied in Territory of New Mexico v. Delinquent Taxpayers, 12 N. M. 144, 76 Pac. 308, lands of Pueblo Indians are taxable.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1223.

1 Cal. 295–322, WOODWORTH v. FULTON.

An American Alcalde Could not Grant public lands in San Francisco.

Approved in Hart v. Burnett, 15 Cal. 589, 597, 606, discussing title to San Francisco pueblo lands.

1 Cal. 322–329, REYNOLDS v. WEST.

Grant of Lands in San Francisco by an American alcalde is void.

Approved in Hart v. Burnett, 15 Cal. 606, discussing title to San Francisco pueblo lands.

Grant by Mexican Official Duly Authorized and made in accordance with Mexican laws applicable to California gives valid title.

Cited in Ohm v. San Francisco (Cal.), 25 Pac. 157, arguendo.

Where Boundaries of Alcalde's Land Grant are uncertain, true location of lot is for jury.

Approved in County of Sierra v. County of Nevada, 155 Cal. 7, 99 Pac. 374, determining boundary between Sierra and Nevada counties.

1 Cal. 331–332, EX PARTE KYLE.

Attorney has No Lien on Judgment recovered by him for his client, for quantum meruit for services, as lien extends only to costs.

Approved in Tyler v. Superior Court, 30 R. I. 115, 73 Atl. 470, following rule.

1 Cal. 336–337, SEAMAN v. MARIANI.

Constitutionality of Compulsory Reference in actions at law. See note, 13 L. R. A. (n. s.) 146.

1 Cal. 345–347, SOULE v. HAYWARD.

Practice Act, Section 74, providing for arrest of debtor, does not apply in case of one partner suing to recover money received by another.

Distinguished in Ledford v. Emerson, 140 N. C. 292, 52 S. E. 642, 4 L. R. A. (n. s.) 130, statute permitting arrest for fraud applies when, by reason of character of transaction or general termination

of partnership dealings, action at law will lie against one partner in favor of other.

1 Cal. 353–354, YONGE v. PACIFIC MAIL STEAMSHIP CO.

In Action Against Carrier for nonperformance of contract to carry passenger, remote and contingent damages are not recoverable.

Cited in Coleman v. Southern Ry. Co., 138 N. C. 355, 50 S. E. 691, discussing right to compensation to passenger who was given wrong information by ticket agent.

Liability to Passenger for Default or delay in running train. See note, 32 L. R. A. 545.

1 Cal. 355–358, DUNBAR v. SAN FRANCISCO.

Right to Compensation for Property Destroyed in abating public nuisance. See note, 19 L. R. A. 197.

1 Cal. 363–365, GEORGE v. LAW.

Appellate Court will not Interfere with verdict where question upon which they have passed is solely one of unliquidated damages, unless beyond doubt verdict is unjust.

Approved in Hanson v. Henderson, 20 S. D. 456, 107 N. W. 671, following rule.

Power of Appellate Court over verdict for excessive damages. See note, 26 L. R. A. 388.

1 Cal. 365–367, KELLY v. CUNNINGHAM.

Duties of Vessels to Avoid Injuring each other and their occupants. See note, 121 Am. St. Rep. 50, 51.

1 Cal. 378–379, TYSON v. WELLS.

Right to Appeal from Unfavorable while accepting favorable part of decree, judgment, or order. See note, 29 L. R. A. (n. s.) 27.

1 Cal. 379–386, PEOPLE v. McCAULEY.

Power of Officials to Act as determined by place of performance. See note, 33 L. R. A. 90.

1 Cal. 387–393, DEVINELLE v. HENRIQUEZ.

Where Documentary Evidence is Offered and rejected, it or its substance must be incorporated in record in order for appellate court to review ruling.

Approved in San Francisco Com. Agency v. Hogan Co., 6 Cal. App. 409, 92 Pac. 312, following rule.

Public Administrator is Personally Liable on contract made in relation to estates upon which he administers.

Distinguished in dissenting opinion in Briggs v. Breen (Cal.), 56 Pac. 887, majority holding executor personally liable for compensation of his attorney.

1 Cal. 399–402, GARDET v. BELKNAP.

Acceptance of Goods to Satisfy Statute of Frauds. See note, 96 Am. St. Rep. 219.

1 Cal. 403–405, PEOPLE v. BAKER.

In Criminal Case Affidavit of Juror made after verdict as to his prior misconduct cannot be received on motion for new trial.

Approved in State v. Beesskove, 34 Mont. 52, 85 Pac. 378, following rule; Sutton v. Lowry, 39 Mont. 471, 104 Pac. 547, rejecting affidavit of one juror, relating to conversation had with another juror tending to show misconduct on part of latter.

1 Cal. 406–409, **PEOPLE v. CLARK.**

Where Statute is Declared to Take Effect from and after its passage, it takes effect at the very moment of its approval by governor.

Approved in Gay v. Engebretson, 158 Cal. 26, 139 Am. St. Rep. 67, 109 Pac. 878, under Vrooman Act, section 3, completion of publication of order is not condition precedent to ordering work to be done; Quinn v. City of Cambridge, 187 Mass. 509, 73 N. E. 661, determining time within which special assessment commences to run.

Fraction of Day as Determining Priorities or precedence of rights. See note, 1 L. R. A. (n. s.) 836.

1 Cal. 409–410, **SMITH v. CHICHESTER.**

View by Jury. See note, 42 L. R. A. 386.

1 Cal. 410–412, **HEATH v. LENT.**

Where Complaint Against Administrator is based on instrument executed by intestate, administrator need not deny signature of intestate.

Approved in Marx v. Raley, 6 Cal. App. 481, 92 Pac. 520, where in action to recover guaranteed price of fruit sold by plaintiff's assignors to defendant, answer sets out letter referring to prior letter, proof of nonreceipt of such letter is admissible without denial of execution under oath.

Where Owner's Possession is not Disturbed, only nominal damages can be recovered for wrongful attachment.

Approved in Plymouth Gold Min. Co. v. U. S. Fidelity etc. Co., 35 Mont. 31, 88 Pac. 568, in action on attachment bond where possession of realty not disturbed, interruption of business is not proper element of damages.

Distinguished in McCarthy & Co. v. Boothe, 2 Cal. App. 172, 83 Pac. 176, measure of damages for wrongful attachment of corporate stock is difference in value of stock when seized and when restored with loss of its use meanwhile.

1 Cal. 413–414, 54 Am. Dec. 297, **FISHER v. SALMON.**

Contract of Guaranty. See note, 105 Am. St. Rep. 507.

Miscellaneous.—Cited in Salmon v. Hoffman, 2 Cal. 143, 56 Am. Dec. 322.

1 Cal. 415–416, 54 Am. Dec. 299, **CRAIG v. GODFROY.**

Termination of Authority of auctioneer. See note, 131 Am. St. Rep. 480.

Fraction of Day as Determining Priorities or precedence of rights. See note, 1 L. R. A. (n. s.) 837.

1 Cal. 417–418, **WEBB v. WEBSTER.**

Rights and Liabilities of Assignees of bills of lading. See note, 105 Am. St. Rep. 355.

Liability of Agent Toward Principal and third person respectively for money or property received in course of agency. See note, 2 L. R. A. (n. s.) 660.

1 Cal. 423–425, BROWN v. HOWARD.

Where There is a Known Usage of trade, persons carrying on that trade are presumed to have contracted with reference to usage.

Approved in Pennsylvania R. R. Co. v. Naive, 112 Tenn. 254, 79 S. W. 127, 64 L. R. A. 443, applying rule to custom to suspend business on Fourth of July.

What Contracts will Support maritime lien. See note, 70 L. R. A. 370.

1 Cal. 428, THOMPSON v. MANROW.

Identity of Persons is Presumed from identity of names.

Cited in Sturgis v. State, 2 Okl. Cr. 373, 102 Pac. 61, arguendo.

Distinguished in Bryan v. Kales, 3 Ariz. 428, 31 Pac. 519, fact that record shows suit brought by A against A as administrator and judgment entered therein is not proof in collateral proceeding that plaintiff and defendant were same person.

Admissibility in Evidence of Copies of records of other states. See note, 5 L. R. A. (n. s.) 974.

1 Cal. 429–436, 54 Am. Dec. 300, ROGERS v. HUIE.

Liability of Servant of Agent for conversion, trespass, or other positive tort against third parties under orders. See note, 50 L. R. A. 655.

1 Cal. 437–438, DENNISON v. SMITH.

Party upon Whom Bill of Particulars is served if not satisfied should immediately return it or move for further bill.

Approved in Ames v. Bell, 5 Cal. App. 4, 89 Pac. 620, objection to further bill of particulars made after five months and at time of trial comes too late.

1 Cal. 438–440, IN RE HOLDFORTH.

Constitutionality of Imprisonment for debt. See note, 34 L. R. A. 637.

1 Cal. 441–444, BRYANT v. MEAD.

No Action Lies to Recover Money won at gambling.

Approved in Union Collection Co. v. Buckman, 150 Cal. 161, 119 Am. St. Rep. 164, 88 Pac. 709, 9 L. R. A. (n. s.) 568, denying recovery on note given solely to evidence money lost at gambling.

1 Cal. 448–450, YOUNG v. PEARSON.

Conflict of Laws as to Statute of Frauds. See notes, 64 L. R. A. 123; 19 L. R. A. 794.

1 Cal. 450–451, DE BRIAR v. MINTURN.

Where No Definite Period of Employment is agreed upon, master may discharge servant at any time.

Approved in Savannah etc. Ry. Co. v. Willett, 43 Fla. 314, 31 So. 247, following rule; Brookfield v. Drury College, 139 Mo. App. 365, 123 S. W. 94, construing contract for employment of teacher.

Occupation of Premises as a Servant and as a tenant. See note, 4 L. R. A. (n. s.) 706, 718.

Rights and Remedies of Servant discharged for cause. See note, 5 L. R. A. (n. s.) 531.

Remedy of Wrongfully Discharged Servant by action for breach of contract. See note, 6 L. R. A. (n. s.) 92.

1 Cal. 455–458, WEBER v. SAN FRANCISCO.

Injunction will not Lie to Stay Sale for street improvement assessment where improvement was made without plaintiff's moving in outset to prevent it.

Distinguished in Hotchkiss v. Hansberger, 15 Cal. App. 610, 115 Pac. 960, owner suing to quiet title by removing tax deed void on face need not, as condition precedent, pay to defendant claiming under deed the taxes, penalties and costs paid by him at tax sale.

Injunction Against Collection of Illegal Taxes. See note, 22 L. R. A. 702, 705, 708.

1 Cal. 459–462, 54 Am. Dec. 305, INNIS v. STEAMER SENATOR.

Declarations of Agent when not part of res gestae are not admissible against principal.

Approved in Durkee v. Central Pac. R. Co. (Cal.), 9 Pac. 101, in action for injuries by train, declarations of engineer concerning accident made five minutes after accident are res gestae.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 335.

Where Vessel is Anchored in Bay in path of river and bay steamers, her failure to set light on dark night is negligence per se.

Approved in Carscallen v. Coeur d'Alene etc. Transp. Co., 15 Idaho, 455, 98 Pac. 625, where vessel is moored in place of ordinary safety, and there is no law or harbor rule requiring display of light, omission to display light is not negligence per se.

Duties of Vessels to Avoid Injuring Each Other and their occupants. See note, 121 Am. St. Rep. 51.

1 Cal. 462–469, GUNTER v. GEARY.

All That Part of a Bay or River below low tide is a public highway, which cannot be appropriated by any individual.

Approved in Western Pac. Ry. Co. v. Southern Pac. Co., 151 Fed. 401, 80 C. C. A. 606, determining right to Oakland waterfront.

Acquisition of Tide Land by eminent domain. See note, 66 L. R. A. 898.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 682.

Abatement of Public Nuisance by private person without suit. See note, 124 Am. St. Rep. 596, 598, 600.

Right to Compensation for Property destroyed in abating public nuisance. See note, 19 L. R. A. 196.

1 Cal. 475–478, CARRINGTON v. PACIFIC MAIL S. S. CO.

If It Appear That Jury could not have been misled by charge taken as whole, new trial will not be granted.

Approved in Hayden v. Consolidated Min. etc. Co., 3 Cal. App. 139, 84 Pac. 423, applying rule to instructions as to measure of damages for destruction of ditch.

1 Cal. 481–485, BROOKS v. MINTURN.

Effect of Holidays as to Matters other than relating to negotiable paper. See note, 19 L. R. A. 317.

1 Cal. 485–487, PUGH v. GILLAM.

British Seaman on British Ship, when wrongfully discharged in American port, may sue in state court for wages.

Approved in Enos v. Sowle, 2 Haw. 335, upholding jurisdiction of Hawaiian court over libel for marine trespass committed by American master of American ship on American sailor.

1 Cal. 488–517, PANAUD v. JONES.

Alcaldes in California Had All Powers of judges of first instance in districts where there were no such judges.

Approved in Braly v. Reese, 51 Cal. 461, presuming that bond given and oath taken by guardian of infant appointed by an alcalde in San Francisco in 1849.

Under Mexican Law, Wife During Marriage has revocable dominion and possession of half of community property but husband may sell it.

Approved in Reade v. de Lea, 14 N. M. 461, 95 Pac. 137, under Spanish law husband could sell community property without wife's joinder.

Distinguished in dissenting opinion in Reade v. de Lea, 14 N. M. 468, 469, 474, 95 Pac. 140, 142, majority holding under Spanish law husband could sell community property without wife's joinder.

Presumption and Burden of Proof as to sanity. See note, 36 L. R. A. 724, 733, 734.

1 Cal. 519–536, PEOPLE v. FITCH.

Failure of Governor to Indorse Approval on official bond does not vacate office where incumbent has presented bond within time fixed.

Approved in Curran Printing Co. v. St. Louis, 213 Mo. 39, 111 S. W. 815, upholding contract where mayor had wrongfully refused to approve bond.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 2 CALIFORNIA.

2 Cal. 17-24, GRISWOLD v. SHARPE.

Supreme Court will Order Dissolved an Injunction improperly issued which lower court has refused to dissolve, though final judgment is affirmed on review of case.

Overruled in Nail v. Superior Court, 11 Cal. App. 28, 103 Pac. 903, on appeal to superior court from justice's court, on questions of law and fact, order of justice refusing to dissolve attachment is not reviewable in superior court.

2 Cal. 39-53, FOWLER v. SMITH.

In Action for Price of Land Conveyed by Deed, without covenants, want of title in vendor is no defense unless vendee has been evicted.

Approved in O'Sullivan v. Griffith, 153 Cal. 505, 507, 95 Pac. 875, applying rule to grantee under grant of right, title and interest in street railroad franchise; Riddell v. Blake, 4 Cal. 267, to rescind contract for sale of land on ground that vendor cannot perform because he has no title, vendee must aver and show outstanding paramount title in another.

Right of Grantee in Possession to Question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 385.

2 Cal. 57-58, MONTGOMERY v. LEAVENWORTH.

Stranger to Record cannot appeal.

Approved in State v. Fair, 35 Wash. 137, 102 Am. St. Rep. 897, 76 Pac. 734, witnesses for defense in criminal case whose fees are not allowed by trial court cannot appeal from such action.

Right to Appeal as a Party Interested or injured. See note, 119 Am. St. Rep. 759.

2 Cal. 64-67, 56 Am. Dec. 311, HAIGHT v. JOYCE.

In Absence of Statute, Note Given for gambling debt is valid in hands of bona fide indorsee.

Cited in Union Collection Co. v. Buckman, 150 Cal. 166, 119 Am. St. Rep. 164, 88 Pac. 711, 9 L. R. A. (n. s.) 568, neither payee

nor any subsequent purchaser can recover on non-negotiable notes given for gambling debt.

Gambling Consideration. See note, 82 Am. St. Rep. 139.

Advances on Notes and Other Obligations given for gambling debts. See note, 119 Am. St. Rep. 176.

2 Cal. 74–79, 56 Am. Dec. 313, MULDROW v. NORRIS; S. C., 12 Cal. 331.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 99.

Miscellaneous.—Cited in Estate of Burns, 2 Cof. Prob. 46, to point that trial before referee is to be conducted in same manner as before court.

2 Cal. 80–81, McDOUGAL v. ROMAN.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 41.

2 Cal. 81–82, GAHAN v. NEVILLE.

Money Won at Cards cannot be recovered.

Approved in Union Collection Co. v. Buckman, 150 Cal. 161, 119 Am. St. Rep. 164, 86 Pac. 709, 9 L. R. A. (n. s.) 566, 709, denying recovery on notes given for gambling debt.

2 Cal. 90–92, BOTTOMLY v. GRACE CHURCH.

Materialman has No Lien Unless Material was actually used in construction of building.

Approved in California etc. Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 701, 118 Pac. 107, where owner abandons work, persons who have delivered material on ground for use on building, but which has not been used in its construction, have no lien, though some of material was made specially.

Mechanic's Lien Law must be strictly construed.

Approved in Lucas v. Redward, 9 Haw. 25, under mechanic's lien law of 1888, lien does not exist until notice thereof is filed.

2 Cal. 92–94, SMITH v. POLLOCK.

Right of Trial by Jury cannot be waived by implication.

Approved in Russell v. Alt, 12 Idaho, 794, 88 Pac. 417, 13 L. R. A. (n. s.) 146, court cannot arbitrarily send ordinary action at law to referee for trial against objection of either party; Simmons v. State, 75 Ohio St. 352, 79 N. E. 557, applying rule in criminal case.

2 Cal. 99–100, 56 Am. Dec. 318, THOMPSON v. MONROW.

Appellate Court Presumes in Favor of judgment of lower court unless record clearly shows error.

Approved in Johnson v. Hancock (Cal.), 4 Pac. 1093, applying rule in ejectment.

Presumption as to Law of other states. See note, 21 L. R. A. 471.

How Case Determined When Proper foreign law not proved. See note, 67 L. R. A. 43.

Conflict of Laws as to Measure of damages. See notes, 91 Am. St. Rep. 735, 742; 56 L. R. A. 309.

2 Cal. 107-114, BILLINGS v. BILLINGS.

Where Law Declares Certain Facts merely presumptive evidence of fraud, jury may find against such presumption.

Approved in Williams v. Fourth Nat. Bank, 15 Okl. 482, 82 Pac. 498, 2 L. R. A. (n. s.) 334, applying principle in construing statute of 1903, regulating sales of stocks of merchandise in bulk.

2 Cal. 122-131, TYSON v. WELLS.

Delivery of Possession of Specified Chattel is unnecessary to consummation of sale.

Approved in Potts Drug Co. v. Benedict, 156 Cal. 328, 104 Pac. 435, 25 L. R. A. (n. s.) 609, applying rule to sale of leasehold interest in land.

Where Sale is Complete but Price is not to be paid until after certain time, right of property passes to buyer.

Approved in Potts Drug Co. v. Benedict, 156 Cal. 334, 104 Pac. 437, 25 L. R. A. (n. s.) 609, applying rule to sale of leasehold interest in land.

Miscellaneous.—Cited in Estate of Burns, 2 Cof. Prob. 45, claimant prosecuting doubtful claim presented to administrator which has been referred to referee cannot testify as to any matter of fact occurring before death of decedent.

2 Cal. 132, REISS v. BRADY.

An Order Improperly Dissolving an attachment will be reversed.

Overruled in Nail v. Superior Court, 11 Cal. App. 28, 103 Pac. 903, on appeal to superior court from justice's court, on questions of law and fact, order of justice refusing to dissolve attachment is not reviewable in superior court.

2 Cal. 138-143, 56 Am. Dec. 322, SALMON v. HOFFMAN.

Specific Performance may be Compelled when attorney in fact executed deed in his own name.

Approved in Gillespy v. Hollingsworth, 169 Ala. 605, 53 So. 988, following rule.

2 Cal. 145-149, 56 Am. Dec. 326, KILBURN v. RITCHIE.

Declarations of Third Persons are inadmissible unless they have joint interest with parties or some legal relation exists between them.

Approved in State v. Ryan, 56 Or. 535, 108 Pac. 1013, fact that witness made no response when person stated in his presence that witness had made certain statement could not be shown to impeach him.

A Defendant Entering into Possession under bond for deed from plaintiff does not hold adversely under color of title.

Approved in Beasley v. Equitable Securities Co., 72 Ark. 610, 84 S. W. 228, bond for title is not color of title within act of 1883, providing for compensation for improvements made by occupant under color of title of land belonging to another.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 402.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 192.

2 Cal. 163–164, FOLSOM v. BARTLETT.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 758, 770.

2 Cal. 165–173, FOWLER v. PEIRCE.

In Approving a Statute, the executive acts in a legislative capacity, and his power of approval ceases on adjournment of legislature.

Approved in Lukens v. Nye, 156 Cal. 501, 105 Pac. 594, agreement between governor and beneficiaries under act appropriating money to satisfy claim against state that controller should draw warrant for less sum in full satisfaction is void; Everett v. Baker, 7 Haw. 237, act of his majesty in acting on bills passed by legislature does not require advice and consent of cabinet; State v. Junkin, 79 Neb. 538, 113 N. W. 258, agreement of Secretary of State to consider bill which governor desired to file in his office with his objections thereto as filed does not take place of actual filing, if bill remains in governor's possession.

Right of Executive to Sign Bill after adjournment of legislature. See note, 37 L. R. A. 391.

Mandamus Lies to Compel Comptroller to account to legislator for daily compensation fixed by law.

Approved in State v. Edwards, 33 Utah, 249, 93 Pac. 722, upholding right to mandamus against auditing officer for compensation of court stenographer.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 879.

Conclusiveness of Enrolled Bill. See note, 23 L. R. A. 343, 348.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 39, 40.

2 Cal. 173–176, CONRAD v. LINDLEY.

Party Seeking Specific Performance must show he has acted in good faith.

Distinguished in Livesley v. Johnston, 48 Or. 52, 84 Pac. 1048, when contract for sale of hops required buyer to make advances about April 1st, and March 28th he sent money but stopped check on 31st, because premature, and on April 4th told seller he was ready to perform, there was no laches.

2 Cal. 183–192, ROSS v. AUSTILL.

Judicial Notice. See note, 4 L. R. A. 34.

2 Cal. 198–236, PEOPLE v. WELLS.

When Judge Passes Beyond Territorial Line his functions cease to exist.

Approved in People v. Ruef, 14 Cal. App. 626, 114 Pac. 51, order transferring criminal case to supreme court signed by one justice who immediately left the state and signed by fourth justice while first was out of state is void.

Sickness as Vacancy in Office authorizing performance of duties by another. See note, 25 L. R. A. 613.

2 Cal. 243–244, 56 Am. Dec. 331, PEOPLE v. CRAYCROFT.

When Right Exists at Common Law and new remedy is given by statute, latter is cumulative, and either may be pursued.

Approved in Southern Ry. Co. v. Moore, 133 Ga.-810, 67 S. E. 87, 26 L. R. A. (n. s.) 851, shipper sustaining damage by carrier's failure to furnish cars within reasonable time is not prevented from suing at common law instead of pursuing remedy provided by acts of 1905, page 120.

Where Both Right and Remedy are given by statute, that remedy alone can be pursued.

Approved in State v. Southern Ry. Co., 145 N. C. 539, 59 S. E. 585, railroad not indictable for violation of passenger rate act of 1907, but was liable for penalty only.

2 Cal. 245-248, RUSSELL v. ELLIOTT.

An Order of Reference Does not Violate right of trial by jury.

Approved in United States v. Ramsey, 158 Fed. 493, determining right to and mode of reviewing findings of referee under Idaho statute.

Mandamus Lies to Compel Judge to enter judgment on report of referee.

Approved in Matter of Ford, 160 Cal. 346, 116 Pac. 762, mandamus lies to relieve indicted person from prosecution where, without cause, trial court has arbitrarily postponed trial beyond statutory time.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 895.

2 Cal. 251-256, 56 Am. Dec. 332, BENEDICT v. BRAY.

Bond Taken by Officer Without Authority to require it is void.

Approved in San Francisco v. Hartnett, 1 Cal. App. 656, 82 Pac. 1066, bail bond given to secure appearance of one accused of grand larceny in police court is void where amount of bond was fixed by bond and warrant clerk.

Estoppel of Party Invoking Jurisdiction to deny it. See note, 15 L. R. A. 274.

2 Cal. 257-261, PEOPLE v. TANNER.

In Prosecution for Grand Larceny, punishable by imprisonment or death at discretion of jury, juror who says he would hang man for murder but not for stealing may be challenged by state.

Approved in Demato v. People, 49 Colo. 149, 111 Pac. 704, juror who on voir dire states that under no circumstances would he inflict death penalty is disqualified in murder case; Rhea v. State, 63 Neb. 472, 88 N. W. 792, discussing qualifications of jurors who have conscientious scruples against death penalty.

2 Cal. 262-264, IN RE HANSON.

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 524.

2 Cal. 289-304, DE WITT v. SAN FRANCISCO.

Legislative Grant of Authority to Erect Jail embraces power to buy land to erect it.

Approved in Territory v. Baxter, 16 Okl. 362, 83 Pac. 710, following rule.

Law Embraces but One Subject, which is expressed in its title where subjects embraced in same statute and not expressed by title have congruity or proper connection.

Approved in McGuire v. Chicago, Burlington etc. Ry. Co., 131 Iowa, 347, 108 N. W. 904, upholding Acts 27th Gen. Assem., p. 33, c. 49, amending code, section 2071, relating to railway fellow-servants.

Right of Municipality to be Part Owner of property. See note, 35 L. R. A. 737.

2 Cal. 322–326, HEADLEY v. REED.

After Rendition of Judgment Court may award new trial and set aside referee's report for any reason that would be sufficient to set aside award of an arbitrator.

Approved in United States v. Ramsey, 158 Fed. 493, applying rule under Idaho statute.

Referee cannot File amended report.

Approved in Cline v. Langan, 31 Nev. 244, 101 Pac. 554, after reporting in favor of defendant in action involving leasehold, referee cannot make subsequent order suspending all proceedings pending motion for new trial to be filed.

2 Cal. 326–340, 56 Am. Dec. 339, McDANIEL v. BACA.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 39.

Slander of Title. See note, 13 L. R. A. 708.

2 Cal. 361–369, BREED v. CUNNINGHAM.

Where Lots are Sold as Bounded by space designated in deed as street, use of such space as street passes as appurtenant to grant and vests right of way in grantee.

Approved in The McCarthy Co. v. Moir, 12 Cal. App. 444, 107 Pac. 629, following rule; Petitpierre v. Maguire, 155 Cal. 247, 100 Pac. 692, where owner of tract subdivides same into lots, leaving way between them opening onto street and sells lots as bounding on same, he is estopped to deny grantees use thereof; City of Eureka v. Croghan (Cal.), 19 Pac. 486, conveyance of tract by deed designating it as bounded by certain streets if projected and as being part of certain block as laid down on official map, together with five years' use of projected streets by public, constitutes dedication of streets.

Effect on Grantee's Rights of Call in deed for street or alley in which grantor owns fee. See note, 14 L. R. A. (n. s.) 881.

2 Cal. 370–373, BAILEY v. STEAMER NEW WORLD.

Declarations and Acts of agents. See note, 131 Am. St. Rep. 330.

2 Cal. 374–378, DEWEY v. GRAY.

The Decision by the Supreme Court on a former appeal is the law of the case and cannot be reviewed on subsequent appeal.

Approved in Westerfeld v. New York Life Ins. Co., 157 Cal. 342, 107 Pac. 700, applying rule to decision as to insufficiency of complaint in action on life policy which had been settled and which settlement was claimed to be fraudulent; People's Lumber Co. v. Gillard, 5 Cal. App. 438, 90 Pac. 557, where on former appeal question as to validity of Code of Civil Procedure, section 1203, raised, and it was held that bond given thereunder was enforceable as common-law bond, decision is law of case on later appeal where voluntary issue of bond not in issue; People v. Bennett (Cal.), 50 Pac. 704,

where on assault with intent to murder defendant convicted of lesser offense and new trial granted, and on second trial he was convicted of higher offense and new trial granted because he was once in jeopardy, and judgment reversed on people's appeal for failure to plead jeopardy, supreme court on appeal from judgment on verdict could not review former decision.

Conclusiveness of Prior Decisions on subsequent appeal. See note, 34 L. R. A. 325.

2 Cal. 385-386, BENEDICT v. HOGGIN.

Miscellaneous.—Cited in Morissey v. Hill, 142 N. C. 358, 55 S. E. 194, publication of notice under Revisal 1905, section 39, is not necessary to enforcement of section 93.

2 Cal. 387-408, 56 Am. Dec. 342, BENHAM v. ROWE.

Mortgagee in Possession is not Entitled to compensation for managing property and collecting rents.

Approved in Barnard v. Paterson, 137 Mich. 635, 100 N. W. 894, following rule.

Plaintiff Always has Affirmative, and has the right to open and close.

Approved in Estate of Martin, 4 Cof. Prob. 452, proponent and not contestant of holographic will has burden of proving that instrument was entirely written, dated and signed by testator.

Miscellaneous.—Cited in Curry v. King, 6 Cal. App. 576, 92 Pac. 665, as to duties and obligations of agent in dealing with principal.

2 Cal. 409-412, 56 Am. Dec. 348, COOKE v. SPEARS.

Defendant will not be Permitted to amend answer to plead limitations unless in furtherance of justice.

Approved in Trower v. San Francisco, 157 Cal. 769, 109 Pac. 620, upholding allowance of amendment after cause submitted on second hearing to plead limitations; Rudd v. Byrnes, 156 Cal. 638, 105 Pac. 958, 26 L. R. A. (n. s.) 134, applying rule where failure to plead statute in negligence case was caused by inadvertence of counsel; Reed v. Harshall, 12 Cal. App. 704, 108 Pac. 722, upholding denial of leave to file, after submission of cause, amended answer setting forth plaintiff's failure, as foreign corporation, to designate process agent; Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 316, 90 Pac. 209, upholding denial of amendment four years after issue joined so as to plead novation of debt on note and mortgage, which was barred as against subsequent lienholder; Hewel v. Hogin, 3 Cal. App. 252, 84 Pac. 1004, 1005, upholding denial, after plaintiff rested, of amendment of answer pleading limitations in mandamus to compel irrigation district treasurer to pay interest coupons; O'Neill v. Jones, 24 S. D. 82, 123 N. W. 496, upholding refusal of amendment that payee of note was foreign corporation which had not complied with law and that plaintiff had received note with knowledge thereof.

Distinguished in Lilly-Brackett Co. v. Sonnemann, 157 Cal. 196, 106 Pac. 716, upholding order setting aside default based on service by publication, and directing that case be tried on merits.

Amendment to Pleading. See note, 99 Am. St. Rep. 964.

Statute of Limitations. See note, 81 Am. St. Rep. 908.

"May" and "Shall" in Construction of statute with reference to amendment of pleadings are convertible terms.

Approved in In re Chadbourne, 15 Cal. App. 369, 114 Pac. 1014, construing Code of Civil Procedure, section 1511, with reference to removal of executors who fail to give notice to creditors, as discretionary.

2 Cal. 413–418, 56 Am. Dec. 350, **ADAMS v. BLANKENSTEIN.**

Delivery to Imposter by carrier. See note, 37 L. R. A. 179.

2 Cal. 421–422, **COLLIN v. CARD.**

What Provable by Books of account. See note, 52 L. R. A. 719.

2 Cal. 424–459, **IN RE PERKINS.**

No Appeal Lies from Final Order in habeas corpus.

Approved in Matter of Hughes, 159 Cal. 363, 113 Pac. 686, discussing reviewability on writ of review of judgment of superior court in habeas corpus; Ex parte White, 2 Cal. App. 727, 84 Pac. 242, denying right to appeal from order of superior court discharging petitioner on habeas corpus.

2 Cal. 463–470, 56 Am. Dec. 352, **DE WITT v. HAYS.**

Naked Right to Collect Wharfage cannot be assessed eo nomine.

Distinguished in Inter-Island Steam Nav. Co. v. Shaw, 10 Haw. 633, discussing elements of taxation of corporation engaged in shipping and commercial pursuits.

Tax Sales. See note, 134 Am. St. Rep. 702.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 351.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 702, 703, 704, 705.

2 Cal. 477–482, **HARLEY v. HEYL.**

Municipal Power Over Nuisances affecting safety, health, and personal comfort. See note, 38 L. R. A. 310.

2 Cal. 485–488, 56 Am. Dec. 356, **RIGGS v. WALDO.**

One Signing Note in Blank is not an indorser but a guarantor.

Approved in Yuen Lung & Co. v. Burke, 9 Haw. 145, one signing note on back in blank before delivery and before its indorsement by payee is a first indorser.

Liability of Stranger Indorsing commercial paper before delivery. See note, 18 L. R. A. 33.

Necessity of Notice of Default to bind guarantor. See note, 20 L. R. A. 261.

2 Cal. 489–493, 56 Am. Dec. 360, **GODEFROY v. CALDWELL; S. C.,** 3 Cal. 101.

One Advancing Money as Loan for payment of labor and materials used on building is not entitled to benefit of mechanic's lien law.

Approved in Hackfeld & Co. v. Hilo R. R. Co., 14 Haw. 455, applying rule where cash advanced to subcontractor to be used by him in paying laborers grading railroad line.

2 Cal. 494–497, **GAVIN v. ANNAN.**

Accord and Satisfaction by part payment. See note, 20 L. R. A. 793.

2 Cal. 498-502, LORD v. SHERMAN.

Implied Powers Under Power of Attorney to transact business. See note, 4 L. R. A. (n. s.) 844.

2 Cal. 503-507, GRAHAM v. BENNET.

Where Parties are Competent to Contract, an open avowal of intention and assumption of relative duties imposed is sufficient.

Approved in dissenting opinion in Sharon v. Sharon, 75 Cal. 77, 16 Pac. 355, majority upholding agreement to become husband and wife, made per verba de praesenti, though it contains collateral promise by one party not to make marriage known till future date without other's consent.

Issue of Marriages Deemed Null in law is legitimate.

Approved in Mickle v. Fennell, 15 N. D. 191, 107 N. W. 54, applying rule under Revised Code of 1899, section 2733; Allison v. Bryan, 21 Okl. 563, 97 Pac. 284, 18 L. R. A. (n. s.) 931, construing statute with reference to legitimization of illegitimates by father; Estate of James, 3 Cof. Prob. 181, arguendo.

Right of Mother, or Reputed Father, of illegitimate to its custody or control. See note, 65 L. R. A. 692.

2 Cal. 507-509, MANSFIELD v. DORLAND.

An Attorney has No Lien upon Judgment recovered in favor of his client as compensation for his services.

Approved in Tyler v. Superior Court, 30 R. I. 115, 73 Atl. 470, following rule.

2 Cal. 510-514, McLAREEN v. SPALDING.

Instance Where Lease Did not Protect Lessee from damage caused by city authorities compelling him to remove stands from sidewalk.

Approved in Pabst Brewing Co. v. Thorley, 145 Fed. 125, 76 C. C. A. 87, where defendant obtained a revocable permission to construct vault in street in front of property, he is liable to lessee, where permit revoked before termination of lease, on covenant for quiet enjoyment; Davis v. Simpson Coal Co., 162 Ala. 428, 50 So. 369, where one leased premises with knowledge that they included part of street, it is no defense to action for rent that city has evicted him.

Distinguished in Pabst Brewing Co. v. Thorley, 145 Fed. 120, 76 C. C. A. 87, holding lessor liable to lessee under covenant for quiet enjoyment where vault permit in street revoked before termination of lease.

Rights of Tenants and Reversioners of property taken by eminent domain. See note, 21 L. R. A. 219.

Eviction of Tenant, by Enforcement by public officials of restrictions on use of premises. See note, 2 L. R. A. (n. s.) 974.

2 Cal. 515-516, MORSE v. TALLANT.

Estoppel to Deny landlord's title. See note, 89 Am. St. Rep. 93.

2 Cal. 520-523, TURNER v. BILLAGRAM.

If Action be Improperly Commenced, party bringing it cannot avoid responsibility he may have thus incurred by pleading his own wrong.

Approved in State v. Board of Commrs. of Clinton County, 166 Ind. 210, 76 N. E. 1001, where party on appeal assumed that judg-

ment appealed from had only certain effect and procured opinion along such lines, he cannot on subsequent appeal contend that judgment had other effect; Ewing v. Mallison, 65 Kan. 488, 93 Am. St. Rep. 299, 70 Pac. 370, arguendo.

Estoppel of Party Invoking jurisdiction to deny it. See note, 15 L. R. A. 275.

2 Cal. 524–557, 55 Am. Dec. 385, SMITH v. MORSE.

Common Council cannot Delegate to Others functions imposed on them by charter.

Approved in Schwartze v. Camden, 77 N. J. Eq. 140, 75 Atl. 650, under act empowering council of city owning waterworks to purchase additional lands when deemed advisable, council cannot delegate power.

Delegation of Municipal Power as to license, franchise, and buildings. See note, 20 L. R. A. 727.

Power of Officials to Act, as determined by place of performance. See note, 33 L. R. A. 93.

2 Cal. 558–561, RAMIRES v. KENT.

Alien's Right to Inherit. See note, 31 L. R. A. 87, 179.

Necessity for Judicial Proceeding to effect escheat. See note, 15 L. R. A. 381.

Estoppel to Deny landlord's title. See note, 89 Am. St. Rep. 93.

2 Cal. 564–567, PEOPLE ex rel. PURLEY.

Where Judge is Charged with Receiving Bribe not to forfeit recognizance, absence of allegations that any proceeding upon recognizance had been commmenced is fatal.

Approved in State v. Butler, 178 Mo. 327, 77 S. W. 575, in prosecution for attempting to bribe officer on question which may by law be brought before him, verdict of guilty not sustained by proof that attempt made before law went into effect.

2 Cal. 568–571, FOWLER v. SMITH.

All Contracts Made in This State prior to act of April 22, 1850, are governed by civil law.

Approved in Sterett v. Sweeney, 15 Idaho, 424, 128 Am. St. Rep. 68, 98 Pac. 421, 20 L. R. A. (n. s.) 963, limitations as to contract made in Washington on which partial payments made in that state by resident of this state are governed by Washington law.

Buyer has No Right of Action on implied warranty of quiet enjoyment unless actual judicial eviction shown.

Approved in Riddell v. Blake, 4 Cal. 267, to rescind contract for sale of land on ground that vendor cannot perform because he has no title, vendee must aver and show outstanding paramount title in another.

2 Cal. 571–574, 56 Am. Dec. 363, ROGERS v. HUIE.

Conversion is Gist of Action of trover.

Approved in Southern Express Co. v. Sinclair, 130 Ga. 375, 60 S. S. 850, where in trover against express company alleging it had possession of plaintiff's trunk, proof showed trunk transported to destination and burned in company's possession, plaintiff cannot recover.

Liability of Servant or Agent for Conversion, trespass, or other positive tort against third parties under orders. See note, 50 L. R. A. 655.

Liability of Agent Toward Principal and third person respectively for money or property received in course of agency. See note, 2 L. R. A. (n. s.) 660.

Law of Auction Sales. See note, 131 Am. St. Rep. 500.

2 Cal. 588–589, SHATTUCK v. CARSON.

Equity will Order Cancellation of outstanding deed which improperly clouds title of true owner.

Approved in Tennant's Heirs v. Fretts, 67 W. Va. 572, 140 Am. St. Rep. 979, 68 S. E. 388, upholding equity jurisdiction to remove cloud by canceling deed, though defendant is nonresident served by publication.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 108.

2 Cal. 590–593, 56 Am. Dec. 366, MINTURN v. HAYS.

Taxation of Property in Different states as double. See note, 15 L. R. A. (n. s.) 143.

Where Ships are Taxable. See note, 37 L. R. A. 520.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

2 Cal. 594–595, PERALTA v. ADAMS.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 896.

2 Cal. 595–596, KENT v. LAFFAN.

Under Practice Act, Section 229, there is right of redemption from mortgage foreclosure sales.

Approved in Levy v. Burkle (Cal.), 14 Pac. 566, upholding right to redeem from sale under deed of trust.

2 Cal. 597–598, 56 Am. Dec. 369, KOHLER v. SMITH.

Moneys, After Maturity, Bear Interest at rate agreed upon in written contract though nothing said about interest after maturity.

Approved in Greenhaw v. Holmes, 8 Ariz. 96, 68 Pac. 537, following rule; Heeser v. Taylor, 1 Cal. App. 622, 82 Pac. 979, arguendo.

2 Cal. 599–602, PIERSON v. NORMAN.

Where Object of Submission is to Make an end of litigation and award is uncertain and incomplete on face, it must be set aside.

Approved in Boyd v. Bargagliotti, 12 Cal. App. 238, 107 Pac. 154, following rule.

2 Cal. 605–606, CLARKE v. SMITH.

Limit of Amount of License Fee. See note, 30 L. R. A. 425.

2 Cal. 607–609, McGILVERY v. MOREHEAD.

Affidavit for Arrest must Show Facts relied upon by positive averment.

Distinguished in Ex parte Howitz, 2 Cal. App. 755, 84 Pac. 230, where affidavit for arrest was sufficient in other respects and had attached a copy of complaint, and affiant swears that allegations therein are true, it is sufficient.

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3 Cal. 27–46, VANDERSLICE v. HANKS.

Where Governor Signs Grant, it is presumed that grant was approved by legislature as required by law.

Distinguished in Welch v. Sullivan, 8 Cal. 198, discussing alcalde's power to grant pueblo lands.

In Absence of Forfeiture of Grant for grantee's failure to comply with directions imposed by grant, his right to it is good as against world.

Approved in Catron v. Laughlin, 11 N. M. 635, 72 Pac. 33, following rule.

3 Cal. 59–63, 58 Am. Dec. 383, LICK v. O'DONNELL.

Deed for "Half of My Lot" with proof that grantor owned at time but one lot in place is not void for uncertainty in description.

Approved in Lange v. Waters, 156 Cal. 145, 103 Pac. 891, construing contract of sale of land containing reservation of one acre; Burns v. Witter, 56 Or. 372, 108 Pac. 131, applying rule where contract was to sell "my farm containing 40 acres"; Tilton v. Flormann, 22 S. D. 333, 334, 117 N. W. 381, upholding sufficiency of description of land in deed.

Distinguished in Crozer v. White, 9 Cal. App. 620, 100 Pac. 134, construing deed of farming land situated in certain county as conveying whole tract and not merely farmhouse.

Deed for "One-half of My Lot" only conveys undivided half of lot, and grantee takes as tenant in common with grantor.

Approved in Chemung Min. Co. v. Hanley, 11 Idaho, 308, 81 Pac. 621, construing deed as passing all of grantor's title.

3 Cal. 69–75, 58 Am. Dec. 385, SURROCO v. GEARY.

Right to Compensation for Property destroyed in abating public nuisance. See note, 19 L. R. A. 197.

3 Cal. 90–93, RAMSAY v. CHANDLER.

Right of Land Owner to accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 710.

Liability for Damming back stream. See note, 59 L. R. A. 892.

3 Cal. 94–98, **MILLS v. DUNLAP.**

Affidavit Sworn to Before a Notary is regular though his seal is not affixed.

Approved in Kinkade v. Howard, 18 S. D. 63, 99 N. W. 92, failure of notary to sign certificate to deposition in his official capacity and affix seal thereto is not substantial defect.

3 Cal. 98–100, **SINCLAIR v. WOOD.**

Letters are Inadmissible in Absence of proof that they were written by party intended to be charged by their contents.

Approved in People v. Le Doux, 155 Cal. 550, 102 Pac. 523, applying rule to marriage certificate.

3 Cal. 115–120, **BURNHAM v. HAYS.**

Court may Allow Amendment of cost bill.

Approved in Neary v. Northern Pac. Ry. Co., 41 Mont. 508, 110 Pac. 237, following rule.

3 Cal. 120–121, **LUPTON v. LUPTON.**

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 76.

3 Cal. 122–129, **PAYNE v. SAN FRANCISCO.**

Where Statute Prescribes Time within which public officer is to perform an official act, regarding rights and duties of others, it is merely directory.

Approved in Miller v. Kern County, 150 Cal. 800, 90 Pac. 121, defect in assessment because of omission of clerk of supervisors and of auditor to affix to corrected assessment-book their affidavits within statutory time is cured by affixing such affidavits before taxes are paid under protest.

Where Act to be Performed affected officer's own right and not rights of third parties, statute specifying time for performance is mandatory.

Approved in White v. Mitchell, 11 Cal. App. 206, 104 Pac. 334, denying extra compensation to member of city board of equalization where board sat for more than the two weeks provided for in ordinance.

Vacancy in Offices by Failure to file bond within time prescribed. See note, 16 L. R. A. 140.

3 Cal. 140–144, **STEVENS v. STEWART.**

Delivery of an Order for Goods is delivery of goods themselves only when they are susceptible of immediate delivery.

Approved in Back v. Smith, 66 W. Va. 50, 66 S. E. 2, following rule.

3 Cal. 147–148, **KELLER v. YBARRU.**

Contract to Deliver to Plaintiff as many grapes as he may wish becomes complete when plaintiff names quantity he will take.

Approved in McCaw Mfg. Co. v. Felder, 115 Ga. 415, 41 S. E. 668, following rule; Russ v. Tuttle, 158 Cal. 229, 110 Pac. 814, applying principle to offer to sell corporate stock.

Validity of Contract for Purchase of indefinite quantity. See note, 15 L. R. A. 219.

Mutuality of Accepted Proposition to furnish such material as one needs. See note, 11 L. R. A. (n. s.) 716.

3 Cal. 151-167, HYATT v. ARGENTI.

What Constitutes a Transaction a sale. See note, 94 Am. St. Rep. 241.

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 746.

3 Cal. 167-178, 58 Am. Dec. 398, PEOPLE v. OLDS.

Mandamus Does not Lie where there is any other specific, speedy and adequate remedy.

Approved in McKannay v. Horton, 151 Cal. 715, 716, 121 Am. St. Rep. 146, 91 Pac. 599, 600, 13 L. R. A. (n. s.) 661, upholding mandamus to compel auditing of salary of appointee of mayor though it may incidentally determine who is de facto mayor. See note, 95 Am. St. Rep. 608, on mandamus.

Mandamus Does not Lie to try title to office.

Approved in Kline v. McKelvey, 57 W. Va. 30, 49 S. E. 896, mandamus lies to compel admission to office of party having certificate thereto.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 885.

Mandamus to Compel Surrender of office. See note, 31 L. R. A. 360, 362.

Distinguished in Potomac Oil Co. v. Dye, 10 Cal. App. 539, 102 Pac. 679, upholding mandamus to try title to office in private corporation and compel delivery of papers by ex-officer to his successor.

Mandamus Does not Lie where office claimed is full or against an incumbent de facto.

Approved in City Council v. People, 19 Colo. App. 403, 75 Pac. 604, mandamus does not lie to restore contestee who was unseated where contestant had been seated and qualified.

Mandamus to Try who is de facto officer. See note, 13 L. R. A. (n. s.) 664, 665.

De Facto Officers. See note, 140 Am. St. Rep. 196, 198.

3 Cal. 179-184, CALL v. HASTINGS.

Where Mortgage Made Prior to conveyance act of 1850 was not recorded as required by said act, it lost its priority as against subsequent purchaser without notice.

Denied in dissenting opinion in Stafford v. Lick, 7 Cal. 502, majority upholding section 41 of recording act, requiring recordation of conveyances made prior to passage of act and penalizing failure to so record.

Statutes Creating Doctrine of constructive notice are strictly construed.

Approved in National Surety Co. v. Wyandotte Coal & Lime Co., 76 Kan. 917, 92 Pac. 1112, one furnishing material to city contractor under illegal contract, illegality of which he has knowledge is not as between himself and surety company barred by mere constructive notice of such illegality.

3 Cal. 190–191, MOOR v. TEED.

Degree of Care and Skill which physician or surgeon must exercise. See note, 37 L. R. A. 837.

3 Cal. 191–192, COTES v. CAMPBELL.

In Suit on Note Made by A and B, note signed by A and B & Co. shows fatal variance.

Approved in Hartman v. Belden, 38 Wash. 661, 80 Pac. 807, where complaint alleges contract between appellants and B jointly, and proof showed contract between appellants A and B and appellant C, jointly, variance was fatal.

3 Cal. 206–208, DULTON v. SHELTON.

Attachment Does not Lie unless contract is made in or is payable in this state.

Approved in Atwood v. Little Bonanza Quicksilver Co., 13 Cal. App. 596, 110 Pac. 345, where by its terms note made out of state is presumed payable out of state, attachment cannot be invoked; Drake v. De Witt, 1 Cal. App. 618, 82 Pac. 982, dissolving attachment issued on contract for commissions on sales to be made by plaintiff in another state, executed and performed in such other state; Moody v. First Bank of Skagway, 1 Alaska, 107, justice of peace in Alaska, under laws of Oregon then in force there, could not render judgment in attachment on note payable in British Columbia.

3 Cal. 212–215, MARYSVILLE v. BUCHANAN.

Remittitur of Supreme Court is attached to judgment-roll by clerk of district court.

Approved in State ex rel. Dolenty v. District Court, 42 Mont. 173, 111 Pac. 731, under Revised Codes, section 7120, entry of judgment of supreme court is duty of clerk of lower court, and mandamus does not lie against judge to compel entry.

Staying of Execution otherwise than by statutory proceedings. See note, 127 Am. St. Rep. 712.

3 Cal. 216–219, AH THAIE v. QUAN WAN.

Recovery on Injunction Bond of attorneys' fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 55.

3 Cal. 219–227, HICKS v. BELL.

Exemption from Taxation or assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 296.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769, 772.

3 Cal. 231–235, BACKUS v. MINOR.

Method of Computing interest. See note, 96 Am. St. Rep. 71.

3 Cal. 235–236, McNALLY v. MOTT.

Where Defendant Sued and Served as George M. and judgment entered against him by same name, order obtained on plaintiff's motion, without notice, amending judgment by altering name to Gordon M. is erroneous.

Approved in Brum v. Ivins, 154 Cal. 20, 129 Am. St. Rep. 137, 96 Pac. 877, denying right of one named "Brum" duly served in action against defendant named therein as "de Brum" to enjoin execution on default judgment.

3 Cal. 236-237, **HANSON v. WEBB.**

Establishment, Regulation and Protection of ferries. See note, 59 L. R. A. 547.

3 Cal. 238-241, **MIDDLETON v. FRANKLIN.**

Actions Against Two or More Persons creating or maintaining a nuisance. See note, 118 Am. St. Rep. 882.

3 Cal. 246-247, **BURT v. WASHINGTON.**

Mechanics' Liens on Public property. See note, 35 L. R. A. 144.

3 Cal. 249-253, 58 Am. Dec. 408, **EDDY v. SIMPSON.**

Right of Property in Water is usufructuary.

Approved in Miocene Ditch Co. v. Campion Min. etc. Co., 3 Alaska, 586, one who posts notice of water right location without intending to appropriate water to beneficial use, but to hold it for speculation, acquires no right; Pickens v. Coal River etc. Timber Co., 51 W. Va. 450, 90 Am. St. Rep. 819, 41 S. E. 401, holding owner of boom erected so close to mill as to impede flow of water, liable to mill owner for resultant damages.

Use of Natural Stream to convey appropriated water. See note, 51 L. R. A. 931.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

Right of Prior Appropriation of water. See note, 30 L. R. A. 672.

3 Cal. 255-257, **MORRISON v. DAPMAN.**

Court at Any Time may Amend Judgment nunc pro tunc where record shows that minute entry does not correctly give what was judgment of court.

Approved in San Francisco v. Brown, 153 Cal. 651, 96 Pac. 284, upholding power of court at any time to vacate and correct, on plaintiff's motion, a judgment entered by clerk different from that rendered.

3 Cal. 263-266, **TARTAR v. HALL.**

A Party cannot Controvert the declaration he has made by deed.

Approved in Grady v. Newman, 1 Ind. Ter. 625, 43 S. W. 756, assignee of chattel mortgage which permits the mortgagor to retain possession, who gets possession prior to breach under promise to the mortgagor that he might redeem and get possession, is estopped to set up anterior title in suit to cancel mortgage.

3 Cal. 266, **LEWES v. THOMPSON.**

Persons in Whose Name deputy should act. See notes, 106 Am. St. Rep. 826; 19 L. R. A. 179.

3 Cal. 273-283, **CHIPMAN v. EMERIC.**

Under Forcible Entry Act Nonpayment of rent works forfeiture of tenant's possession, if rent demanded on day when due.

Cited in Hicks v. Beacham, 131 Ga. 91, 62 S. E. 46, arguendo.

3 Cal. 287-290, **ORD v. LITTLE.**

Where Administrator Resigns or is Removed before administration completed, court should apportion compensation in reference to compensation fixed by law for whole.

Approved in In re Leavitt, 8 Cal. App. 761, 97 Pac. 918, succeeding trustee of trust to convey to designated beneficiaries after termination of life estate in net income of trust property is entitled to commissions on income actually accounted for and not on corpus of trust estate.

3 Cal. 312-323, KASHAW v. KASHAW.

Conflict of Laws on Divorce. See note, 59 L. R. A. 149.

Right to Join Prayer for Return of property with prayer for divorce. See note, 29 L. R. A. (n. s.) 820.

3 Cal. 328-329, CARRIER v. BRANNAN.

No Action Lies to Recover money lost at gambling.

Approved in Union Collection Co. v. Buckman, 150 Cal. 161, 119 Am. St. Rep. 164, 88 Pac. 709, 9 L. R. A. (n. s.) 568, denying recovery on notes given for gambling debt.

3 Cal. 334-340, GASKILL v. TRAINER; S. C., 4 Cal. 233.

Lien upon Leasehold Interest attaches subject to all conditions of lease.

Approved in Cornelius v. Washington Steam Laundry, 52 Wash. 277, 100 Pac. 729, following rule.

While Surrender of Leasehold is Merger in fee, it cannot defeat right of third party whose rights intervened prior to merger.

Approved in McAnally v. Glidden, 30 Ind. App. 26, 65 N. E. 293, following rule; McDonald v. May, 96 Mo. App. 247, 69 S. W. 1062, if under-lessee attorns to original lessor after surrender by mesne tenant, under-lessee is liable to landlord for rent for full sublease; Cuschner v. Westlake, 43 Wash. 695, 86 Pac. 950, interest of sublessee cannot be defeated by mesne lessee's surrender of his estate to the lessor.

Effect of Surrender of Original Lease on rights of sublessee. See note, 7 L. R. A. (n. s.) 221.

3 Cal. 341-342, HENLY v. HASTINGS.

Appeal Does not Lie from order refusing to set aside former order.

Approved in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 488, 114 Pac. 840, denying appealability of order refusing to vacate interlocutory order appointing receiver; California S. R. Co. v. Southern P. R. Co. (Cal.), 4 Pac. 13, order denying motion to set aside final order of condemnation is not appealable.

Distinguished in Mills v. Smiley, 9 Idaho, 323, 76 Pac. 785, when writ of assistance is issued, one not party to action at time of issuance may move to set order aside and appeal from denial of motion.

3 Cal. 343-347, 58 Am. Dec. 412, JOHNSON v. TOTTEN.

Rights of One Dealing with a partnership are not affected by its dissolution unless he has actual notice of such dissolution.

Approved in Kelley v. McNamee, 164 Fed. 375, 22 L. R. A. (n. s.) 851, 90 C. C. A. 357, retiring partner is liable to employees who continue in employment of firm after change without knowledge thereof.

Partnership After Death. See note, 79 Am. St. Rep. 710.

3 Cal. 348-363, FITCH v. BROCKMON.

Assignability of Executory Contract to perform particular work. See note, 23 L. R. A. (n. s.) 224.

3 Cal. 373–376, TOBIN v. POST.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 86.

3 Cal. 389–391, CAULFIELD v. HUDSON.

Act Giving District Court appellate jurisdiction is void.

Approved in Ex parte Cox, 44 Fla. 540, 33 So. 510, 61 L. R. A. 734, writ of error does not lie from supreme court to review judgment of individual justice in habeas corpus; Burks v. Walker, 25 Okl. 358, 109 Pac. 546, statute of 1909, establishing superior court for each county having certain population, does not violate section 10, article 7 of constitution.

3 Cal. 426, WHITE v. ABERNATHY.

Error must Affirmatively Appear of record to justify reversal.

Approved in Billups v. Utah Canal etc. Extension Co., 7 Ariz. 214, 63 Pac. 714, following rule.

3 Cal. 427–430, POWELL'S HEIRS v. HENDRICKS.

Necessary for Calling Subscribing Witnesses to prove attested instruments. See note, 35 L. R. A. 322, 323.

3 Cal. 438–440, TOOMS v. RANDALL.

The Law Abhors a dilatory plea.

Approved in Riverdale Mining Co. v. Wicks, 14 Cal. App. 532, 112 Pac. 898, failure of corporation to file articles before commencement of action must be affirmatively pleaded; Reed v. Harshall, 12 Cal. App. 704, 108 Pac. 722, upholding denial, after submission of cause, of leave to file amended and supplemental answer setting forth failure of plaintiff, a foreign corporation, to designate process agent.

3 Cal. 443–453, COHAS v. RAISIN.

Under Mexican Laws Municipal Lands become absolute property of pueblo subject only in their disposition to general laws of Mexico.

Criticised in Hart v. Burnett, 15 Cal. 597, 599, San Francisco holds pueblo lands in trust for public use and they are not subject to execution.

Acquisition of California by United States did not suspend or determine any interest of San Francisco in pueblo lands.

Approved in Vilas v. Manila, 220 U. S. 360, 31 Sup. Ct. 420, 55 L. Ed. 497, public property belonging to Manila as municipality did not pass to United States.

Miscellaneous.—Cited in Ohm v. San Francisco (Cal.), 25 Pac. 157, to point that action at law may be maintained by one alleging he has perfect title under Mexican grant.

3 Cal. 454–457, HELM v. DUMARS.

Correct Judgment will not be Reversed because rendered on wrong reason.

Approved in Stanley v. McElrath (Cal.), 22 Pac. 674, following rule.

3 Cal. 458–464, 58 Am. Dec. 415, LUBERT v. CHAUVITEAU.

What Provable by Books of account. See note, 52 L. R. A. 714.

3 Cal. 469–470, **RHODES v. PATTERSON.**

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 121.

3 Cal. 477–501, **PEOPLE ex rel. HARRIS v. BRENHAM.**

Instance Where Election was Held Valid despite irregularities in notice.

Denied in Marsden v. Harlocker, 48 Or. 93, 120 Am. St. Rep. 786, 85 Pac. 329, holding there was no valid election where members of county court did not meet and make proper investigation, but merely signed memorandum authorizing local option election.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 61, 68.

3 Cal. 502–506, **PEOPLE v. MOTT.**

Appointee of Governor to Office of district judge holds only till next election and not to end of term.

Approved in Rodwell v. Rowland, 137 N. C. 630, 50 S. E. 324, appointee to fill vacancy occurring during term of clerk of superior court holds only until next general election.

After Election is Held Governor cannot fill vacancy by appointment.

Approved in People v. Fitch, 1 Cal. 536, where legislature elected state printer and printer previously appointed by governor resigned during recess of legislature, a second appointment by governor is void.

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4 Cal. 5–6, INNIS v. STEAMBOAT SENATOR.

In Collision Case Witness may be Asked whether vessel, on such night as he had testified with reference to position of colliding vessels, could be seen at a distance and if so, how far.

Approved in Johnson v. Chicago R. I. & Pac. R. R. Co., 80 Kan. 465, 103 Pac. 96, discussing competency of evidence of tests on effect of bluff in deadening sound of approaching train.

4 Cal. 12–14, ESTATE OF SANDFORD.

Words of Acknowledgment of Paternity of illegitimate child to make it an heir must be clear.

Approved in Estate of Blythe, 4 Cof. Prob. 158, construing Civil Code, section 1387.

Distinguished in Estate of Gird, 157 Cal. 541, 137 Am. St. Rep. 131, 108 Pac. 502, as to sufficiency of evidence of paternity and legitimation of children.

4 Cal. 14–15, JONES v. POST.

Assignor of Bond is Incompetent as Witness where he still has interest in proceeds.

Approved in Griffin v. Alsop, 4 Cal. 408, assignor under assignment for benefit of creditors is incompetent as witness for assignee.

4 Cal. 17–21, FLINT v. LYON.

Use in Sale Note of Given Name for goods sold is warranty that they bear that name.

Approved in Springfield Shingle Co. v. Edgecomb Mill Co., 52 Wash. 630, 101 Pac. 236, applying principle to contract for sale of "Star a Star" shingles.

4 Cal. 22–23, RICH v. DAVIS.

Liability of Partnership for torts. See note, 51 L. R. A. 495.

4 Cal. 23–27, COOK v. McCHRISTIAN.

Interest of Spouses in Homestead is joint.

Criticised in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 354, 107 Pac. 337, where husband died in 1885, rights of grantees

of wife who declared homestead on husband's separate property on June 19, 1874, depended on law in force when husband died.

4 Cal. 27–28, **MAYO v. MADDEN.**

Claim for Damages for Personal Tort cannot be united with equitable demand.

Approved in Benson v. Battey, 70 Kan. 295, 78 Pac. 847, cause of action for equitable accounting against two defendants cannot be joined with cause of action at law for tort against another defendant.

4 Cal. 3–34, 60 Am. Dec. 578, **HUTCHINSON v. PERLEY.**

Prior Possession is Sufficient to Maintain ejectment against naked trespasser.

Approved in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987, where defendant used ditch in controversy by permission of plaintiff's grantor, he becomes trespasser on asserting right in it as against plaintiff.

What Title or Interest will support ejectment. See note, 18 L. R. A. 784.

4 Cal. 35–37, **MINTURN v. FISHER.**

Banking Customs. See note, 21 L. R. A. 440.

4 Cal. 37–41, 60 Am. Dec. 579, **WELTON v. ADAMS.**

Actions on Lost Instruments. See note, 94 Am. St. Rep. 474.

4 Cal. 41–44, **MAYOR ETC. OF SACRAMENTO v. STEAMER NEW WORLD.**

Right to Wharfage. See note, 70 L. R. A. 195, 197.

4 Cal. 45–46, **SACRAMENTO v. THE STEAMER CONFIDENCE.**

Right to Wharfage. See note, 70 L. R. A. 195, 197.

4 Cal. 46–62, 60 Am. Dec. 581, **PEOPLE v. COLEMAN.**

Where Provisions of Constitutions of Other States which had been judicially construed are adopted, it is presumed that such construction was acquiesced in.

Approved in De Raismes v. De Raismes, 70 N. J. L. 18, 56 Atl. 171, under General Statutes, page 1976, section 10, requiring written acknowledgment signed by party charged, to defeat limitations, a written promise to pay a note by agent of person bound thereby is insufficient.

Taxation of Occupations is within legislative discretion.

Approved in Iowa etc. Ins. Assn. v. Gilbertson, 129 Iowa, 665, 106 N. W. 156, upholding Code Supplement of 1902, section 1333d, taxing insurance companies, except county mutuals not organized for profit; In re Lipschitz, 14 N. D. 624, 95 N. W. 158, upholding hawkers and peddlers' act of 1903.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 250.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 334.

Corporate Taxation and the commerce clause. See note, 60 L. R. A. 692.

Constitutional Equality of Privileges, immunities and protection. See note, 14 L. R. A. 582, 583.

4 Cal. 62-65, 60 Am. Dec. 595, MATTHEY v. GALLY.

Waiver of Notice of Nonpayment is waiver of presentment.

Approved in Bank of Montpelier v. Montpelier etc. Co., 16 Idaho, 735, 102 Pac. 686, where indorser waives protest and notice of protest, he waives presentment and demand for payment.

Necessity of New Consideration to support waiver of failure to give notice of dishonor, and subsequent promise by indorser. See note, 29 L. R. A. 313.

4 Cal. 70-80, 60 Am. Dec. 597, WINANS v. CHRISTY.

General Verdict in Ejectment concludes several defendants where they have not answered separately.

Approved in McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 402, 84 Pac. 351, general verdict in action for damages caused by locomotive sparks supports verdict against both defendants.

What Title or Interest will support ejectment. See note, 18 L. R. A. 784, 785.

4 Cal. 80-88, ELDRIDGE v. COWELL.

Survey of San Francisco into Blocks and streets extended into tide waters.

Approved in Grant v. Or. Navigation Co., 49 Or. 330, 90 Pac. 180, deed from state of tide land was not rendered void because high tide land was on next block farther out than land conveyed, but was only voidable.

Establishment of Dock Lines. See note, 14 L. R. A. 499.

Right to Obstruct or Destroy rights of navigation. See note, 59 L. R. A. 84.

Right of State to Grant tide lands. See note, 22 L. R. A. (n. s.) 337.

Miscellaneous.—Cited in Kelley v. Salvas, 146 Wis. 548, 131 N. W. 437, to point that owner of lands bordering on navigable stream and who owns bed of stream in front of his lands may separate ownership of lands from ownership of bed of stream.

4 Cal. 88-89, LINDSEY v. FLINT.

In Action on Bond there can be no constructive parties jointly liable with proper obligors.

Approved in City of Chamberlain v. Quarnberg, 23 S. D. 61, 119 N. E. 1028, where undertaking for restraining order was not executed by plaintiff, he was not liable thereon on dissolution of order.

4 Cal. 90-94, ABELL v. CALDERWOOD.

Taking Possession of Realty as part performance to satisfy statute of frauds. See note, 3 L. R. A. (n. s.) 795.

4 Cal. 94-97, 60 Am. Dec. 599, PLUME v. SEWARD.

What Constitutes Possession of real estate stated.

Approved in Lofstad v. Murasky, 152 Cal. 68, 91 Pac. 1010, constructive possession is insufficient to quiet title under McEnerney Act.

Possession of Land as notice of title. See note, 13 L. R. A. (n. s.) 85.

What Title or Interest will support ejectment. See note, 18 L. R. A. 784, 785.

4 Cal. 104, TAYLOR v. McKINLEY.

Appellate Court will not Disturb ruling on motion for new trial where evidence is conflicting.

Approved in Kellenberger v. Market St. etc. Ry. Co. (Cal.), 33 Pac. 90, applying rule in personal injury case.

4 Cal. 105–106, PARKER v. SMITH.

Court may on Motion Strike Out illegal evidence.

Approved in Kimic v. San Jose-Los Gatos etc. Ry. Co., 156 Cal. 390, 104 Pac. 991, applying rule in personal injury case; Spotswood v. Spotswood, 4 Cal. App. 714, 89 Pac. 363, applying rule in action to quiet title; Boyer v. Pac. Mutual Life Ins. Co., 1 Cal. App. 56, 81 Pac. 672, admission in evidence in ejectment of judgment-roll in foreclosure suit did not include admission of inadmissible affidavit and order for publication, though wrongfully attached to judgment-roll by clerk.

4 Cal. 107–112, GOULDIN v. BUCKELEW.

Nature of Interest of Vendor or vendee in land contract as real or personal property. See note, 57 L. R. A. 643.

4 Cal. 113–114, McDERMOTT v. ISBELL.

In Action on Replevin Bond fact that defendant had commenced action before tribunal incompetent to try matter is no defense.

Approved in Hoffman v. Fleming, 66 Ohio St. 160, 64 N. E. 67, holding sureties on executor's bond estopped to show principal not duly appointed executor; Cahill v. Colgan (Cal.), 31 Pac. 618, arguendo.

4 Cal. 114–117, SAN FRANCISCO v. SCOTT.

When Title Passes in condemnation proceedings. See note, 16 L. R. A. (n. s.) 538.

4 Cal. 127–173, PEOPLE v. HAYS.

Statutes are not Construed so as to be given retrospective operation unless such intention is expressed in terms.

Approved in Estate of Richmond, 9 Cal. App. 411, 99 Pac. 558, expense of procuring executor's bond incurred prior to statutes of 1905, page 477, cannot be allowed in final account.

Legislature may Repeal Statute where no vested rights are disturbed or no obligation of contract impaired.

Approved in People v. Bank of San Luis Obispo, 159 Cal. 76, 112 Pac. 870, discussing effect of repeal of banking act of 1903, in pending actions for liquidation of banks.

Execution Officer Defined.

Cited in People v. Salsbury, 134 Mich. 545, 550, 96 N. W. 939, 941, city attorney is an executive or judicial officer within Compiled Laws, section 11,312, punishing receipt of bribes by such officers; State v. Loechner, 65 Neb. 819, 91 N. W. 875, 59 L. R. A. 915, member of board of education of school district in city of over 1,500 population is ministerial officer within Criminal Code, section 180, punishing malfeasance in office.

4 Cal. 175–176, PEOPLE v. PERALTA.

Residence Depends upon Intention as well as fact.

Approved in Estate of De Noon, 3 Cof. Prob. 353, where testatrix and husband had home in S. county and after his death she lived

part of each year there and remained in F., where she had lodging-house and repeatedly stated she would live elsewhere when home in S. sold, but intention never consummated, she was resident of S. county.

4 Cal. 177–180, **PEOPLE v. BELL.**

Mandamus Does not Lie to compel anyone invested with discretionary power to act in any particular manner.

Approved in Inglin v. Hoppin, 156 Cal. 489, 105 Pac. 584, granting mandamus to compel supervisors to have lands in particular reclamation district set off and erected into independent district.

4 Cal. 180–182, **MINTURN v. LISLE.**

Rights and Duties of Toll-bridge Proprietors. See note, 58 L. R. A. 160.

Right to Obstruct or Destroy rights of navigation. See note, 59 L. R. A. 70.

4 Cal. 185–186, **GRAY v. SCHUPP.**

Certiorari Does not Lie where remedy by appeal exists.

Approved in Chapman v. Justice Court, 29 Nev. 161, 86 Pac. 554, denying certiorari to review conviction of misdemeanor before justice court.

4 Cal. 198–200, **PEOPLE v. KOHLE.**

Accused Who has not Exhausted peremptories may challenge one juror after twelve jurors are accepted but before they are sworn.

Approved in State v. Hunter, 118 Iowa, 691, 92 N. W. 874, where accused had exercised three peremptories and his counsel announces that accused waives one more challenge and state's attorney does likewise, remaining challenges are not waived.

4 Cal. 200–201, **BESSIE v. EARLE.**

What is Community Property. See notes, 126 Am. St. Rep. 110; 4 Cof. Prob. 53.

4 Cal. 201–202, **YOUNGS v. BELL.**

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 525, 538.

4 Cal. 227–229, **STEARNS v. MARTIN.**

One Pleading Assignment of Contract to him must allege positive transfer and character of it.

Distinguished in Buckheit v. Decatur Land Co., 140 Ala. 218, 37 So. 76, averment in foreclosure that note and mortgage were assigned by mortgagee to complainant by instrument in writing is sufficient to show equitable assignment.

Joint Contract is Inadmissible where pleadings set up several contract alone.

Approved in Hartman v. Belden, 38 Wash. 661, 80 Pac. 807, where complaint alleges contract between respondent and appellants jointly, and proof shows contract between appellant A and respondent and appellant B jointly, variance is fatal.

4 Cal. 233–235, **GASKILL v. MOORE.**

Improvements Made by Property Owner, after surrender of lease by tenant, upon whose leasehold interest mechanic's lien had previously attached, do not impair lien.

Approved in McAnally v. Glidden, 30 Ind. App. 26, 65 N. E. 293, surrender of lease prior to its expiration and acceptance thereof by lessor does not defeat lien for labor and materials on leasehold estate.

4 Cal. 238–243, PEOPLE v. THOMPSON.

After Sentence but Before Signing final judgment court may amend sentence by shortening time.

Approved in Ex parte Monckros Von Vetsera, 7 Cal. App. 139, 93 Pac. 1037, upholding right of court which, on habeas corpus, had made oral order discharging prisoner, which order had never been entered on minutes, to vacate order and reserve application for hearing.

Effect of Failure to Give Accused opportunity to plead. See note, 13 L. R. A. (n. s.) 813.

4 Cal. 245–246, RAMIREZ v. McCORMICK.

Way of Necessity Where Other Means of access exist. See note, 17 L. R. A. (n. s.) 1023.

4 Cal. 250–254, CAVENDER v. GUILD.

In Absence of Proof Where Foreign Judgment is silent, it is presumed that no interest is allowed by law of such other state on such judgments.

Denied in Herblay v. Norris, 8 How. 338, rate of interest on foreign judgment is that of country where judgment is sued upon.

Presumption as to Law of other states. See note, 21 L. R. A. 471.

How Case Determined When Proper foreign law not proved. See note, 67 L. R. A. 43.

Act of 1852 Does not Alter Time provided by act of 1850 for suing on foreign judgments.

Approved in Patten v. Ray, 4 Cal. 287, foreign judgment is not a "contract, obligation or liability for payment of money, founded on an instrument, executed out of this state" within statute of limitations.

Conflict of Laws as to measure of damages. See note, 56 L. R. A. 309.

Conflict of Laws as to Measure of damages. See note, 91 Am. St. Rep. 735, 742.

4 Cal. 254–256, HARTMAN v. WILLIAMS.

Necessity of Jury to Compute Damages on default judgment. See note, 20 L. R. A. (n. s.) 7.

4 Cal. 260–263, TREADWELL v. WELLS.

Publication of Notice of Dissolution of partnership in paper taken by plaintiff is fact from which jury may infer actual notice.

Approved in Kelley v. McNamee, 164 Fed. 375, 22 L. R. A. (n. s.) 851, 90 C. C. A. 357, retiring partner is liable to employees who continue in employment without knowledge of change.

4 Cal. 268–273, 60 Am. Dec. 606, TAYLOR v. HARGOUS.

Homestead is Sort of joint tenancy.

Criticised in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 354, 107 Pac. 337, where husband died in 1885, rights of grantees

of wife who declared homestead on husband's separate property on June 19, 1874, depended on law in force when husband died.

Abandonment of Homestead. See note, 102 Am. St. Rep. 390.

4 Cal. 274–275, MOWRY v. STARBUCK.

In Action on Quantum Meruit, testimony is admissible to show original contract changed at defendant's request, and value of extra work performed.

Approved in City Street Imp. Co. v. Kroh, 158 Cal. 323, 110 Pac. 940, where plans for street work changed so as to reduce amount of work, contractor cannot charge full contract price.

4 Cal. 277, LIGHTSTONE v. LAURENCEL.

Necessity of Notice of Default to bind guarantor. See note, 20 L. R. A. 261.

4 Cal. 278–279, 60 Am. Dec. 615, BEQUETTE v. CAULFIELD.

What Title or Interest will support ejectment. See note, 18 L. R. A. 784.

4 Cal. 286, GATES v. BUCKINGHAM.

Appellate Court will not Review Order retaxing costs where notices and affidavits on application to retax costs not embodied in statement.

Approved in Schomberg v. Long, 15 N. D. 507, 108 N. W. 332, on appeal from judgment, order taxing costs can only be reviewed on statement of case containing record upon which court acted in making order.

4 Cal. 289–290, 60 Am. Dec. 616, FITZGERALD v. GORHAM.

Acceptance of Goods to Satisfy statute of frauds. See note, 96 Am. St. Rep. 227.

Whether Presumption of Fraud flowing from retention of chattel by vendor may be overcome. See note, 24 L. R. A. (n. s.) 1139.

4 Cal. 294–296, SHAFER v. BEAR RIVER ETC. MIN. CO.

Complaint in Action to Pay Money must allege facts showing consideration or indebtedness.

Approved in Malott v. Sample, 164 Ind. 647, 74 N. E. 246, holding complaint in action by servant for injuries did not allege facts showing master's previous knowledge of defect causing injury; Chesney v. Chesney, 33 Utah, 509, 94 Pac. 992, holding allegation of indebtedness in complaint was mere legal conclusion.

4 Cal. 297–299, MOODY v. McDONALD.

"Smart-money" cannot be Allowed in case of simple negligence.

Approved in Davis v. Hearst, 160 Cal. 173, 116 Pac. 543, instruction in libel that malice in law consisted in that which law regards as sufficient invasion of plaintiff's right to sustain exemplary damages by reason of carelessness or willful disregard of plaintiff's rights is erroneous; Spencer v. San Francisco Brick Co., 5 Cal. App. 128, 89 Pac. 851, applying rule in action for damages arising from negligent construction of bulkhead by defendant on his premises which gave way in wet weather.

4 Cal. 304–306, DOUGLASS v. PACIFIC MAIL STEAMSHIP CO.

Scope of Term "persons." See note, 19 L. R. A. 223.

4 Cal. 308, MORAGA v. EMERIC.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 631.

4 Cal. 309, VINTON v. CROWE.

Transferee of Negotiable Note after maturity takes subject to equities between maker and payee but not such as subsisted between maker and intermediate holder.

Approved in Reardon v. Cockrell, 54 Wash. 402, 103 Pac. 458, following rule.

Rights of Transferee after maturity of negotiable paper. See note, 46 L. R. A. 788.

4 Cal. 310–314, WARNER v. WILSON.

Letters of Guardianship of Lunatic issued by probate court cannot be collaterally attacked.

Approved in Soules v. Robinson, 158 Ind. 99, 92 Am. St. Rep. 301, 62 N. E. 1000, following rule; Guardianship of Treadwell, 3 Cof. Prob. 316, determination of superior court in guardianship that minor was resident of county is conclusive on application for letters in another county.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 40.

4 Cal. 315–317, BEACH v. COVILLARD.

Executed Parol Agreement is Good Defense to action on specialty.

Approved in Bowman v. Wright, 65 Neb. 663, 91 N. W. 581, reaffirming rule; Keeney v. Waters, 135 Ky. 530, 122 S. W. 838, contract required by statute to be in writing may be rescinded by parol.

Applicability of Statute of Frauds to assignment or surrender of purchaser's interest under land contract. See note, 19 L. R. A. (n. s.) 881.

4 Cal. 333–334, REDDING v. BELL.

Act of 1854, Creating Office of state printer and requiring comptroller to draw warrants on treasury for such sums as may be due printer, is not a specific appropriation.

Approved in Menefee v. Askew, 25 Okl. 631, 107 Pac. 162, construing act of 1909, with reference to appropriation for compensation of game warden.

Requisites of Appropriation for official salary or expenses. See note, 16 L. R. A. (n. s.) 634.

4 Cal. 339–340, BEACH v. FARISH.

Rights and Liabilities of Tenant on destruction of leased building. See note, 22 L. R. A. 614.

4 Cal. 341, PEOPLE v. NUGENT.

Bare Negative Qualification need not be averred in an indictment.

Approved in Ex parte Hornef, 154 Cal. 361, 97 Pac. 893, holding exceptions in section 1 of dental act of 1901 need not be negatived in information.

4 Cal. 355–358, 60 Am. Dec. 618, RUIZ v. NORTON.

In Action on Written Contract to Deliver "sound" rice, plaintiff cannot recover unless he shows rice was "sound."

Distinguished in Tustin Fruit Assn. v. Earl Fruit Co. (Cal.), 53 Pac. 698, construing contract with fruit association with reference to warranty of quality of fruit, where agent supervised grading and packing.

Where One of Two Innocent Parties must suffer, it must be he who trusted most.

Approved in Wilcox-Rose Construction Co. v. Evans, 9 Cal. App. 121, 98 Pac. 84, applying rule in action on implied contract for repairs on building.

Where Undisclosed Principal Sues in Own Name on contract in writing made by his agent, defendant may make same defenses as he could against agent.

Approved in Hogen v. Klabo, 13 N. D. 322, 100 N. W. 848, following rule.

On Right in Action by Undisclosed principal to defenses available in action by agent. See note, 28 L. R. A. (n. s.) 228.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 613.

Miscellaneous.—Cited in Easton v. George Wostenholm & Son, 137 Fed. 533, 70 C. C. A. 108, to point that power of each member to bind firm remains after retirement of one partner without notice to party with whom firm is dealing.

4 Cal. 359–361, RUIZ v. NORTON.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 331.

4 Cal. 362–367, WILSON v. ROACH.

District Court's Jurisdiction Over Minors is conferred by constitution and cannot be devested by legislature.

Approved in Guardianship of Deisen, 2 Cof. Prob. 466, upholding jurisdiction of superior court to appoint guardian for minors brought into state for theatrical purposes and then taken out of state for same purpose; State v. Superior Court, 54 Wash. 391, 103 Pac. 468, holding void act of 1909, authorizing county commissioners to divide county into judicial districts.

Probate Court has not Exclusive Jurisdiction over persons or estates of minors.

Approved in In re Sall, 59 Wash. 543, 110 Pac. 34, upholding superior court's jurisdiction over estate of nonresident incompetent.

4 Cal. 368–374, JOHNSON v. GORDON.

What Adjudications of State Courts can be brought up in United States supreme court by writ of error. See note, 62 L. R. A. 515.

4 Cal. 376–380, 60 Am. Dec. 620, PEOPLE v. GILMORE.

Former Conviction of Manslaughter is an acquittal of murder and a bar to prosecution therefor.

Approved in Johnson v. State, 1 Okl. Cr. 350, 97 Pac. 1071, following rule; People v. Huntington, 8 Cal. App. 614, 97 Pac. 761, and Huntington v. Superior Court, 5 Cal. App. 291, 293, 90 Pac. 141, 143, both holding where one charged with murder was convicted of manslaughter and new trial granted for erroneous instructions new trial must be limited to manslaughter; dissenting opinion in People v. Bennett (Cal.), 50 Pac. 704, 705, 706, 708, 709, 710, majority not

passing on point; dissenting opinion in Trono v. United States, 199 U. S. 540, 26 Sup. Ct. 121, 50 L. Ed. 300, majority holding one not placed twice in jeopardy by conviction of homicide in Philippine supreme court, on appeal by accused from conviction in trial court, which, after acquitting of murder, convicts of assault; dissenting opinion in Cornelius v. State, 54 Tex. Cr. 201, 112 S. W. 1064, majority holding on trial for manslaughter of one whose conviction of murder has been reversed instructions as to murder are harmless.

Limited in People v. Ham Tong, 155 Cal. 584, 132 Am. St. Rep. 110, 102 Pac. 265, 24 L. R. A. (n. s.) 481, reversal of conviction on information for robbery which does aver money taken from possession of person robbed is no bar to prosecution for grand larceny.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 77, 78.

Conviction of Lower or Different Degree in prosecution for homicide. See note, 21 L. R. A. (n. s.) 21, 22.

4 Cal. 381–383, BENEDICT v. COZZENS.

In Requiring Remission of Portion of judgment as terms for refusing new trial, court must use sound discretion.

Approved in Bentley v. Hurlburt, 153 Cal. 803, 96 Pac. 893, where pending defendant's motion for new trial plaintiff in writing remits excess amount of judgment, court may by order unconditional in former recite waiver and deny motion at once.

Withdrawal of Juror. See note, 48 L. R. A. 433, 438.

4 Cal. 386–387, RANSOM v. FARISH.

Accord and Satisfaction. See note, 100 Am. St. Rep. 419.

Effect of Release of One Joint Tort-feasor on liability of other. See note, 58 L. R. A. 300.

4 Cal. 388–389, WASHINGTON v. PAGE.

Constitutional Provision That Every Law must embrace but one object, which shall be expressed in its title, is directory.

Cited in Clark v. Los Angeles, 160 Cal. 41, 116 Pac. 726, to the effect that section 22, article I, of Constitution, was enacted because of ruling of principal case.

Criticised in In re Walker, 9 Haw. 174, construing similar provision liberally and upholding section 5 of act 3 of the provisional government.

4 Cal. 390–391, SWIFT v. ARENTS.

Bill by Creditor for Relief against fraudulent transfers and concealment of property by debtor is ground for equitable jurisdiction.

Approved in Watkins v. Wilhoit (Cal.), 35 Pac. 649, following rule.

4 Cal. 392–394, BALDWIN v. BENNETT.

Where from Nature of Contract no possible mode is left for ascertaining damage, agreed price is measure of damags.

Approved in Scheinesohn v. Lemonck, 84 Ohio, 434, 95 N. E. 915, allowing damages as per contract to attorney who agreed to collect account which was taken away from him by client without cause and without giving attorney reasonable time to make collection.

Loss of Profits as Element of damages for breach of contract. See note, 53 L. R. A. 80.

Miscellaneous.—Cited in Philbrook v. Moxey, 191 Mass. 36, 77 N. E. 521.

4 Cal. 397–398, COOK v. BONNET.

On Municipal Ownership of Tide Lands. See note, 64 L. R. A. 337.

4 Cal. 399–405, PEOPLE v. HALL.

Word "Black" Includes All Negroes, but term "negro" does not include all black persons.

Approved in State v. Treadaway, 126 La. 317, 139 Am. St. Rep. 514, 52 So. 506, an octoroon is not a "person of negro or black race" within statute of 1908, punishing concubinage.

Chinese and All Other People not whites are included in prohibition of Civil Practice Act, section 394, from being witnesses against whites.

Disapproved in Pumphrey v. State, 84 Neb. 639, 122 N. W. 20, 23 L. R. A. (n. s.) 1023, Japanese is prima facie competent to take oath and testify.

4 Cal. 411, HASKELL v. McHENRY.

Breach of Part of Entire Contract is breach of whole and gives party complaining a complete right of action.

Approved in Alderson v. Houston, 154 Cal. 10, 13, 96 Pac. 887, 888, upholding immediate right of real estate agent to sue for entire damage caused by principal's breach of contract to clear lots from all street assessments.

Loss of Profits of Sale or purchase as damages. See note, 52 L. R. A. 246.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 5 CALIFORNIA.

5 Cal. 9–23, BURGOYNE v. SAN FRANCISCO.

Nonjudicial Functions cannot be Conferred on courts.

Approved in State v. Brill, 100 Minn. 518, 111 N. W. 647, holding void act of 1898, requiring judges of district court to appoint members of board of control.

5 Cal. 23–36, PEOPLE v. BILGER.

Motives Which Impelled Legislature to enact a law cannot be judicially inquired into.

Approved in Lukens v. Nye, 156 Cal. 505, 105 Pac. 596, governor is acting in legislative capacity when approving bills, and all evidence to show what induced him to sign a bill should be rejected.

5 Cal. 36–39, STOAKES v. BARRETT.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769.

5 Cal. 43–44, 63 Am. Dec. 76, PARSONS v. TUOLUMNE CO. WATER CO.

Each Branch of Judicial Department has its functions assigned by constitution, and they cannot be controlled by other departments of government.

Approved in Ex parte Cox, 44 Fla. 540, 33 So. 510, 61 L. R. A. 734, holding void act of 1901, authorizing review by writ of error of habeas corpus proceedings before individual supreme justice.

5 Cal. 48–49, RUSSELL v. ALVAREZ.

Libel of Vessel in Federal Court for nondelivery of freight is no defense to action for freight money in state court.

Approved in Hunt v. Darling, 26 R. I. 483, 59 Atl. 399, 69 L. R. A. 497, subcontractor may prosecute suit for mechanic's lien simultaneously with action at law against contractor in which part of contract price in owner's hands for satisfaction of lien is attached.

Abatement of Action in State Court by prior action in federal court and vice versa. See note, 82 Am. St. Rep. 589, 595.

Pendency of Actions in Both State and federal courts sitting in **same state.** See note, 42 L. R. A. 450, 462.

5 Cal. 49–51, 63 Am. Dec. 80, CHIPMAN v. EMERIC.

Waiver by Lessor of Condition against assignment dispenses with that condition forever.

Approved in German-American Sav. Bank v. Gollmer, 155 Cal. 688, 102 Pac. 954, 24 L. R. A. (n. s.) 1066, waiver of single condition against assignment does not free the estate from other covenants in the lease.

Effect of License to Commit Breach of condition subsequent, or waiver of past breach, to extinguish condition. See note, 11 L. R. A. (n. s.) 403.

5 Cal. 53–56, EGERY v. BUCHANAN.

Statutory Penalties are not Recoverable where sheriff in good faith refuses to pay over moneys collected.

Approved in Wilson v. Broder, 10 Cal. 489, applying rule where there was a contest, apparently real, as to title to money collected by sheriff.

Sheriff's Return is not Collaterally Attackable for fraud.

Approved in Smoot v. Judd, 184 Mo. 525, 83 S. W. 486, bill in equity does not lie to set aside default based on false return showing proper service unless plaintiff in action was party to false return or knew of it.

5 Cal. 63–64, ANDERSON v. POTTER.

Next of Kin Entitled to Share in distribution of estate in statute relating to administration means next of kin capable of inheriting.

Approved in Estate of Crockett, 4 Cof. Prob. 332, when testatrix leaves everything to husband, whom she names as executor, but he dies before probate, her sister, who is sole heir and who is contesting probate, is entitled to special letters as against public administrator.

Limited in Perry v. Scaife, 126 Wis. 408, 105 N. W. 920, statement in petition for leave to appeal from probate of will that petitioners are near relatives and heirs at law of deceased is sufficient.

5 Cal. 64–66, MORRISON v. ROSSIGNOL.

Equity will not Specifically Enforce a contract which is uncertain or creates a perpetuity.

Approved in Meyer v. Lincoln Realty Co., 14 Cal. App. 758, 113 Pac. 333, lease for ten years at "average monthly rental of $845 per month to be graduated" is too vague for specific performance; Elliott v. Elliott, 3 Alaska, 363, applying rule in action to recover one-half interest in copper mines by reason of grubstake contract with locator; Marks v. Gates, 2 Alaska, 527, applying rule in action to compel specific performance of a contract for sale of real estate and an accounting; Parker v. Cartwright, 7 Haw. 610, covenant in lease giving "privilege of removal subject, however, to a new agreement" is uncertain.

Covenants for Renewal of leases. See note, 123 Am. St. Rep. 462.

5 Cal. 66–68, PEOPLE v. HAYS.

Purchaser at Sheriff's Sale who does not pay purchase price acquires no interest.

Approved in Walker v. McLoud, 138 Fed. 396, 70 C. C. A. 534, act of October 30, 1888, of the Choctaw Nation does not authorize sheriff to make sale of improvements owned by noncitizens, on credit.

5 Cal. 69, PEOPLE v. THURSTON.

Proceedings of a Grand Jury composed of more than the statutory number are void.

Distinguished in Coffey v. Superior Court, 2 Cal. App. 458, 83 Pac. 582, silence of the law as to number necessary to make an accusation for misconduct in office does require unanimous agreement of grand jury.

Number of Grand Jurors necessary or proper to act. See notes, 28 L. R. A. 37; 27 L. R. A. 848.

5 Cal. 70, 63 Am. Dec. 84, McLAREN v. SHARTZER.

Where Object of Notice of Appeal is accomplished, it is immaterial whether or not it is given.

Approved in Estate of Mayhew, 4 Cal. App. 164, 87 Pac. 418, written appearance, acknowledgment of service and consent that judgment rendered shall bind them, filed by parties not served with notice of appeal, cured omission.

5 Cal. 72, PEOPLE v. KOHLER.

In Felony Trial Prisoner must be Present at all times.

Approved in Percer v. State, 118 Tenn. 774, 103 S. W. 783, right of accused in murder case to be present when verdict announced is not waived by failure of counsel to object.

5 Cal. 73–75, 63 Am. Dec. 85, GUY v. HERMANCE.

The State Holds the Title to Lands under water in its sovereign capacity.

Approved in Hobart v. Hall, 174 Fed. 450, grantee from the United States of land in Minnesota bounded by a navigable stream takes title to the middle thread of the stream subject to sovereign ownership for protecting navigation.

Title to Land under water. See note, 42 L. R. A. 163.

5 Cal. 81–82, CUNNINGHAM v. HARRIS.

Where A sued B for Cattle and recovered verdict for part, recovery is bar to action for remainder against one holding under B.

Approved in Hesser v. Johnson, 13 Okl. 64, 74 Pac. 323, where sheriff makes levy on property of wrong person and takes several articles on same levy on same day, there is but one cause of action.

5 Cal. 82–84, KING v. HALL.

Action may be Brought by One Person against another for purpose of determining adverse claim, which latter make against former.

Approved in Harrison v. Russell, 17 Idaho, 201, 105 Pac. 49, in action to compel defendant to come into court and have determined question as to whether notes have been paid, plaintiff has burden of proof.

5 Cal. 86–87, RYAN v. JOHNSON.

Fee Bill is not Act of General Nature within meaning of constitution.

Approved in Russell v. Esmeralda Co., 32 Nev. 314, 107 Pac. 892, upholding fee bill of 1883.

Distinguished in State v. Spellmire, 67 Ohio St. 86, 65 N. E. 622, holding void act of 1902, creating special school district.

5 Cal. 87–88, POTTER v. KNOWLES.

Prior Possession Alone, as Against a mere intruder, is sufficient to support an action of ejectment.

Approved in Stephens v. Hambleton (Cal.), 47 Pac. 52, applying rule where plaintiffs bought from the owner, taking a bond for a deed, and were in possession for two years claiming title before defendants entered and ousted them.

5 Cal. 90–93, McHENRY v. MOORE.

In Equity, Judge may, on Setting Aside referee's report, take up testimony reported by referee, find facts and render decree.

Approved in Kossuth County State Bank v. Richardson, 141 Iowa, 743, 118 N. W. 908, following rule.

5 Cal. 94–95, JACKSON v. WHARTENBY.

Jurisdiction is Determined by the Amount claimed by the plaintiff without regard to the amount found due.

Approved in Becker v. Superior Court, 151 Cal. 316, 90 Pac. 690, reaffirming rule.

5 Cal. 97–102, 63 Am. Dec. 87, McCLINTOCK v. BRYDEN.

Title to Mineral Land cannot be Acquired by occupancy, except for purpose of mining or extracting minerals.

Approved in Burns v. Schoenfeld, 1 Cal. App. 124, 81 Pac. 714, servant employed to excavate land appropriated as nonmineral was entitled to gold which he discovered in the course of his excavation and reduced to possession.

Distinguished in McLemore v. Express Oil Co., 158 Cal. 566, 139 Am. St. Rep. 147, 112 Pac. 62, one claiming land upon which there is homestead entry, as valuable for oil without proof of its present value for such mineral purpose, cannot enter thereon and prospect it for oil.

Discovery of Mineral in Mining Claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 157.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 770.

Courts are Bound to Consider the best interests of the country they judicially rule.

Approved in Lux v. Haggin (Cal.), 4 Pac. 931, applying rule to rights of riparian owners to use of water of a non-navigable stream; Van Dyke v. Midnight Sun Mining etc. Co., 177 Fed. 90, 100 C. C. A. 503, discussing water rights in Alaska.

Adoption of Common Law in United States. See note, 22 L. R. A. 505.

5 Cal. 106–107, PEOPLE v. AIKENHEAD.

Sureties on Official Bond are Liable Only for acts done during term for which bond was given.

Approved in Priet v. De La Montanya (Cal.), 22 Pac. 172, reaffirming rule.

Liability of Sureties on Official Bond after expiration of term of office. See note, 103 Am. St. Rep. 933.

5 Cal. 113–114, TREAT v. STUART.

Plaintiff in Forcible Entry and Detainer must show actual peaceable possession in himself at time of entry.

Approved in Chezum v. Campbell, 42 Wash. 564, 85 Pac. 50, owner of land in actual possession of tenant cannot maintain forcible detainer against person dispossessing tenant.

Right to Civil Action for Forcible Entry and detainer. See note, 121 Am. St. Rep. 382.

5 Cal. 114–116, WILSON v. WILSON.

All Parties Interested in the Subject Matter should be before the court.

Approved in O'Connor v. Irvine, 74 Cal. 443, 16 Pac. 239, in action to establish and enforce a trust in corporate stock, the court should have ordered that a third party interested with plaintiff as a cestui que trust be made a party; dissenting opinion in Hawley v. Griffin, 121 Iowa, 703, 97 N. W. 90, majority holding heirs of deceased owner, on vacating decree in favor of plaintiffs in quiet title suit, cannot interpose as defense to suit their right of redemption conferred by Code, sections 892, 893.

5 Cal. 118–119, SMITH v. BROWN.

Order that Garnishee Pay into Court amount of judgment is improper.

Approved in Brummagim v. Boucher, 6 Cal. 17, reaffirming rule.

5 Cal. 119–120, WALDRON v. MARSH.

Injunction will not be Granted unless it be shown to the court how and why injury would be irreparable.

Approved in Bishop v. Owens, 5 Cal. App. 87, 89 Pac. 846, mere allegation that irreparable injury will be suffered is insufficient; Phenix v. Frampton, 29 Nev. 319, 124 Am. St. Rep. 926, 90 Pac. 5, upholding temporary injunction against completion of a building where title and possession of the land was in dispute.

Injunction Against Trespass on realty. See note, 99 Am. St. Rep. 743.

5 Cal. 120–123, 63 Am. Dec. 110, STILES v. LAIRD.

One may Remove as a Nuisance so much of a dam as interferes with his right to water in a stream.

Approved in Chu Kit v. Lee Lung, 15 Haw. 71, applying rule in action for assault and battery, for resisting an effort to prevent the abatement of such a nuisance.

Abatement of Public Nuisance by private person without suit. See note, 124 Am. St. Rep. 607.

What are Public Nuisances. See note, 107 Am. St. Rep. 203.

Liability for Damming Back Stream. See note, 59 L. R. A. 879.

5 Cal. 123–124, PRICE v. VAN CANEGHAN.

Notice of Appeal from the Whole of justice's judgment need not state whether it is taken on questions of law or fact.

Approved in Rauer's Law etc. Co. v. Superior Court, 10 Cal. App. 425, 102 Pac. 548, reaffirming rule.

5 Cal. 124–126, SURVEY v. WELLS, FARGO & CO.

Where Lost Check was Paid by Banker on forged indorsement, measure of damages in suit on same after banker's refusal to deliver it to owner is full amount for which it was drawn.

Distinguished in Freeman v. Strobehn, 122 Iowa, 159, 97 N. W. 1095, in action under Code, section 4822, for maliciously destroying check drawn in plaintiff's favor by defendant, only nominal damages recoverable in absence of showing of substantial loss.

5 Cal. 127–131, **PEOPLE v. MILGATE.**

Evidence of Good Character to create doubt of guilt. See notes, 103 Am. St. Rep. 904; 20 L. R. A. 618.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 489.

Heat of Passion Which will Mitigate or reduce degree of homicide. See note, 5 L. R. A. (n. s.) 823.

5 Cal. 135–136, **ENGELS v. HEATLY.**

Right to Recover from Agent money paid him for principal. See note, 23 L. R. A. (n. s.) 556.

5 Cal. 138–139, **PIERCE v. KENNEDY.**

Necessity of Notice of Default to bind guarantor. See note, 20 L. R. A. 261.

5 Cal. 140–147, 63 Am Dec. 113, **IRWIN v. PHILLIPS.**

The Policy of This State conferring the privilege to work mines confers the right to divert streams from their natural channels.

Approved in Lux v. Haggin (Cal.), 4 Pac. 922, 932, 933, holding grantee of public land is entitled to have water running thereon continue in its natural channel undiminished in quantity; Van Dyke v. Midnight-Sun Mining etc. Co., 177 Fed. 90, 100 C. C. A. 573, discussing water rights in Alaska.

Prior Possessory Rights of Agricultural Settlers must yield to rights of miners to extract precious metals.

Distinguished in Burdge v. Underwood, 6 Cal. 46, miner had no right to dig ditch within inclosure surrounding improvements of settler.

Pollution of Stream by mining. See note, 24 L. R. A. 67.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 768.

Right of Prior Appropriation of water. See note, 30 L. R. A. 670, 671.

Facts of Which Courts will take judicial notice. See note, 124 Am. St. Rep. 52.

5 Cal. 149–152, **DE JOHNSON v. SEPULBEDA.**

The Object of a Statement or bill of exceptions is to make that record which before was not record.

Approved in Williams v. Southern Pac. R. Co. (Cal.), 9 Pac. 153, statement on motion for new trial, certified by the judge and filed with clerk, will be considered without proof it was used on motion for new trial.

It is not Necessary to Embody Matter of record in bill of exceptions.

Approved in Goo Kim v. Holt, 10 Haw. 657, under statute requiring charge of court and requested instructions to be in writing and filed in the cause, they are part of record.

5 Cal. 155, MARTINEZ v. GALLARDO.

Where Appeal is Dismissed for Want of bond and no final judgment rendered, an appeal may be taken at any time within time allowed by law.

Approved in Groendyke v. Musgrave, 123 Iowa, 542, 99 N. W. 146, appellant may voluntarily dismiss perfected appeal and take second appeal within time limited for appeal.

5 Cal. 156–160, FRAZIER v. HANLON.

Force, Either Actually Applied or Justly to be feared from conduct of defendant, is essential to support of action of forcible entry and detainer.

Approved in Wegner v. Lubenow, 12 N. D. 105, 95 N. W. 466, following rule.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 392.

5 Cal. 160–161, 63 Am. Dec. 116, GUSHEE v. LEAVITT.

Answer Alleging Fraud must Point out facts constituting the fraud.

Approved in Clarkson v. Hoyt (Cal.), 36 Pac. 384, upholding action of court in denying motion to amend answer so as to attack statement of account on ground of fraud, where proposed amendment alleged fraud only in general terms.

Plea That Note Sued on is property of another than plaintiff is not good without showing some substantial matter of defense against such other which could not be set up against plaintiff.

Approved in Russ v. Tuttle, 158 Cal. 231, 110 Pac. 815, applying rule in action for breach of contract to sell corporate stock.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 536, 537, 538.

5 Cal. 161–164, JOYCE v. JOYCE.

Guardian may not Injuriously Affect his ward's interests by admissions or negligence.

Approved in dissenting opinion in Thurston v. Bishop, 7 Haw. 450, majority holding natural guardian of minor had power to manage and dispose of estate of his ward.

5 Cal. 169–172, SAN FRANCISCO v. HAZEN.

That Ordinance shall be Passed by majority of all members means a majority of votes of entire number.

Approved in In re Majority of Legislature, 8 Haw. 597, construing article of constitution requiring note of want of confidence in cabinet to be "passed by a majority of all of the elective members of the legislature"; McLean v. East St. Louis, 222 Ill. 516, 78 N. E. 817, where charter provided for fourteen aldermen and vacancy occurred in office of one, seven was not majority; Pollasky v. Schmid, 128 Mich. 700, 92 Am. St. Rep. 560, 87 N. W. 1031, 55 L. R. A. 614, where charter provided two-thirds of all members of council shall be necessary to pass ordinance, and three places had become vacant, a two-thirds vote of remaining members was not sufficient; Wood v. Gordon, 58 W. Va. 324, 52 S. E. 262, six is not majority of council composed of twelve members though one is absent.

5 Cal. 173–176, HUMPHREYS v. CRANE.

Unauthorized Alteration of Written instruments. See note, 86 Am. St. Rep. 90.

Duty Owed by Creditor to surety. See note, 115 Am. St. Rep. 88.

5 Cal. 183–185, PEOPLE v. LABRA.

Codefendant Who Elects to be Tried Separately is competent witness for other defendants charged with same crime.

Approved in State v. Knudtson, 11 Idaho, 527, 83 Pac. 227, codefendant who has pleaded guilty is competent witness for state.

5 Cal. 186–189, 63 Am. Dec. 117, WESTON v. BEAR RIVER ETC. MIN. CO.

No Transfer of Stock is Good against third parties unless made on the books of the company.

Approved in Man v. Boykin, 79 S. C. 6, 128 Am. St. Rep. 830, 60 S. E. 18, where transfer of bank stock is not regularly entered on books, transferrer is liable to creditors of bank.

Distinguished in Nat. Bank etc. v. Western Pac. Ry. Co., 157 Cal. 577, 578, 579, 108 Pac. 678, failure to register transfer of stock does not subject it to levy of attachment against person in whose name it remains on books; First Nat. Bank v. Stribling, 16 Okl. 55, 86 Pac. 516, when shares of stock provide that they are transferable on books only on surrender of certificate, reissue without surrender is void as against bona fide holder of original.

Denied in Mapleton Bank v. Standrod, 8 Idaho, 748, 71 Pac. 121, 67 L. R. A. 656, where pledged stock is transferred by delivery and indorsement, but transfer not entered on books, attachment for stockholder's debt is valid only against interest of assignor after debt paid.

Validity of Pledge or Other Transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers. See note, 67 L. R. A. 668.

Compelling Issue of Stock. See note, 133 Am. St. Rep. 724.

5 Cal. 195–213, COHEN v. BARRETT.

Title of Act cannot be Resorted to for purpose of giving statute a different meaning from what its words import.

Approved in Forman v. Sewerage and Water Board, 119 La. 52, 43 So. 909, construing act for compensation of attorney for services rendered in certain action by state; dissenting opinion in In re Clarke's Estate, 148 Cal. 123, 113 Am. St. Rep. 197, 82 Pac. 766, 1 L. R. A. (n. s.) 996, 7 Ann. Cas. 306, majority holding, in construing section 1322 of the Code of Civil Procedure, relating to foreign wills, title of act must be read into section.

5 Cal. 214–218, LOW v. MARYSVILLE.

A City can Have No Active Powers or functions that are not public and governmental in character.

Approved in Davoust v. City of Alameda, 149 Cal. 76, 84 Pac. 763, 5 L. R. A. (n. s.) 536, 9 Ann. Cas. 847, municipal corporation is liable for death caused by negligent operation of electric light plant owned by it.

Under Constitution, Article IV, Section 31, municipal corporation cannot be created for commercial purposes.

Distinguished in Clark v. Los Angeles, 160 Cal. 37, 116 Pac. 725, proceedings to issue bonds for city electric works are not invalid because of any invalidity of charter provisions authorizing city to sell surplus power to consumers outside, in absence of showing that city intends to engage in such sale.

5 Cal. 228-229, RITCHIE v. BRADSHAW.

If Check be Presented for Payment in usual banking hours on next succeeding day after its delivery, where payee resides in immediate vicinity of place of payment, it is sufficient.

Approved in School Dist. No. 57 v. Eager, 19 Okl. 237, 91 Pac. 848, following rule; R. H. Herron Co. v. Mawby, 5 Cal. App. 42, 89 Pac. 73, sending of check by mail directly to drawee bank does not constitute proper presentment for payment.

5 Cal. 230-234, ZANDER v. COE.

Legislature cannot Confer on One Court functions or powers which constitution has conferred on another.

Approved in State v. Superior Court, 54 Wash. 391, 103 Pac. 468, holding void act of 1909, authorizing county commissioners to divide county into judicial districts.

Distinguished in Burks v. Walker, 25 Okl. 358, 109 Pac. 546, upholding act of 1909, creating superior courts in certain counties; Higgins v. Tax Assessors of Pawtucket, 27 R. I. 406, 63 Atl. 36, upholding statute of 1905, giving superior court jurisdiction over prerogative writs.

Justice of Peace cannot have Jurisdiction where amount in controversy exceeds $200.

Approved in Fitchett v. Henley, 31 Nev. 338, 104 Pac. 1065, justice's judgment for $396, treble damages for unlawful detainer and $100 rent due is void.

5 Cal. 237-239, IN RE MANCHESTER.

Where Requisition Certifies That Affidavit is "duly authenticated according to the laws" of said state, it is sufficient.

Approved in State v. Curtis, 111 Minn. 243, 126 N. W. 720, following rule.

Extradition Proceedings. See note, 112 Am. St. Rep. 119, 121.

Papers Necessary to Obtain Surrender of fugitives from another state. See note, 28 L. R. A. 804, 805.

Prisoner's Right to Discharge on habeas corpus after commitment and before trial. See note, 100 Am. St. Rep. 39.

Right of Court of Asylum State to examine sufficiency of papers charging offense for which extradition demanded. See note, 11 L. R. A. (n. s.) 427.

5 Cal. 239-240, CHIPMAN v. EMERIC.

Where Statute Gives Treble Damages, demand therefor must be expressed, inserted in declaration.

Approved in Springer v. Jenkins, 47 Or. 508, 84 Pac. 481, administrator proceedings under B. & C. Comp., section 1152, must allege that he seeks to recover double damages.

Disapproved in Carpenter v. Chicago etc. R. R. Co., 119 Mo. App. 207, 95 S. W. 986, where verdict assessed damages in action against railroad for killing horse, court could enter judgment for double damages under Revised Statutes of 1899, section 1105.

5 Cal. 240–241, **HOUGHTON v. BLAKE.**

Materialman has No Lien on building unless he shows materials were used on building and were by contract furnished for particular building.

Approved in Fuller & Co. v. Ryan, 44 Wash. 387, 87 Pac. 486, following rule; California etc. Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 701, 118 Pac. 107, where owner abandons work, persons who have delivered material on ground for use on building, but which has not been used in its construction, have no lien, though some of material made specially.

5 Cal. 244–245, 63 Am. Dec. 121, **WOLF v. FLEISCHACKER.**

A Homestead cannot be Carved Out of land held in joint tenancy or by tenancy in common.

Approved in Estate of Davidson, 159 Cal. 100, 115 Pac. 50, widow not entitled to probate homestead in husband's undivided interest in land held by them as tenants in common; Schoonover v. Birnbaum, 148 Cal. 549, 83 Pac. 999, applying rule in action brought by trustee in bankruptcy to declare invalid homestead of bankrupt on undivided half interest.

Distinguished in Swan v. Walden, 156 Cal. 198, 199, 134 Am. St. Rep. 118, 103 Pac. 932, 933, land held in joint tenancy by husband and wife may be homesteaded by the wife.

5 Cal. 252–257, 63 Am. Dec. 125, **BEARD v. KNOX.**

On Death of Husband, wife takes one-half of community property as heir.

Approved in Estate of Moffitt, 153 Cal. 360, 95 Pac. 654, 20 L. R. A. (n. s.) 207, surviving wife's share of community property is subject to payment of inheritance tax imposed by act of March 20, 1905; dissenting opinion in Reade v. de Lea, 14 N. M. 474, 95 Pac. 142, majority holding act of 1901, requiring signature of both spouses to deed to community property does not apply to property acquired prior to statute.

Criticised in Reade v. de Lea, 14 N. M. 463, 95 Pac. 137, act of 1901, requiring signature of both spouses to deed to community property does not apply to property acquired prior to statute.

Constitutionality of Statutes Affecting Rights based on pre-existing marriage. See note, 84 Am. St. Rep. 449.

5 Cal. 258–260, **MAGEE v. MOKELUMNE HILL ETC. MINING CO.**

Implied Power of Corporation to borrow money and give evidence of indebtedness and security therefor. See note, 111 Am. St. Rep. 322.

5 Cal. 260–262, 63 Am. Dec. 128, **COIT v. HUMBERT.**

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 767.

5 Cal. 262–265, NORTON v. JACKSON.

Where There is a Covenant of Warranty, the payment of the purchase money cannot be resisted so long as grantee remains in possession.

Approved in Leet v. Gratz, 124 Mo. App. 405, 101 S. W. 699, reaffirming rule.

Right of Grantee in Possession to question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 377.

5 Cal. 266, MOORE v. GOSLIN.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 387.

5 Cal. 275–278, PEOPLE v. BACKUS.

Effect of Conviction of Lower Offense embraced in indictment is to acquit of higher offense.

Approved in People v. Huntington, 8 Cal. App. 614, 97 Pac. 761, verdict of manslaughter constitutes acquittal of charge of murder; Huntington v. Superior Court, 5 Cal. App. 291, 90 Pac. 143, where one charged with murder was convicted of manslaughter under erroneous instruction, for which error the cause was remanded, such conviction was acquittal of murder, and new trial must be limited to manslaughter; People v. Bennett (Cal.), 50 Pac. 705, applying rule where under charge of assault with intent to commit murder, defendant was convicted of assault with deadly weapon, and on second trial was convicted of higher offense, but failed to plead former jeopardy; dissenting opinion in Cornelius v. State, 54 Tex. Cr. 201, 112 S. W. 1064, discussing effect of verdict of guilty of lower offense as bar to prosecution for higher offense on second trial.

Verdict in Criminal Case will be Set Aside where jurors separate in such manner that they may have been improperly influenced.

Approved in State v. Sly, 11 Idaho, 119, 80 Pac. 1128, separation of jury in capital case gives prima facie right to new trial.

Effect of Separation of jury. See notes, 103 Am. St. Rep. 165, 24 L. R. A. (n. s.) 777.

Affidavit of Juror Who has Separated without leave purging his conduct from imputation of impropriety is inadmissible.

Approved in State v. West, 11 Idaho, 161, 81 Pac. 108, following rule.

5 Cal. 279–280, BROCK v. BRUCE.

County Court has No Jurisdiction to enforce mechanic's lien where amount in controversy exceeds two hundred dollars.

Approved in Becker v. Superior Court, 151 Cal. 316, 90 Pac. 690, in action to foreclose mechanic's lien, superior court has jurisdiction to render judgment for less than three hundred dollars.

5 Cal. 280–281, MOFFATT v. MOFFATT.

Exceptions to Rule That Husband's Domicile is that of wife. See note, 84 Am. St. Rep. 29.

Domicile of Wife for Purpose of divorce suit. See note, 16 L. R. A. 499.

Conflict of Laws on divorce. See note, 59 L. R. A. 148.

5 Cal. 281–283, **BROOKS v. HAGER.**

Party may Intervene Where He is Directly interested in subject matter in litigation.

Approved in Faricy v. St. Paul Inves. & Sav. Soc., 110 Minn. 316, 125 N. W. 678, construing intervention statute.

5 Cal. 288–290, 63 Am. Dec. 130, **HUNSAKER v. BORDEN.**

Property of a Public Corporation is exempt from execution.

Approved in People v. San Joaquin etc. Agricultural Assn., 151 Cal. 806, 91 Pac. 744, property of district agricultural association cannot be sold under execution to enforce payment of judgment unless state has assented thereto.

When Public Officers Assuming to Act for the government are subject to suit. See note, 108 Am. St. Rep. 831.

5 Cal. 294, **CAHOON v. LEVY.**

Garnishment Being Common-law Proceeding, parties are entitled to jury.

Approved in Russell v. Alt, 12 Idaho, 794, 88 Pac. 417, 13 L. R. A. (n. s.) 146, court cannot send ordinary action at law to referee over objection of either party.

5 Cal. 297–299, **SANFORD v. HEAD.**

District Court Sitting in Equity has power to set aside a judgment for fraud.

Approved in Bacon v. Bacon, 150 Cal. 485, 88 Pac. 320, equity jurisdiction to review decree of distribution is not affected or devested by section 1666 of Code of Civil Procedure; Hanley v. Hanley, 4 Cof. Prob. 476, equity will set aside homestead procured to be set apart by fraud.

5 Cal. 300–306, **EX PARTE KNOWLES.**

Congress cannot Confer Judicial Power on state court.

Cited in Hoxie v. New York etc. R. R., 82 Conn. 367, 73 Atl. 760, arguendo.

Powers of State Legislatures and courts as to naturalization. See note, 30 L. R. A. 762.

5 Cal. 306–307, **TOUCHARD v. TOUCHARD.**

A Municipal Corporation, except with regard to its governmental powers, must be treated as a private person.

Approved in Davoust v. City of Alameda, 149 Cal. 70, 84 Pac. 761, 5 L. R. A. (n. s.) 536, 9 Ann. Cas. 847, city engaged in operating electric light plant is liable for death of a person caused by negligent operation; Hart v. Burnett, 15 Cal. 623, applying rule to validity of execution sales of lands within limits of pueblo at San Francisco.

5 Cal. 308–310, **FITZGERALD v. URTON.**

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 770.

5 Cal. 310–312, **PAYNE v. TREADWELL.**

The Action of Ejectment is Confined to cases where the claimant has possessory title.

Approved in San Francisco v. Grote (Cal.), 47 Pac. 939, applying rule in ejectment by city to recover possession of street dedicated to the public.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 566, 569.

5 Cal. 314, FORD v. SMITH.

Receipts Executed by Third Party acknowledging payment of money are but secondary evidence.

Cited in Doherty v. Doherty, 155 Mo. App. 488, 134 S. W. 1113, receipt is not competent evidence against stranger of payment therein acknowledged.

Receipt as Evidence of Payment as against third parties. See note, 29 L. R. A. 737.

5 Cal. 315–319, HASTINGS v. VAUGHN.

Delivery of Conveyance Depends more upon intention of parties than upon mode of fulfilling it.

Approved in McGrath v. Hyde (Cal.), 21 Pac. 949, deed made by husband to wife and placed in trunk by him after saying it could be recorded at any time was delivered.

Distinguished in Whitney v. Dewey, 10 Idaho, 653, 654, 80 Pac. 1122, 69 L. R. A. 572, parol evidence is inadmissible to show that deed absolute on face delivered to grantee was to take effect only on performance of conditions not expressed therein.

When Defects in Certificates of acknowledgment are fatal. See note, 106 Am. St. Rep. 529.

5 Cal. 319–322, FORD v. HOLTON.

Error will not be Presumed but must be affirmatively shown.

Approved in Evans v. Glencross, 4 Ariz. 226, 36 Pac. 213, on appeal it is presumed that allegation was proved unless record shows contrary.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 176.

Liability of Cotenants for improvements and repairs. See note, 29 L. R. A. 451.

5 Cal. 322–325, MEYER v. GORHAM.

Chattel Mortgage Stipulating for Enjoyment of possession by mortgagor until breach of conditions is invalid as to all except parties to it.

Approved in Bank of Ukiah v. Gibson (Cal.), 39 Pac. 1070, chattel mortgage on property other than that authorized by law is valid against all persons except subsequent creditors of mortgagor and bona fide purchasers.

Effect upon Validity of Mortgage of merchandise of provision or agreement giving mortgagor possession with power of sale. See note, 18 L. R. A. 613.

Effect of Chattel Mortgagee taking possession before any specific right of creditors has attached to cure original defect. See note, 25 L. R. A. (n. s.) 113.

5 Cal. 327–329, CONROY v. FLINT.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 49.

5 Cal. 334–336, 63 Am. Dec. 135, PETERS v. JAMESTOWN BRIDGE Co.

Rights of Assignee of mortgage. See notes, 87 Am. St. Rep. 747; 79 Am. St. Rep. 608.

5 Cal. 339–342, GOODALE v. WEST.

After Apparent Acquiescence in Admission of evidence, a party is concluded from questioning its competency.

Approved in Durkee v. Chino Land and Water Co., 151 Cal. 571, 91 Pac. 393, where rule for measurement of damages was adopted and acquiesced in by both parties, whether correct or not, neither litigant can question competency of evidence introduced under it.

5 Cal. 343–345, DICKEY v. HURLBURT.

Time and Place are of the Substance of every election.

Approved in Vickery v. Wilson, 40 Colo. 495, 90 Pac. 1036, under Denver Charter, section 22, providing for reference of ordinances to electors at "general election," reference must be at general city election and not at state election.

Legislature cannot Confer Nonjudicial Functions on county judge.

Approved in Board of Supervisors v. Todd, 97 Ind. 266, 99 Am. St. Rep. 438, 54 Atl. 966, 62 L. R. A. 609, holding void act of 1896, relating to petition by electors to circuit court to submit liquor question to vote.

5 Cal. 351–353, ARGENTI v. BRANNAN.

Right in Action by Undisclosed Principal to defenses available in action by agent. See note, 28 L. R. A. (n. s.) 231.

5 Cal. 355–356, PEOPLE v. LITTLEFIELD.

Indictment is Sufficiently Certain as to time if it appear from it that offense was committed prior to indictment.

Approved in State v. Rogers, 31 Mont. 4, 77 Pac. 294, upholding conviction for burglary when it appeared it was committed on day prior to date alleged.

Denied in Morgan v. State, 51 Fla. 78, 40 So. 829, charging that offense was committed "on or about" certain day is indefinite and uncertain.

Indictment Charging Taking of Three Head of cattle is sufficiently certain.

Approved in People v. Machado (Cal.), 63 Pac. 67, upholding indictment describing stolen property as "one cow, the same being the property then and there of H. and B."; Ortega v. Territory, 8 Ariz. 42, 68 Pac. 545, indictment for branding cattle, stating offense was committed on or about a day specified and, before finding of indictment is sufficient; State v. Rathbone, 8 Idaho, 167, 67 Pac. 187, upholding information charging larceny of two mares.

Legislature may Leave It to Court or jury to say, within certain limits, what the penalty shall be.

Approved in Territory of Hawaii v. Marshall, 13 Haw. 79, upholding statute which divides offense of making and publishing a libel into two degrees.

5 Cal. 357-359, **PEOPLE ex rel. McMINN v. HASKELL.**

Legislature may Alter Term of Office of purely legislative creation.

Approved in Territory v. Albright, 12 N. M. 319, 78 Pac. 212 (in opinion of lower court), supreme court holding assessor appointed pursuant to amendment of 1903, to act dividing Bernardillo county, was not entitled to office.

5 Cal. 360-365, 63 Am. Dec. 135, **MAY v. HANSON.**

As Soon as Ferryman Signifies His Assent to receive passenger he is liable for safe transit and delivery.

Approved in Wilson v. Alexander, 115 Tenn. 134, 88 S. W. 937, applying rule where ferryman told mule driver, who knew boat was not fastened, to drive on and mules backed off boat into water.

Ferryman as a Common Carrier. See note, 68 L. R. A. 154, 160.

5 Cal. 366-369, **MONTGOMERY v. HUNT.**

Sale of Personal Property without actual change of possession is void as to creditors.

Approved in Kennedy v. Conroy (Cal.), 44 Pac. 796, bill of sale of sheep and hogs from stepfather to stepson without any manifest change in possession was void as to creditors; Avery Mfg. Co. v. Emsweller, 31 Ind. App. 293, 67 N. E. 947, upholding delivery of farm machinery sold on farm where buyer removed portion.

Right to Impeach One's own witness. See note, 21 L. R. A. 419, 420.

5 Cal. 373-380, **PEOPLE ex rel. ATTORNEY GENERAL v. FOLSOM.**

Adoption of Common Law in United States. See note, 22 L. R. A. 506.

Effect of State Constitutions and statutes upon inheritance by or from alien. See note, 31 L. R. A. 87, 147.

Effect of Treaties upon alien's right to inherit. See note, 32 L. R. A. 186.

Necessity for Judicial Proceedings to effect escheat. See note, 15 L. R. A. (n. s.) 383.

5 Cal. 381-387, **PEOPLE ex rel. ATTORNEY GENERAL v. GERKE.**

Statutes Yield to Treaties.

Approved in In re Stixrud's Estate, 58 Wash. 343, 109 Pac. 345, holding inheritance tax law of 1907 void as in conflict with Swedish treaty.

Effect of Treaties upon Alien's Right to inherit. See note, 32 L. R. A. 177, 186.

5 Cal. 393-395, **TEVIS v. WOOD.**

Notice to Indorsers That Demand and dishonor were one day too late was insufficient.

Disapproved in Derham v. Donohue, 155 Fed. 388, 83 C. C. A. 657, mistake in dating notice of protest January 25, 1904, instead of January 25, 1905, and failure to state certificate contained words, "No interest after six months," did not mislead or prejudice indorser.

5 Cal. 395-399, **TARTAR v. SPRING CREEK WATER ETC. CO.**

The Right to Mine on Public Land carries with it as incidents right to use of wood and water.

Approved in dissenting opinion in Lux v. Haggin (Cal.), 4 Pac. 932, majority holding grantee of public lands through which water flows is entitled to have water continue to flow in its natural channel; Miles v. Butte Electric Co., 32 Mont. 66, 79 Pac. 553, arguendo.

5 Cal. 400–401, THROCKMORTON v. BURR.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 712.

5 Cal. 401–403, SEALE v. MITCHELL.

In Construction of Statutes rule of stare decisis is adhered to.

Approved in Hayes v. Kelley, 111 Tenn. 300, 76 S. W. 893, construing Shannon's Code, section 4882, relating to filing of transcripts in election contests.

Effect of Statutes making pre-existing contracts illegal. See note, 120 Am. St. Rep. 480.

5 Cal. 406–407, CARPENTIER v. HART.

Equity has Jurisdiction to Set Aside Judgment obtained by fraud.

Approved in Hanley v. Hanley, 4 Cof. Prob. 477, equity has jurisdiction to set aside homestead procured to be set apart by fraud.

5 Cal. 410–412, POTTER v. SEALE; S. C., 8 Cal. 220.

Power of Appellate Court Over Verdict for excessive damages. See note, 26 L. R. A. 391.

5 Cal. 412–413, PICKETT v. SUTTER.

Contracts of Intoxicated Persons. See notes, 107 Am. St. Rep. 538; 54 L. R. A. 442; 2 L. R. A. (n. s.) 667.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 465.

5 Cal. 416–417, GUY v. FRANKLIN.

After Judgment on Promissory Note has been obtained, rate of interest is regulated by statute.

Approved in United States Nat. Bank v. Waddingham, 7 Cal. App. 175, 93 Pac. 1047, judgment providing that note shall bear interest at rate fixed therein until execution was erroneous.

In Action on Note or Chose in Action the theory of law is that damages be recovered for nonperformance of contract.

Distinguished in Compressed Air Co. v. West San Pablo Co., 9 Cal. App. 365, 99 Pac. 533, in action to recover property leased and unpaid rental therefor, no recovery can be had for money not due at beginning of action.

5 Cal. 418, 63 Am. Dec. 139, QUIGLEY v. GORHAM.

Exemption of Tools and Implements from execution. See note, 123 Am. St. Rep. 144.

5 Cal. 419–426, VAN DE CASTEELE v. CORNWALL.

Liability of Notaries. See note, 82 Am. St. Rep. 385.

5 Cal. 428–429, ROBINSON v. HOWARD.

Judgment Which Determines Merits of Case is bar to subsequent action.

Approved in Frye v. Miley, 54 W. Va. 333, 46 S. E. 138, following rule; Wiese v. San Francisco Musical Society, 82 Cal. 646, 23 Pac.

212, 7 L. R. A. 577, where in action for sick benefits question of validity of by-law was litigated, defendant was estopped from making same defense in action for installments subsequently due; Ayres v. Cone, 138 Fed. 781, 71 C. C. A. 144, where validity of claim of a petitioning creditor in involuntary bankruptcy proceedings was put in issue by bankrupt's answer, determination in favor of creditor was conclusive; Glass v. Basin & Bay State Min. Co., 35 Mont. 572, 90 Pac. 754, where judgment rendered on pleadings was affirmed on appeal, but supreme court reserved certain question, judgment was not bar; Board of Commrs. of Grant Co. v. Cross, 12 N. M. 76, 73 Pac. 616, where demurrer to complaint was sustained, in determination of which material issues passed on and defendant refused to amend and appealed, affirmance is bar to new suit in same cause of action; Lockhart v. Leeds, 12 N. M. 167, 76 Pac. 315, holding judgment on demurrer is bar.

5 Cal. 430–432, GOODRICH v. MARYSVILLE.

Findings of Referee can be Reviewed only upon motion for new trial or upon appeal.

Approved in United States v. Ramsey, 158 Fed. 493, applying rule under Idaho statute adopted from California code.

Trial Before Referee Should be Conducted in same manner as before court.

Approved in Estate of Burns, 2 Cof. Prob. 46, where executor refers doubtful claim to referee, reference must be conducted as provided in Code of Civil Procedure, sections 638–645, 1508.

5 Cal. 435, CARRIERE v. MINTURN.

Averment as to Counsel Fees is unnecessary in foreclosure suit where amount is stipulated in mortgage.

Approved in Hewett v. Dean (Cal.), 25 Pac. 756, allegation that three hundred dollars was reasonable attorney's fee was sufficient, without averment showing actual payment of that amount.

5 Cal. 445–446, 63 Am. Dec. 140, HILL v. NEWMAN.

Right to Water is Right Running with land and has none of characteristics of mere personalty.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 726, 93 Pac. 865, 15 L. R. A. (n. s.) 359, right to water which has been diverted into ditches for purposes of irrigation is real and not personal property; Northern Light etc. Co. v. Stacher, 13 Cal. App. 421, 109 Pac. 900, riparian rights are proper subject of condemnation to public use.

Right to Running Water. See note, 81 Am. St. Rep. 418.

Property in Water of a Stream upon public lands may be acquired by mere appropriation.

Approved in Lux v. Haggin (Cal.), 4 Pac. 928, where state has authorized appropriation of water running through its own lands, rights of appropriator are superior to those of subsequent purchaser.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 670,

5 Cal. 449, JOYCE v. JOYCE.

Acts of Deputies must be Done in the name of their principals.

Approved in People v. Le Doux, 155 Cal. 544, 102 Pac. 520, disqualification of sheriff to summon jury panel affected all his deputies.

Distinguished in Jordan v. McDonnell, 151 Ala. 286, 44 So. 103, copy of writ of error from federal circuit court sufficiently authenticated to be admissible in evidence where seal was attached to certificate signed "A, clerk of U. S. Circuit Court, per B, Deputy Clerk."

Persons in Whose Name deputy should act. See notes, 106 Am. St. Rep. 826, 827, 828; 19 L. R. A. 180.

5 Cal. 453–454, RITCHIE v. DAVIS.

Report of Referee will not be Set Aside because of defect in plea not raised by demurrer.

Approved in Wilkins v. Stidger, 22 Cal. 235, too late to make objection after verdict.

5 Cal. 455–457, DILLON v. BYRNE.

Debt is not Lost by Acceptance of new mortgage intended to supply old one and secure same debt.

Approved in Farmers' Loan etc. Co. v. Meridian Waterworks Co., 139 Fed. 671, where water company having franchise from city to construct waterworks, made new issue of bonds pending suit by city to annul its franchise, provision therein for renewal and extension of prior mortgages, did not operate to discharge such mortgages.

Lien for Purchase Money of homestead. See note, 86 Am. St. Rep. 176.

5 Cal. 460–461, ROBINSON v. PIOCHE.

Intoxication of Person Injured by Falling through hole in sidewalk is no defense to action for damages.

Approved in Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 722, 103 Pac. 195, mere abstraction or lack of attention to condition of sidewalk by pedestrian cannot be assigned as contributory negligence; Jackson v. Southern Pacific Co., 11 Cal. App. 105, 103 Pac. 1100, instruction making intoxication contributory negligence without regard to its degree or character was properly refused.

Intoxication as Affecting Negligence. See note, 40 L. R. A. 138.

5 Cal. 463–465, WASHBURN v. ALDEN.

General Words in Power of Attorney following declaration of particular purpose are limited to acts necessary to accomplish such purpose.

Distinguished in Moore v. Gould, 151 Cal. 728, 91 Pac. 618, generality of terms employed in power of attorney clearly included authority to execute instruments of renewal.

Implied Powers Under Power of Attorney to transact business. See note, 4 L. R. A. (n. s.) 844.

5 Cal. 465–467, GREWELL v. HENDERSON.

Court has No Jurisdiction to Enter Judgment until after expiration of time to appear.

Approved in Forsyth v. Chambers, 30 Nev. 340, 96 Pac. 931, where service is had by publication, it is improper to take judgment until twenty days after completion of publication in cases where personal service cannot be had.

5 Cal. 467–470, POSTEN v. RASSETTE.

In Case of Lost Instruments Witness need not recite contents word for word.

Approved in Rogers v. Clark Iron Co., 104 Minn. 212, 116 N. W. 744, reaffirming rule; Seaboard National Bank v. Ackerman, 16 Cal. App. 58, 116 Pac. 92, restoring burnt records of action.

Sufficiency of Evidence of lost deeds. See note, 134 Am. St. Rep. 1096.

Power of Attorney Coupled With an Interest cannot be revoked.

Distinguished in Weaver v. Richards, 144 Mich. 407, 108 N. W. 387, 6 L. R. A. (n. s.) 855, power appointing attorney to sell all property of signer and providing that it shall be irrevocable and survive is not coupled with interest and is revoked by death of grantor.

5 Cal. 470–471, MUNROE v. THOMAS.

Ferry Franchise is not Subject to execution.

Distinguished in Evans v. Kroutinger, 9 Idaho, 158, 72 Pac. 884, holding ferry franchise may be sold on execution.

Execution or Judicial Sale of Corporate Franchise or property necessary to its enjoyment. See note, 20 L. R. A. 737.

Establishment, Regulation and Protection of Ferries. See note, 59 L. R. A. 545.

5 Cal. 471–474, MOORE v. McKINLAY.

A Warranty will not be Implied where party has an opportunity to examine goods.

Approved in Tustin Fruit Assn. v. Earl Fruit Co. (Cal.), 53 Pac. 698, where defendant accepted oranges as No. 1 fruit, relying on its own judgment, no warranty of quality was implied, notwithstanding there were latent defects in goods. See note, 102 Am. St. Rep. 608, on implied warranty of quality.

Warranty on Sale of Goods by sample. See note, 70 L. R. A. 660.

Implied Warranty of Quality in Sales by description. See note, 14 L. R. A. 494.

Implied Warranty of Fitness of Property bought for special purpose. See note, 22 L. R. A. 195, 196.

5 Cal. 474–475, NICHOLSON v. PATCHIN.

Where Employee Continues in Service after expiration of contract, terms of original contract as to compensation control.

Approved in Perry v. Noonan Furniture Co., 8 Cal. App. 39, 95 Pac. 1129, remedy for continued salary is by assumpsit on contract

5 Cal. 476–478, CLARY v. HOAGLAND; S. C., 6 Cal. 685.

Instance of Issues Where an Inferior Board, officer or tribunal, exercising judicial functions, has exceeded its jurisdiction, and there is no adequate remedy at law.

Approved in Berkey v. Thompson, 126 Iowa, 398, 102 N. W. 136, where defendant moved to tax costs of transcribing reporter's notes, district court's action in overruling action of supreme court is reviewable on certiorari.

Exceptions to Rule That Certiorari will not lie where there is an appeal. See note, 50 L. R. A. 793.

Who may Prosecute Writ of certiorari. See note, 103 Am. St. Rep. 112.

5 Cal. 480–482, 63 Am. Dec. 141, OLENDORF v. SWARTZ.

Necessity of New Consideration to Support Waiver of failure to give notice of dishonor, or subsequent promise by indorser. See note, 29 L. R. A. 312.

5 Cal. 483–485, PRICE v. DUNLAP.

The Party to Whom a Note is made payable is prima facie the owner.

Approved in Russ v. Tuttle, 158 Cal. 231, 110 Pac. 815, holding defendant cannot object that plaintiff, who is apparent owner of contract to sell corporate stock, is not real party in interest.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 601.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 536, 537, 554.

Actions on Lost Instruments. See note, 94 Am. St. Rep. 473, 474.

5 Cal. 485–486, GROVER v. HAWLEY.

Necessity and Character of Title or Possession to sustain action of trespass. See note, 30 L. R. A. (n. s.) 257.

5 Cal. 494–497, EX PARTE COHEN.

Contempt is Disobedience or Resistance of lawful order of court or judge.

Approved in Alan v. Everett, 7 Haw. 84, upholding judgment for damages, though rather large, against police judge who inflicted fine for failure to obey order beyond his authority to make.

Courts, Tribunals and Persons authorized to punish contempts. See note, 117 Am. St. Rep. 951.

Disobedience of Void Order as contempt. See note, 16 L. R. A. (n. s.) 1067.

Equity Court may Appoint Receiver and order him to take possession of property in controversy.

Approved in Severns v. English, 19 Okl. 577, 101 Pac. 754, reaffirming rule.

Where Accused Appears and Answers to rule to show cause in contempt, court acquires jurisdiction over his person.

Approved in dissenting opinion in State v. Harvey, 16 N. D. 166, 112 N. W. 59, majority holding accused in contempt proceedings does not waive want of jurisdiction by pleading to charge based on information and belief.

5 Cal. 502, BENNETT v. TAYLOR.

Mortgagor's Wife may Intervene in Foreclosure of mortgage on homestead.

Approved in Potlatch Lumber Co. v. Runkel, 16 Idaho, 197, 101 Pac. 397, 23 L. R. A. (n. s.) 536, claimant of property attached in action for debt may intervene; McDonald v. Sanford, 88 Miss. 639, 117 Am. St. Rep. 758, 41 So. 370, husband and wife may maintain bill to cancel decree in suit to which wife was not party, declaring that instrument executed by husband alone constituted encumbrance on homestead.

Recitals in Mortgage as Evidence of indebtedness. See note, 112 Am. St. Rep. 793.

5 Cal. 504–507, SARGENT v. WILSON.

Wife of Mortgagor may Intervene in Foreclosure of mortgage on property claimed as homestead.

Cited in Houssels v. Taylor, 24 Tex. Civ. App. 75, 58 S. W. 191, arguendo.

5 Cal. 507–509, LARUE v. GASKINS.

Writ of Review will not Lie to annul judgment where justice court acts within its jurisdiction.

Approved in Hall v. Justice's Court, 5 Cal. App. 138, 89 Pac. 871, delay of eight years in entering judgment by default after return of summons does not show excess of jurisdiction.

5 Cal. 509–510, PHILLIPS v. HENSHAW.

Agent has No Right to Sue for purchase money due his principal.

Approved in Tustin Fruit Assn. v. Earl Fruit Co. (Cal.), 53 Pac. 695, where agent contracted directly with a party as a principal, he may sue in his own name on the contract whether or not fact of agency was known.

5 Cal. 511–513, GUY v. CARRIERE.

Miscellaneous.—Cited in Faber v. Muir, 27 Tex. Civ. App. 31, 64 S. W. 940, where executory contract for sale of land provided that vendee should erect building on lot and vendor should advance him certain sum for its construction, and vendee employed plaintiff to build house, and vendor without notice paid vendee the money, plaintiff acquired no lien.

5 Cal. 515–517, ORD v. McKEE.

It is Duty of Court of Equity to adjust rights of all parties before it.

Approved in Swan v. Talbot, 152 Cal. 147, 94 Pac. 240, 17 L. R. A. (n. s.) 1066, court had jurisdiction to state and settle account between the parties, where it found for rescission of bill of sale and it was impractical to decree return of property; dissenting opinion in Hawley v. Griffin, 121 Iowa, 703, 97 N. W. 90, majority holding heirs of deceased owner on vacating decree in favor of plaintiffs in quiet title suit cannot interpose as defense to suit their right of redemption conferred by Code, sections 892, 893.

NOTES

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CASES IN 6 CALIFORNIA.

6 Cal. 19–21, CUNNINGHAM v. DORSEY.

Loss of Profits of Sale or Purchase as damages. See note, 52 L. R. A. 247.

6 Cal. 26–29, PEOPLE v. PORTER.

A Resignation is Effectual without acceptance by the appointing power.

Approved in Movins v. Lee, 30 Fed. 301, director of national bank may resign.

Distinguished in dissenting opinion in State v. Murphy, 30 Nev. 428, 429, 97 Pac. 720, 18 L. R. A. (n. s.) 1210, majority holding sheriff could withdraw resignation before day of taking effect, though accepted by county commissioners.

Criticised in State v. Superior Court, 46 Wash. 619, 620, 123 Am. St. Rep. 944, 91 Pac. 5, 12 L. R. A. (n. s.) 1010, where officer resigns, no vacancy exists until resignation is formally accepted.

Necessity of Acceptance to Complete Resignation of office. See note, 23 L. R. A. 682.

Right to Repudiate or Withdraw resignation. See note, 16 L. R. A. (n. s.) 1060.

Proclamation of Governor Required by Statute is necessary to validity of a special election.

Approved in Marsden v. Harlocker, 48 Or. 93, 120 Am. St. Rep. 786, 85 Pac. 329, under act of 1905, local option election is invalid where court did not meet to authorize election.

Necessity of Notice or Proclamation of election. See note, 120 Am. St. Rep. 795.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 62, 67, 68, 69.

6 Cal. 29–32, REINA v. CROSS.

Party Receiving Money to Use of Another is rightfully in possession until same is demanded.

Denied in Young v. Kimber, 44 Colo. 452, 98 Pac. 1133, where bailee of bonds belonging to plaintiff delivered interest coupons

to defendant for collection for plaintiff's use, no demand is necessary to entitle plaintiff to sue for proceeds of coupons.

6 Cal. 32–33, PAGE v. RANDALL.

Privilege of Nonresident Witness from suit. See note, 25 L. R. A. 728.

Miscellaneous.—Cited in Bechtel v. Wier, 152 Cal. 447, 93 Pac. 77, 15 L. R. A. (n. s.) 459, to point that execution sale en masse instead of by separate parcels is voidable and not void; Vigoureux v. Murphy, 54 Cal. 351, miscited.

6 Cal. 33–41, RITCHIE v. DORLAND.

Jurisdiction of Action to Quiet Title and obtain possession of land against persons holding under common source but claiming distinct tracts of the land. See note, 126 Am. St. Rep. 995, 998.

Effect of Legal Remedy upon equitable jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 51.

Jurisdiction of Equity, upon Ground of avoiding multiplicity of suits, to entertain suit for possession of separate parcels held by different defendants under common source. See note, 14 L. R. A. (n. s.) 241.

6 Cal. 41–43, MERRILL v. GORHAM.

Two Laws on the Same Subject must be construed together, if possible.

Approved in Home for the Care of Inebriates v. Reis, 95 Cal. 148, 30 Pac. 207, act providing that fines for drunkenness should be paid to home for inebriates not repealed by act providing that police court fines should be paid into city treasury.

Fact That Assessment for State and county taxes in city not based on city assessor's valuation as required by statute is no ground for enjoining collection of taxes.

Approved in Wilson v. Green, 135 N. C. 350, 47 S. E. 472, taxpayer cannot restrain collection of tax on ground that property has been fraudulently assessed.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 702, 703.

6 Cal. 43–44, DAUMIEL v. GORHAM.

Where Goods of Third Party are Mixed with property of judgment debtor, sheriff is not liable for levying on them as property of debtor unless there has been notice and demand for goods by owner.

Approved in McCausey v. Hock, 159 Mich. 574, 124 N. W. 572, where officer levies on goods some of which are subject to execution and some not, it is his duty to separate them if possible.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 125.

6 Cal. 45–46, BURDGE v. UNDERWOOD.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 770.

6 Cal. 46–47, WATSON v. ZIMMERMAN.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 570.

6 Cal. 47–53, 65 Am. Dec. 475, SMITH v. RANDALL.

Inadequacy of Price is not of Itself Sufficient to set aside execution sale.

Approved in Odell v. Cox, 151 Cal. 73, 90 Pac. 196, setting aside execution sale of corporate stock worth two thousand dollars for twenty-one dollars, where by reason of manner of levy and of giving notice of sale judgment debtor was ignorant of sale.

Failure of Sheriff Prior to Execution Sale of realty to give proper notice does not avoid sale.

Approved in Barton v. Kipp, 30 Mont. 286, 287, 76 Pac. 565, 566, failure to give notice of execution sale provided by law does not invalidate sale; dissenting opinion in Satterwhite v. Melczer, 3 Ariz. 170, 24 Pac. 186, majority holding levy of execution out of district court by constable instead of sheriff is void.

Necessity for Recording Deeds and mortgages. See note, 82 Am. St. Rep. 399.

6 Cal. 53–55, SHERWOOD v. DUNBAR.

Action for Contribution not Founded on express promise. See note, 98 Am. St. Rep. 43.

6 Cal. 55–56, GRANT v. WHITE.

Where There is No Regular Substitution of Attorneys as pointed out by statute, notices may be served on attorney of record.

Approved in Choctaw etc. R. Co. v. Burgess, 21 Okl. 121, 123, 95 Pac. 610, 611, following rule.

6 Cal. 56–57, HART v. VIDAL.

In Action for Value of Attorney's Services in certain suit, value of plaintiff's services in another action is inadmissible.

Approved in Heblich v. Slater, 217 Pa. 409, 66 Atl. 656, in action for legal services rendered, evidence of amount paid another attorney for services in same case is inadmissible.

6 Cal. 57–61, MATOON v. EDER.

Affidavit for Arrest Alleging Fraud on information and belief is sufficient.

Approved in Ex parte Howitz, 2 Cal. App. 757, 84 Pac. 231, complaint on which order for arrest founded need not charge fraud.

Constitutionality of Imprisonment for debt. See note, 34 L. R. A. 642.

Writ of Arrest is Only Intermediate Process to secure presence of party till final judgment, and facts on which it is based must be affirmatively found in judgment.

Distinguished in Banning v. Roy, 47 Or. 123, 114 Am. St. Rep. 908, 82 Pac. 710, where defendant provisionally arrested and order of arrest not vacated, and execution against his property returned unsatisfied, execution against person might issue though judgment did not show issuance of writ of arrest.

6 Cal. 63–67, O'CALLAGHAN v. BOOTH.

The Rule That a Penal Statute must be declared on by the party seeking recovery does not apply to justices of the peace.

Approved in Ex parte Luening, 3 Cal. App. 78, 84 Pac. 446, complaint before justice of the peace need not plead ordinance by title and date of passage.

Power of County Court to Treble Damages in forcible entry cases results from its power to try de novo.

Distinguished in Fitchett v. Henley, 31 Nev. 338, 104 Pac. 1065, holding void justice's judgment for three hundred and ninety-six dollars, treble damages for unlawful detainer, and one hundred dollars rent due.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 388, 396.

6 Cal. 67–68, GREENFIELD v. GUNNELL.

Objection to Necessary Verification of Complaint must be taken either before or at time of answering.

Approved in Moore v. Hupp, 17 Idaho, 245, 105 Pac. 213, answer to complaint for injunction waives defective verification.

6 Cal. 68–71, ADAMS v. GORHAM.

Effect as to Warehousemen of Recitals in their receipts. See note, 19 L. R. A. 302.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 50, 51.

6 Cal. 71–73, 65 Am. Dec. 481, POOLE v. GERRARD.

The Homestead is a Joint Estate in husband and wife with the right of survivorship.

Distinguished in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 354, 107 Pac. 337, homestead law is statute of descent.

Husband and Wife must Join in deed to homestead.

Distinguished in Cushman v. Davis, 79 Vt. 118, 64 Atl. 458, where husband and wife occupying a homestead leave same, though at different times, without any intention to return and again occupy property as homestead, such acts constitute abandonment thereof.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 935.

Effect of Wife's Separate Deed of Homestead in connection with conveyance or encumbrance by husband, or her subsequent joinder therein. See note, 8 L. R. A. (n. s.) 750.

6 Cal. 74–75, SACRAMENTO VALLEY R. R. CO. v. MOFFATT.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 304.

6 Cal. 75, PEOPLE v. WHITE.

Sale of Land at Auction is Void where no note or memorandum is made by auctioneer.

Approved in Young v. Patterson, 9 Cal. App. 471, 99 Pac. 553, when money paid into county treasury title of state passes, though deed not delivered.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 241.

6 Cal. 80–81, McAULEY v. THE YORK MIN. CO.

In Action Against Corporation, witness who was stockholder at time liabilities were incurred but who sold out before action begun is incompetent.

Approved in Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 687, 64 S. E. 885, stockholder in plaintiff corporation is incompetent as juror.

6 Cal. 87–88, MOSES v. THORNE.

To Enable the Assignee of a Judgment to sue on the appeal bond, he must have an assignment of the bond.

Approved in Chilstrom v. Eppinger (Cal.), 59 Pac. 697, reaffirming rule.

6 Cal. 92–94, PEOPLE v. PHOENIX.

General Statute Controlled in Some of Its Provisions by subsequent special statute is revived by amendment of latter intended to give effect to former.

Approved in County of Trinity v. County of Mendocino, 151 Cal. 284, 90 Pac. 687, act of March 30, 1872, providing for commission of survey, prevails over Political Code, section 3969.

6 Cal. 94–96, 65 Am. Dec. 489, DOWNER v. LENT.

Where Law is Obliged to Trust to the Discretion of an officer, he should be protected from consequences of an erroneous judgment.

Approved in Wyatt v. Arnot, 7 Cal. App. 224, 94 Pac. 88, superior judge not liable in damages for delay in deciding case.

Personal Liability of Judicial Officers. See note, 137 Am. St. Rep. 49, 51.

6 Cal. 96–99, PEOPLE v. FREELAND.

The Status of a Juror Need not be Established by the best evidence.

Approved in People v. Quijada, 154 Cal. 246, 97 Pac. 690, citizenship proved by judgments of naturalization and exercise of rights of citizenship.

Qualification of Grand Jurors. See note, 28 L. R. A. 196.

In Indictment for Murder It is Sufficient to describe deceased by name by which he was commonly known.

Approved in People v. Gilbert, 199 N. Y. 27, 92 N. E. 91, indictment alleging that defendant did kill and murder Viola Hughes implies that rational being was subject of crime.

Name Under Which Person may be indicted. See note, 100 Am. St. Rep. 841.

Insulting Words or Conduct as provocation to homicide. See note, 4 L. R. A. (n. s.) 154.

Heat of Passion Which will Mitigate or reduce degree of homicide. See note, 5 L. R. A. (n. s.) 816.

6 Cal. 99–101, 65 Am. Dec. 490, GUY v. IDE.

Where Relief can be Obtained in Trial Court, appellate court will not administer it.

Approved in Luci v. Chin Wa, 5 Haw. 630, denying appeal from judgment by default.

In Foreclosure Plaintiff has No Right to have receiver of rents of mortgaged property appointed pending litigation.

Denied in Moncrieff v. Hare, 38 Colo. 227, 232, 233, 234, 87 Pac. 1084, 1085, 1086, 7 L. R. A. (n. s.) 1801, where mortgage pledged

rents as part of security and mortgagor is insolvent, on foreclosure decree receiver to collect rents may be appointed.

Power of Equity, Where Mortgage does not convey title, to impound rents and profits pending foreclosure. See note, 7 L. R. A. (n. s.) 1004, 1008.

6 Cal. 105–108, KELLY v. NATOMA WATER CO.

Actual Appropriation must be Test of priority in all claims to the use of water, not founded on ownership of land through which water flows.

Approved in Lower Tule River Ditch Co. v. Angiola Water Co., 149 Cal. 499, 86 Pac. 1082, one may by prior actual and complete appropriation acquire water right paramount to title of subsequent appropriator under code manner; Hewitt v. Story, 64 Fed. 515, 12 C. C. A. 250, 30 L. R. A. 265, water right abandoned by nonuser.

Right of Prior Appropriation of water. See note, 30 L. R. A. 677.

Where One Begins to Build a Dam in good faith, his right relates back to the time of commencement.

Approved in Otis Co. v. Ludlow Mfg. Co., 186 Mass. 95, 104 Am. St. Rep. 563, 70 N. E. 1011, reaffirming rule; Morris v. Blan, 146 Fed. 427, effect of statutes is to deny to appropriator who does not comply therewith right to date from beginning of work.

6 Cal. 108–113, REYNOLDS v. JOURDAN.

Where Entire Performance has Been Prevented or terms of contract varied, action for amount due should be in form of indebitatus assumpsit.

Approved in Brown v. Crown Gold Milling Co., 150 Cal. 384, 89 Pac. 90, following rule; Boyd v. Bargagliotti, 12 Cal. App. 237, 107 Pac. 154, applying rule where written contract modified by oral agreement and completion prevented by defendant; Castagnino v. Balletta (Cal.), 21 Pac. 1098, applying rule where completion of building was prevented by defendants.

Under Common Count for Work and Labor, contract may be introduced in evidence as admission of standard of value.

Approved in Naylor v. Adams, 15 Cal. App. 556, 115 Pac. 339, and Breen v. Roy, 8 Cal. App. 478, 97 Pac. 171, but reaffirming rule; Brown v. Crown Gold Milling Co., 150 Cal. 383, 384, 89 Pac. 90, contract, though void, admissible as evidence of terms and nature of employment.

6 Cal. 113–116, 65 Am. Dec. 491, ADAMS v. HASKELL.

A Fund in the Hands of a Receiver is not subject to attachment.

Approved in In re John L. Nelson & Bros. Co., 149 Fed. 592, applying rule to ancillary receiver apointed in bankruptcy proceedings.

Right to Attach Property in Hands of assignee for creditors. See note, 26 L. R. A. 596.

Miscellaneous.—Cited in Adams v. Haskell, 6 Cal. 316, 65 Am. Dec. 517, another phase of same litigation.

6 Cal. 119–123, 65 Am. Dec. 493, CHENERY v. PALMER.

Sale of Personal Property, Unaccompanied by immediate delivery, is void as to creditors, though delivery made before levy.

Approved in Ruggles v. Cannedy, 127 Cal. 300, 53 Pac. 912, 46 L. R. A. 371, chattel mortgage void where recordation delayed more than six months.

Where Sale of Personalty is Absolute in Terms, but with understanding that it was only to operate as mortgage, it is void as to creditors.

Approved in Walkin v. Horswill, 24 S. D. 202, 123 N. W. 672, following rule.

6 Cal. 123–126, LEONARD v. DARLINGTON.

Where Original Sale or Mortgage Void, subsequent advances cannot be recovered.

Approved in Wells v. Langbein, 20 Fed. 186, chattel mortgage, void as in fraud of creditors, cannot be validated by taking possession.

6 Cal. 126–130, 65 Am. Dec. 496, ADAMS v. HASTINGS.

A Contract to Pay More Than Legal Rate of interest is void for want of consideration as to interest already accrued.

Approved in Reed v. Bank of Ukiah, 148 Cal. 98, 82 Pac. 846, reaffirming rule.

Miscellaneous.—Cited in Hastings v. Halleck, 13 Cal. 210, 213, referring historically to cited case.

6 Cal. 140–141, BATTELLE v. CONNOR.

Where Party Complies With Terms imposed, and avails himself of advantage of order, he cannot afterward question its correctness.

Approved in Farley v. Moran (Cal.), 31 Pac. 159, upholding bond for construction of fences, though illegal, where railroad had taken possession.

6 Cal. 141–142, RICH v. DAVIS.

Note Made in Firm Name for Private Use of partner making it binds firm in hands of innocent holder.

Approved in Lewis v. Hayden, 3 Ariz. 282, 32 Pac. 264, where partner gave individual note secured by mortgage on individual property, to raise funds for firm, partnership note executed to such partner and indorsed by him to holder of other note to procure extension is valid in bonds of such holder as against firm.

Liability of Partnership for torts. See note, 51 L. R. A. 495.

6 Cal. 143–144, PEOPLE v. TOWN OF NEVADA.

Nonjudicial Functions cannot be Imposed on courts.

Approved in Town of Searsburg v. Town of Woodford, 76 Vt. 375, 57 Atl. 962, supreme court cannot determine boundary between towns by line claimed to have been established by prescription.

6 Cal. 148, MITCHELL v. HAGOOD.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 812.

Effect of State Constitutions and Statutes upon inheritance by or from alien. See note, 31 L. R. A. 86.

6 Cal. 149–154, 65 Am. Dec. 498, OSBORNE v. ENDICOTT.

Party Making Deed is not Estopped, as between original parties to it, by recitals unnecessary to conveyance.

Approved in Clark v. Sayers, 55 W. Va. 522, 47 S. E. 316, reaffirming rule.

Statute of Frauds must be pleaded.

Approved in Levy v. Ryland, 32 Nev. 469, 109 Pac. 908, statute of frauds must be pleaded by answer and not by demurrer.

Where Land is Purchased in Name of one person and consideration is paid by another, person in whose name conveyance is taken, holds as trustee for one furnishing money.

Approved in Levy v. Ryland, 32 Nev. 465, 109 Pac. 906, following rule.

6 Cal. 155–156, EMERIC v. TAMS.

In Foreclosure Where Complaint has Copy of mortgage annexed to which it refers, correct description of land in mortgage is sufficient for purposes of suit.

Approved in Hackfeld v. Monsarrat, 18 Haw. 334, following rule.

6 Cal. 158–161, CASTRO v. CASTRO.

A Will Takes Effect upon Proof of its execution, unless there is some statute requiring it to be probated.

Approved in Estate of Patterson, 155 Cal. 636, 132 Am. St. Rep. 116, 102 Pac. 944, upholding law modifying evidence required for proof of lost will.

6 Cal. 162–163, CHIPMAN v. HIBBERD.

Measure of Damages for Injury to, or destruction of, **trees.** See note, 19 L. R. A. 657.

6 Cal. 167–169, HICOX v. GRAHAM.

Executors and Administrators are Individually Liable for costs recovered against them.

Approved in Meyer v. O'Rourke, 150 Cal. 178, 88 Pac. 707, it is discretionary with court to award costs against executor personally in quiet title suit without finding mismanagement or bad faith; McCarthy v. Speed, 16 S. D. 590, 591, 94 N. W. 413, 414, where costs are not, by terms of judgment, made chargeable on estate, executor is personally liable therefor.

Right of Executor or Administrator to attorney's fees. See note, 1 Cof. Prob. 155.

6 Cal. 176–183, STEARNS v. AGUIRRE.

Miscellaneous.—Cited in Stearns v. Aguirre, 7 Cal. 443, on subsequent appeal; Fratt v. Fiske, 17 Cal. 385, miscited for 6 Cal. 187.

6 Cal. 183–186, ARMSTRONG v. HAYWOOD.

Release of One Joint or joint and several obligor. See note, 138 Am. St. Rep. 836, 839.

6 Cal. 186–187, AIKEN v. QUARTZ ROCK ETC. MIN. CO.

In Suit Against Corporation summons must be served on one of officers or agents named in statute.

Approved in Ravia Granite Ballast Co. v. Willson, 22 Okl. 692, 98 Pac. 950, return of service of summons on domestic corporation stating it was served on "A, General Manager," is insufficient, where it does not show its president or chairman of board of trustees was absent from county; Karns v. State Bank & Trust Co., 31 Nev. 175,

178, 101 Pac. 566, 567, service on assistant cashier in charge of branch bank is not sufficient.

6 Cal. 187-189, JACKSON v. NORTON.

Injunctions Against Judgments for Defenses existing prior to rendition. See note, 31 L. R. A. 750, 752.

Injunction Against Collection of Purchase Money where title to land defective. See note, 7 L. R. A. (n. s.) 463.

6 Cal. 190-192, SAN FRANCISCO GAS CO. v. SAN FRANCISCO.

A Confirmation by Common Council may be by joint resolution.

Approved in Smith v. State, 64 Kan. 734, 68 Pac. 642, upholding confession of judgment authorized by resolution of city council; Gleason v. Barnett, 115 Ky. 900, 61 S. W. 22, a resolution passed with the formality required for an ordinance is binding as such; Steenerson v. Fontaine, 106 Minn. 228, 119 N. W. 401, upholding vacation of street by resolution of council.

6 Cal. 195-196, 65 Am. Dec. 601, JOHNSON v. GORHAM.

Statutory Penalties Against Sheriff are only recoverable when, by return, he admits collection and refuses to pay money over.

Approved in Craig v. Smith, 74 Ark. 366, 85 S. W. 1125, holding under facts constable did not willfully and corruptly neglect to pay over levy moneys so as to be liable for statutory penalty.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 111.

6 Cal. 197-201, ANDERSON v. PARKER.

Hearsay Information of Death of Ancestor of plaintiff derived from immediate family of deceased is sufficient prima facie to establish fact.

Approved in Fearnley v. Fearnley, 44 Colo. 427, 98 Pac. 823, following rule.

6 Cal. 202-203, PEOPLE v. LAFUENTI.

Where Offense is Charged to have Been Committed on particular day, which was prior to finding of indictment, averment that offense was committed before indictment found is unnecessary.

Approved in State v. Rogers, 31 Mont. 4, 77 Pac. 294, upholding conviction for burglary committed on day prior to date alleged in information.

6 Cal. 203-205, PEOPLE v. GARRETT.

Admissibility in Criminal Trial of Testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 882.

6 Cal. 205-206, PEOPLE v. LOCKWOOD.

Proceedings Against Persons by Less or other than full Christian names. See note, 132 Am. St. Rep. 566, 567.

6 Cal. 206-207, PEOPLE v. WILLIAMS.

Number and Agreement of Jurors necessary to valid verdict. See note, 43 L. R. A. 48.

6 Cal. 207–209, 65 Am. Dec. 503, PEOPLE v. ARO.

Indictment must Contain Certain Description of crime of which defendant is accused, and a statement of the facts by which it is constituted.

Approved in Greenwood v. State, 3 Okl. Cr. 250, 105 Pac. 372, upholding indictment for abortion.

Charge of Time and Place in Indictment for homicide. See note, 3 L. R. A. (n. s.) 1022, 1028.

Distinguished in State v. Sly, 11 Idaho, 112, 113, 80 Pac. 126, upholding sufficiency of information for murder.

6 Cal. 210–214, PEOPLE v. KELLY.

Amendment of Indictment. See note, 98 Am. St. Rep. 816.

Charge of Time and Place in Indictment for homicide. See note, 3 L. R. A (n. s.) 1022, 1023, 1025.

6 Cal. 214–218, PEOPLE v. ROBERTS.

Though Appointment of Sheriff by County Judge is void, acts of such sheriff as de facto officer are valid.

Approved in State v. Mayor of Butte, 41 Mont. 385, 109 Pac. 712, where mayor appointed three persons as police examiners, they were de facto officers, though subsequently council refuse to approve appointments as provided by law; State v. Ely, 16 N. D. 576, 113 N. W. 714, 14 L. R. A. (n. s.) 638, where governor appointed person as judge under misapprehension as to date law creating office took effect, person so appointed and acting was de facto judge.

De Facto Officers. See note, 140 Am. St. Rep. 171.

The Entire Grand Jury Need not be Present at the finding of an indictment, provided twelve concur therein.

Approved in Jones v. United States, 162 Fed. 422, 89 C. C. A. 309, and State v. Weber, 31 Nev. 390, 103 Pac. 412, both following rule; Coffey v. Superior Court, 2 Cal. App. 457, 83 Pac. 581, applying rule to proceedings for removal of local officers under Penal Code, sections 758–771.

Number of Grand Jurors necessary or proper to act. See notes, 28 L. R. A. 35; 27 L. R. A. 848.

The Declaration of a Grand Juror that he is a naturalized citizen is prima facie evidence.

Approved in People v. Quijada, 154 Cal. 246, 97 Pac. 690, admitting judgments of naturalization and proof of exercise of right of citizenship.

Qualification of Grand Jurors. See note, 28 L. R. A. 196.

Organization of Grand Jury. See note, 27 L. R. A. 784, 785.

Instructions Shall be Drawn With Some Slight reference to case as made by evidence.

Approved in Territory v. Hancock, 4 Ariz. 156, 35 Pac. 1061, applying rule to instructions as to aggravated assault.

Evidence and Instructions as to Character of accused. See note, 20 L. R. A. 618.

6 Cal. 221–224, 65 Am. Dec. 506, PEOPLE v. BENSON.

Evidence That Prosecutrix Committed Acts of lewdness with other men is admissible.

Approved in State v. Cowing, 99 Minn. 135, 108 N. W. 856, discussing weight of testimony of experts who examined prosecutrix six days after alleged rape.

Distinguished in People v. Kuches, 120 Cal. 570, 52 Pac. 1003, rejecting evidence of lewd conversation.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 714, 717, 720, 722.

That There was No Outcry, no immediate disclosure and no indications of violence, are strong circumstances of defense.

Approved in People v. Mitchell, 5 Cal. App. 48, 89 Pac. 855, defendant should have been permitted to prove that prosecutrix was under arrest for vagrancy and had been threatened with imprisonment if she did not swear to complaint; Mares v. Territory, 10 N. M. 778, 65 Pac. 167, reversing where testimony of prosecutrix improbable and not corroborated.

Distinguished in People v. Moore, 155 Cal. 240, 100 Pac. 690, affirming where only question was as to intent of assault; People v. Caulfield, 7 Cal. App. 651, 95 Pac. 666, affirming where evidence of prosecutrix, though somewhat inconsistent, was corroborated.

Where Testimony of Prosecutrix in Rape is uncorroborated, court should warn jury of danger of convicting on such testimony.

Approved in People v. Currie, 16 Cal. App. 735, 117 Pac. 943, refusing to reverse rape case for refusal to give charge warning jury against convicting on uncorroborated testimony of prosecutrix where charge as given was sufficient.

Limited in Reeves v. Territory, 2 Okl. Cr. 359, 101 Pac. 1042, in rape court should not instruct that defendant cannot be convicted unless testimony of prosecutrix is corroborated.

6 Cal. 224–225, 65 Am. Dec. 509, WOLF v. FOGARTY.

Certificate of Acknowledgment Insufficient which omits knowledge of identity.

Approved in Lalakea v. Hilo Sugar Co., 15 Haw. 576, certificate insufficient which does not state fact of acknowledgment.

As to When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 558.

6 Cal. 227–228, PEOPLE v. COTTLE.

It is Good Ground for Challenge that juror has expressed opinion as to guilt of prisoner.

Approved in State v. Roberts, 27 Nev. 468, 77 Pac. 599, reaffirming rule.

6 Cal. 228–230, TAYLOR v. CALIFORNIA STAGE CO.

Remark of Juror During Recess that there was no use trying to humbug jury and that lawyer who made shortest speech would win, is not such misconduct as vitiates verdict.

Approved in Taylor v. Winsor, 30 R. I. 52, 73 Atl. 392, refusing to reverse for remarks of juror.

6 Cal. 234–236, HOLDEN v. PINNEY.

To Constitute Homestead There must be an Actual occupancy of premises with intention of dedicating them to residence of family.

Approved in Ball v. Houston, 11 Okl. 238, 66 Pac. 360, following rule.

6 Cal. 236–238, PEOPLE v. HOOD.

Indictment Should Set Forth Facts and circumstances of alleged offense, so that accused may be prepared for his defense.

Approved in State v. Rathbone, 8 Idaho, 166, 67 Pac. 187, upholding information charging larceny in felonious taking of two mares; Greenwood v. State, 3 Okl. Cr. 250, 105 Pac. 372, upholding indictment for abortion by use of instruments.

6 Cal. 239–240, EX PARTE PRADER.

Constitutionality of Imprisonment for debt. See note, 34 L. R. A. 637, 660.

6 Cal. 245–246, WELTON v. GARIBARDI.

Notice of Appeal from Judgment of justice of peace may be served on attorney for adverse party.

Approved in McFarland v. Cruickshank, 22 S. D. 191, 116 N. W. 72, notice by justice of peace to defendants' attorney of time and place of trial is sufficient.

6 Cal. 246–247, PEOPLE v. BEELER.

In a Criminal Case It is Error to charge the jury orally without consent of parties.

Approved in People v. Demint, 8 Cal. 424, reaffirming rule.

Distinguished in Williams v. United States, 158 Fed. 35, right waived where parties by their interlocution invited court to deliver oral instructions.

6 Cal. 248–250, PEOPLE v. DIAZ.

Admission of District Attorney That Witness would testify as averred does not warrant overruling motion for continuance.

Approved in People v. Fong Chung, 5 Cal. App. 590, 91 Pac. 106, reaffirming rule; Miller v. State, 139 Wis. 69, 119 N. W. 855, where accused moves for continuance because of absence of witness, it may be denied on condition of prosecution admitting truth of testimony which absent witness would give.

Continuance in Criminal Cases for absence of witnesses. See notes, 122 Am. St. Rep. 757, 758.

Power to Regulate or Restrict Constitutional Right of accused to compulsory attendance of witnesses. See note, 8 L. R. A. (n. s.) 511.

It is Right of Accused to have Witnesses orally examined in court.

Distinguished in State v. Kline, 109 La. 621, 33 So. 625, written testimony of witnesses permanently absent from state, taken before committing magistrate, is admissible at trial when accused was present at taking.

Constitutional Right of Accused to be confronted by witnesses. See note, 129 Am. St. Rep. 39.

6 Cal. 250–254, SIEMSSEN v. BOFER.

Effect of State Constitutions and Statutes upon inheritance by or from alien. See note, 31 L. R. A. 86.

Effect of Treaties upon Alien's Right to inherit. See note, 32 L. R. A. 186, 187.

6 Cal. 256–258, PEOPLE v. TALMAGE.

One Having Claim on Funds which are subject of action may intervene.

Approved in Faricy v. St. Paul Inves. & Sav. Soc., 110 Minn. 317, 125 N. W. 678, in action for bonds where defendant pleaded limita-

tions, usury and conspiracy with others to recover judgment on bonds as basis for enforcement of stockholder's liability, receiver of loan society alleging ownership of bonds may intervene.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 38, 51.

6 Cal. 258–263, CALIFORNIA STEAM NAVIGATION CO. v. WRIGHT.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 53.

Validity of Stipulation not to Engage in particular business, not ancillary to lawful contract. See note, 6 L. R. A. (n. s.) 849.

6 Cal. 273–276, ROBINSON v. GAAR.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 346.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 702, 703, 705.

6 Cal. 277–281, LOW v. ADAMS.

Appeal Stays Execution but does not impair judgment lien.

Approved in Miller v. Nuckolls, 76 Ark. 486, 113 Am. St. Rep. 101, 89 S. W. 89, following rule.

Docketing Judgments. See note, 87 Am. St. Rep. 668.

6 Cal. 286, SHAY v. TUOLUMNE WATER CO.

Costs are Incident to Judgment and cannot be given by jury by way of damages.

Approved in Dorn v. Cooper, 139 Iowa, 749, 117 N. W. 4, in libel suit instruction that nominal damages are given where no actual injury has resulted, and in such case some small sum is awarded so as to carry costs against defendant, is erroneous.

6 Cal. 287, BRAY v. REDMAN.

Fact That Justice's Fees are not Paid is no ground for dismissing appeal if justice has sent up transcript.

Approved in Vasey v. Parker, 118 Iowa, 619, 92 N. W. 710, following rule.

6 Cal. 291–293, PEOPLE ex rel. FINLEY v. JEWETT.

Right to Remove Officers summarily. See note, 15 L. R. A. 97.

6 Cal. 294–295, PICO v. SUNOL.

Injunction Does not Lie to Enjoin default judgment on ground that return of service of summons does not show place of service, where place of service was proved at hearing of application for injunction.

Approved in Call v. Rocky Mt. Bell Tel. Co., 16 Idaho, 556, 133 Am. St. Rep. 135, 102 Pac. 147, where actual service of summons issued from probate court has been made, but return was insufficient and did not show good service and default taken, return may be amended.

Injunctions Against Judgments for want of jurisdiction or errors and irregularities. See notes, 32 L. R. A. 326, 328; 30 L. R. A. 704; 21 L. R. A. 204.

6 Cal. 295–297, 65 Am. Dec. 515, CAHOON v. LEVY.

Relation Back of Subcontractor's Lien to date of original contractor's. See note, 16 L. R. A. 336.

6 Cal. 316–318, 65 Am. Dec. 517, ADAMS v. HASKELL.

A Commitment for Contempt for Failure to pay over money is void where uncontradicted affidavit of party showed that money had passed from his possession.

Approved in Egibert v. Superior Court, 6 Cal. App. 194, 91 Pac. 749, applying rule to corporate secretary who had resigned before mandate was served; Cline v. Langan, 31 Nev. 244, 101 Pac. 554, prohibition lies where court attempts to punish for violation of void order of referee; Lutz v. District Court, 29 Nev. 153, 86 Pac. 445, affidavit of commitment illegal which did not show defendant's ability to make required payments; Samel v. Dodd, 142 Fed. 73, 73 C. C. A. 254, order imprisoning bankrupt for failure to pay money or surrender goods is void where he swears that he has not money or goods.

Distinguished in Oahu Ry. & L. Co. v. Armstrong, 18 Haw. 508, one who admits maintenance over land of another of pipe-line claimed to be easement to adjoining lands, but decided to be trespass, cannot justify disobedience to injunction against its maintenance on ground that cotenant in and mortgagee of adjoining lands will not allow him to remove it.

6 Cal. 318–321, EX PARTE COHEN.

Commitment for Contempt Should Set Forth that it is within the power of the party to comply.

Approved in Ex parte Rowe, 7 Cal. 177, witness committed for refusal to answer question will be discharged where suit has abated; Egilbert v. Superior Court, 6 Cal. App. 194, 91 Pac. 749, where corporate secretary had resigned before mandate to produce books was served.

Miscellaneous.—Cited in La Societe Francaise v. District Court, 53 Cal. 499, in opinion of lower court.

6 Cal. 359–361, 65 Am. Dec. 518, JOHNSON v. FALL.

Advances on Notes and Other Obligations given for gambling debts. See note, 119 Am. St. Rep. 173.

Legality of Wagers. See note, 18 L. R. A. 859, 861.

Adoption of Common Law in United States. See note, 22 L. R. A. 504.

6 Cal. 373–376, JOHNSTON v. WRIGHT.

Where Several Interest Alone is Expressed or referred to in a power, no general terms will allow meaning to be extended to a joint interest.

Approved in White v. Furgeson, 29 Ind. App. 150, 64 N. E. 51, construing power of attorney executed by legal voter appointing attorney to remonstrate against grant of liquor license.

Implied Powers Under Power of Attorney to transact business. See note, 4 L. R. A. (n. s.) 844.

6 Cal. 376–380, 65 Am. Dec. 519, HEYNEMAN v. DANNEBERG.

Injunctions in Aid of Attachment. See note, 20 L. R. A. 447.

Party's Books of Account as evidence in own favor. See note, 52 L. R. A. 552.

Use of Person's Books of Account as evidence upon issues between other parties. See note, 53 L. R. A. 540.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 81.

6 Cal. 381–383, BILLINGS v. HARVEY.

Under the State Constitution the amendment of a statute operates as an absolute repeal of the old statute.

Cited in dissenting opinion in People v. McNully (Cal.), 28 Pac. 823, arguendo.

6 Cal. 383–385, HUTCHINSON v. BOURS.

Agent's Power to Use Principal's Property for payment of own debt. See note, 14 L. R. A. 235.

6 Cal. 386–394, ELLISON v. HALLECK.

Claims Secured by Mortgages must be presented to the executor or administrator before action can be maintained thereon.

Approved in Burke v. Maguire, 154 Cal. 462, 98 Pac. 23, action against estate, sounding in contract, must allege presentment of claim to administrator; Morse v. Steele, 149 Cal. 305, 86 Pac. 693, complaint in action against executrix on claim based on contract made with deceased must allege presentation of claim before suit.

Word "Claim" in Statute Requiring Presentation of claims to administrators includes every species of charge or account against an estate, whether the same be recorded or not.

Approved in Dodson v. Crocker, 16 S. D. 488, 94 N. W. 393, where defendant agreed to purchase of plaintiff a mechanic's lien, provided it was first claim on property, "claim" included taxes.

6 Cal. 394–398, BRYAN v. BERRY.

Miscellaneous.—Cited in Bryan v. Berry, 8 Cal. 130, on subsequent appeal.

6 Cal. 399–400, ROBINSON v. KELLUM.

Action on Case will not Lie for improperly suing out injunction unless there was abuse of process through malice and without probable cause.

Approved in Doyle v. Sandpoint, 18 Idaho, 657, 112 Pac. 205, municipal corporation is not liable for damages sustained in issuance of injunction sued out by it.

Right to Recover Damages caused by injunction. See note, 18 L. R. A. 275.

6 Cal. 405–412, PEOPLE v. STONECIFER.

Party cannot Commence Affray and then take life of adversary to avert threatened danger, nor can he be justified in killing by cowardly fears of danger, without regard to circumstances which excited those fears.

Approved in State v. Allen, 111 La. 159, 35 So. 497, following rule.

Heat of Passion Which will Mitigate or reduce degree of homicide. See note, 5 L. R. A. (n. s.) 814.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 489.

New Trial for Disqualification of juror. See note, 18 L. R. A. 474.

6 Cal. 415–416, SUTTER v. COX.

It is Error Where Defendant was Sued as John Cox, service returned upon James Cox, and judgment rendered against J. Cox.

Distinguished in Brun v. Ivins, 154 Cal. 20, 129 Am. St. Rep. 137, 96 Pac. 877, one named "Manuel S. Brum" cannot enjoin execution of default judgment because sued as "Manuel S. de Brum."

6 Cal. 416–418, GIBLIN v. JORDAN.

Land Held by a Husband and His Wife and child as tenants in common is not subject to homestead.

Approved in Schoonover v. Birnbaum, 148 Cal. 549, 83 Pac. 999, following rule; Estate of Davidson, 159 Cal. 100, 101, 103, 115 Pac. 50, 51, 52, widow not entitled to probate homestead in husband's undivided interest in land held by them as tenants in common.

Distinguished in Swan v. Walden, 156 Cal. 198, 199, 134 Am. St. Rep. 118, 103 Pac. 932, 933, land held by husband and wife as joint tenants may be homesteaded by wife.

6 Cal. 425–429, WESTON v. BEAR RIVER ETC. WATER & MIN. CO.

One Purchasing Corporate Stock at sheriff's sale, with knowledge that it had been previously hypotheticated, takes subject to claim of pledgee.

Approved in Brissell v. Knapp, 155 Fed. 815, reaffirming rule; National Bank of the Pacific v. Western Pac. Ry. Co., 157 Cal. 577, 578, 579, 108 Pac. 678, sale of stock, though not registered on corporate books, will prevail over attachment for debt of vendor; Mapleton Bank v. Standrod, 8 Idaho, 749, 71 Pac. 121, 67 L. R. A. 656, when stock pledged and transferred by delivery and indorsement, but transfer not entered on books, subsequent attachment by creditor of stockholder is valid only against assignor's interest.

Validity of Pledge or Other Transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers. See note, 67 L. R. A. 669, 680.

6 Cal. 440–443, TUOLUMNE CO. v. STANISLAUS CO.

Only Judicial Functions can be Imposed on judicial officers.

Approved in State v. Barker, 116 Iowa, 110, 93 Am. St. Rep. 222, 89 N. W. 209, 57 L. R. A. 244, holding void statute authorizing district court to appoint trustees of city waterworks; In re Commrs. of Counties of 7th Judicial Dist., 22 Okl. 447, 98 Pac. 562, holding void portion of section 1 of act of 1908, providing for appointment of special district judge on recommendation of supreme court for time recommended by court.

6 Cal. 443–446, AMERICAN RIVER WATER CO. v. AMSDEN.

What Waters are Navigable. See notes, 126 Am. St. Rep. 728; 42 L. R. A. 318.

Right to Use Stream for floating logs. See note, 41 L. R. A. 374.

6 Cal. 452–453, LORRAINE v. LONG.

The Fact That an Equitable Defense may be pleaded to an action at law does not bar a subsequent bill in equity.

Approved in Allis v. Hall, 76 Conn. 329, 56 Atl. 640, sustaining equitable suit where failure to urge defense in action at law was not negligent; McMahan v. Whelan, 44 Or. 406, 75 Pac. 716, judgment for plaintiff in unlawful detainer is no bar to suit by defendant for specific performance of verbal lease and injunction against the judgment.

6 Cal. 456–457, OLIVER v. WALSH.

Assignability of Cause of Action for personal tort. See note, 14 L. R. A. 513.

6 Cal. 462–471, 65 Am. Dec. 523, WHITE v. STEAM-TUG MARY ANN.

Remedial Statutes must be Liberally construed.

Approved in Beley v. Naphtaly, 73 Fed. 125, 19 C. C. A. 392, bona fide grantee of Mexican claim had preferred right of purchase.

Whether Destroyer of Insured Property may defeat owner's suit upon ground that right of action is in insurer. See note, 23 L. R. A. (n. s.) 870.

6 Cal. 471–473, TISSOTT v. THROCKMORTON.

Whether Fraud may be Predicated of misstatement as to title to realty. See note, 28 L. R. A. (n. s.) 213.

6 Cal. 473–475, SOULE v. DAWES.

Miscellaneous.—Cited in Soule v. Dawes, 7 Cal. 575, 14 Cal. 247, on subsequent appeals.

6 Cal. 475–477, ADAMS v. HASKELL.

Assignee in Void Proceeding in Insolvency should be reimbursed for expenses.

Approved in Cahill v. Colgan (Cal.), 31 Pac. 618, liability may exist for expenditures under void receivership.

Liability for Cost of Receivership where final judgment is against the moving party. See note, 25 L. R. A. (n. s.) 415.

6 Cal. 478–483, PHELAN v. OLNEY.

Priority of Notes Falling Due at different times secured by same mortgage. See note, 24 L. R. A. 800.

6 Cal. 483–487, BAKER v. BARTOL.

It is No Objection to a Supplemental Bill that it prays for different relief.

Approved in Melvin v. Stone, 7 Cal. App. 326, 94 Pac. 390, allowing supplemental complaint alleging damages accrued since commencement of action.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 107.

6 Cal. 487–488, PEOPLE v. PARSONS.

Indictments for Perjury. See note, 124 Am. St. Rep. 678.

6 Cal. 489–497, HORR v. BARKER.

Sufficiency of Selection or Designation of Goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 35.

Miscellaneous.—Cited in Horr v. Barker, 8 Cal. 613, 11 Cal. 393, 70 Am. Dec. 791, on subsequent appeals.

6 Cal. 499–506, PEOPLE v. JOHNSON.

Article VIII of the Constitution Prohibits the creation of state indebtedness exceeding three hundred thousand dollars, except as pointed out in the article.

Approved in Nougues v. Douglass, 7 Cal. 75, reaffirming rule; State v. Candland, 36 Utah, 424, 104 Pac. 292, holding Laws of 1909, page 335, with reference to expenditure for university building, violates Constitution, article XIV, sections 1, 2.

Disapproved in Stein v. Morrison, 9 Idaho, 448, 75 Pac. 253, holding appropriation act of 1903 is valid, though funds are not in treasury at time to meet same.

6 Cal. 510–512, DAVIS v. BUTLER.

Abandonment of Property Determines Right of Party thereto from date of the act and, as to him, property is as though he had never owned it.

Approved in Missouri Pacific Ry. Co. v. Bradbury, 106 Mo. App. 458, 79 S. W. 968, where railroad abandons right of way without removing rails, they become property of land owner; Huggins v. Reynolds, 51 Tex. Civ. App. 505, 112 S. W. 117, where at expiration of tenancy tenant declines to gather crop promptly, he abandons it and cannot sue landlord for conversion thereof.

Gain or Loss of Title by abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 890, 911.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 404.

6 Cal. 528–531, 65 Am. Dec. 526, JAMES v. SAN FRANCISCO.

Where Party is Injured by Falling into excavation made by contractor in grading street, owing to failure to guard excavation, contractor and not city is liable.

Approved in Gay v. Engebretson, 158 Cal. 24, 139 Am. St. Rep. 67, 109 Pac. 878, upholding provision in street contract for liability on part of contractor for damages through negligence during progress of work.

Liability of Municipality for Defects or obstructions in streets. See notes, 20 L. R. A. (n. s.) 552, 602.

Exceptions to Rule That an Employer is not liable for acts of independent contractor. See note, 14 L. R. A. 833.

Obligation of City to Keep Streets in repair is suspended while they are actually undergoing such alterations as for the time make them dangerous.

Distinguished in Peterson v. Seattle, 40 Wash. 37, 82 Pac. 142, holding city liable for injuries caused by defects in streets caused by repairs therein which were in progress.

Liability for Acts of Independent Contractor where injuries result from nonperformance of absolute duties of employer. See note, 66 L. R. A. 132.

6 Cal. 531–541, PHELAN v. SAN FRANCISCO.

Legislature cannot Confer Nonjudicial Functions on courts of sessions.

Approved in State v. Brill, 100 Minn. 518, 111 N. W. 647, holding void act requiring judges of district court to appoint members of board of control of Ramsey county.

Deed is Void Where Grantee is incompetent to take under it.

Approved in Rixford v. Zeigler, 150 Cal. 438, 119 Am. St. Rep. 229, 88 Pac. 1094, holding void deed to an unincorporated "church community" for "school and church purposes," not naming its members or other grantee, under which no possession was taken.

Conveyance to Persons not in being. See note, 84 Am. St. Rep. 236, 239.

6 Cal. 541–543, GOODWIN v. SCANNELL.

Effect as to Warehousemen of Recitals in their receipts. See note, 19 L. R. A. 302.

6 Cal. 543–547, PEOPLE v. MARCH.

The Defendant's Insanity at the Instant of committing the crime can be proved only by evidence that he was insane before or afterward.

Approved in Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 717, 103 Pac. 193, evidence of party's mental condition both before and after executing release in question admissible.

6 Cal. 548–559, 65 Am. Dec. 528, CONGER v. WEAVER.

The Right to Collect Rates for Water distributed is a franchise.

Approved in San Joaquin etc. Irr. Co. v. Merced Co., 2 Cal. App. 600, 84 Pac. 288, such franchise is taxable separately from general franchise to exist as a corporation.

Right of Prior Appropriation of water. See note, 30 L. R. A. 670.

Every Judge is Bound to Know the history and the leading traits which enter into the history of the country where he presides.

Approved in dissenting opinion in Bates v. Gregory (Cal.), 22 Pac. 689, majority holding that running of statute of limitations on city's indebtedness was not stopped by act funding same.

Miscellaneous.—Cited in Lux v. Haggin (Cal.), 4 Pac. 932, referring to cited case historically.

6 Cal. 559–562, WILLIAMS v. CHADBOURNE.

Trover Lies Against a Cotenant who has converted the common property.

Distinguished in Balch v. Jones, 61 Cal. 236, one cotenant of chattel cannot maintain trover against another who has possession of chattel.

In Assumpsit for Goods Sold, plaintiff cannot recover for goods alleged to have been delivered to third party and charged to defendant's account.

Denied in Andresen v. Upham Mfg. Co., 120 Wis. 563, 98 N. W. 519, under quantum valebat, evidence that goods were purchased by and delivered to third person for defendant is admissible.

6 Cal. 562–563, PEOPLE v. VANARD.

Effect of Excessive Sentence. See note, 45 L. R. A. 157.

6 Cal. 566–574, BROWN v. COVILLAUD.

Though Time is not of the Essence of the contract, it devolves on the party seeking relief to account for his delay.

Approved in Patterson v. Hewitt, 11 N. M. 24, 66 Pac. 558, 55 L. R. A. 658, refusing to enforce trust in mining property after eight years where defendants had spent much money and property had greatly increased in value.

6 Cal. 574–576, **GARR v. REDMAN.**

Bill for Accounting is Proper for Settlement of proceeds of joint adventure, where in consideration of outfit and advances defendant agreed to account for and pay over proportion of proceeds of his speculations and labor for certain period.

Approved in Causten v. Barnette, 49 Wash. 668, 96 Pac. 228, construing contract whereby plaintiff was to furnish defendant money to buy goods to take to Alaska, plaintiff to get one-third of proceeds and third of all other properties acquired, as entitling plaintiff to accounting.

6 Cal. 577–579, 65 Am. Dec. 534, **FISHER v. DENNIS.**

Filling Up Blank in Note With Rate of interest is not such an alteration as will vitiate it.

Approved in Reese v. Bell (Cal.), 71 Pac. 90, where note not duly indorsed to plaintiff before its apparent maturity, maker may set up any equitable defense.

Unauthorized Alteration of Written instruments. See note, 86 Am. St. Rep. 108, 110, 111, 112.

Maker is Liable to Innocent Purchaser where he delivers note with amount of interest left blank and amount is filled in by payee.

Approved in dissenting opinion in Rollins v. Ebbs, 137 N. C. 367, 49 S. E. 345, majority holding guardian's bond does not bind obligors where it does not contain amount of penalty at time it is signed and no one is afterward authorized to insert amount.

Alteration of Note as affecting bona fide holders. See note, 35 L. R. A. 468.

6 Cal. 590–599, 65 Am. Dec. 535, **NORRIS v. FARMERS' & TEAMSTERS' CO.**

Rights and Duties of toll-bridge proprietors. See note, 58 L. R. A. 166, 167.

6 Cal. 605–606, **SMILEY v. VAN WINKLE.**

Lease must Contain Reversion in favor of grantor.

Approved in Weander v. Claussen Brewing Co., 42 Wash. 228, 114 Am. St. Rep. 110, 84 Pac. 736, where lessee executed instrument in form of lease, but covering entire term, there was mere assignment of lease.

What Amounts to Violation of Covenant in lease against assignment or sale. See note, 14 L. R. A. (n. s.) 1200.

6 Cal. 617–621, 65 Am. Dec. 543, **PEARIS v. COVILLAUD.**

Tenants in Common are not Bound by acts of cotenants in accepting balance of purchase money and promising deed, after right thereto had become forfeited.

Approved in Wright v. Kaynor, 150 Mich. 16, 113 N. W. 783, arguendo.

6 Cal. 621–625, GRIMES' ESTATE v. NORRIS.

A Will Need not be Probated unless there is some statute requiring it.

Approved in Estate of Patterson, 155 Cal. 636, 132 Am. St. Rep. 116, 102 Pac. 944, upholding amendment to statute in reference to proof of lost wills.

6 Cal. 625–630, CARY v. TICE.

What Constitutes a "Family" under homestead and exemption laws. See note, 4 L. R. A. (n. s.) 389.

6 Cal. 632–636, 65 Am. Dec. 547, TEVIS v. RANDALL.

An Official Bond Made to "The People of the State of California" is sufficient, though the statute required it to be made to "The State of California."

Approved in Buhrer v. Baldwin, 137 Mich. 269, 100 N. W. 470, bond to county treasurer sufficient, though statute required it to be made to county.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 197.

Giving Notice of Protest of Note is an official duty of a notary.

Approved in Williams v. Parks, 63 Neb. 752, 89 N. W. 396, 56 L. R. A. 759, following rule.

Liability of Notaries. See note, 82 Am. St. Rep. 381, 385.

6 Cal. 636, PEOPLE v. TOCK CHEW.

Right to Limit Time of Argument of counsel for accused. See note, 25 L. R. A. (n. s.) 1028, 1032.

6 Cal. 637–638, PEOPLE v. GILL.

Crime of Murder is Committed when fatal blow is struck.

Approved in Albright v. Territory of Oklahoma, 11 Okl. 501, 69 Pac. 790, person charged with murder must be indicted and tried in county where injury causing death was inflicted and it is unnecessary to allege place of death.

Time When Homicide deemed committed. See note, 34 L. R. A. 851.

Locality of Crime Committed by Shooting or striking across state boundary. See note, 28 L. R. A. 59.

6 Cal. 643–648, ST. LOSKY v. DAVIDSON.

Where Bailors Agreed That Goods be stored in certain warehouse at their risk and expense, bailees are liable for damages where goods were removed by their agent without their knowledge.

Approved in McCurdy v. Wallblom Furniture & Carpet Co., 94 Minn. 328, 102 N. W. 874, and Wiley v. Locke, 81 Kan. 146, 105 Pac. 13, both following rule.

Liability of Warehouseman for Goods stored in building other than that called for by contract. See note, 24 L. R. A. (n. s.) 1118.

Duty of Warehousemen in care of property. See note, 136 Am. St. Rep. 235.

Duty of Pledgee as to Care of thing pledged. See note, 17 L. R. A. 194.

6 Cal. 654–659, SQUIRES v. PAYNE.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 47.

6 Cal. 660–664, BOURS v. WEBSTER.

Sale or Mortgage of future crops. See note, 23 L. R. A. 450.

6 Cal. 666, IMLEY v. BEARD.

Appeal Does not Lie in Favor of plaintiff from judgment of nonsuit entered on his own motion.

Approved in Hibernia Savings etc. Soc. v. Waymire, 152 Cal. 287, 92 Pac. 646, dismissing appeal from judgment for plaintiff for possession of land pursuant to stipulation.

6 Cal. 666–669, DECK'S ESTATE v. GHERKE.

The Power of the Probate Judge to remove an administrator will not be interfered with unless a gross abuse of discretion is clearly shown.

Approved in In re Moore's Estate (Cal.), 22 Pac. 654, failure to complete administration in fourteen years prima facie evidence of neglect.

Removal of Administrator for failure to file inventory. See note, 2 Cof. Prob. 353.

Claims Against Estate Which have Been Allowed and approved have force and effect of judgment.

Overruled in Haub v. Leggett, 160 Cal. 494, 117 Pac. 557, under Code of Civil Procedure, section 1636, creditor of estate whose claim has only been partially allowed may sue for whole.

6 Cal. 673–674, PEOPLE v. JOHNSTON.

Where Statute by Its Terms was not to go into effect till day named, and one of its sections provided for election prior to such day, election was void.

Approved in Harrison v. Colgan, 148 Cal. 76, 82 Pac. 677, amended law increasing salary of supreme judges, not being in force till after appointment of justices of district courts of appeal, is inapplicable to their salaries; State v. Berghoff, 158 Ind. 357, 358, 63 N. E. 721, holding under statutes of 1901, municipal judge could not be elected until general election in May, 1905.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 62.

6 Cal. 679–681, PEOPLE ex rel. CHURCH v. HESTER.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 34, 36, 74.

6 Cal. 681–685, WEAVER v. PAGE.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 472.

6 Cal. 685–688, CLARY v. HOAGLAND.

The Judgment of an Appellate Court, once obtained, becomes the law of the case.

Approved in People v. Bennett (Cal.), 50 Pac. 704, reaffirming rule.

Distinguished in Sharon v. Sharon, 79 Cal. 653, 22 Pac. 32, decision on appeal from judgment does not establish law of case on appeal from order denying new trial.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 334.

First Point Decided by Any Court is that the court has jurisdiction.

Approved in Hadley v. Bernero, 103 Mo. App. 555, 78 S. W. 65, if court on appeal from justice court in unlawful detainer does not dismiss appeal, but entertains cause without question of jurisdiction being raised, judgment cannot be vacated by writ of error coram nobis; Grand Central Min. Co. v. Mammoth Min. Co., 36 Utah, 374, 104 Pac. 576, in assuming jurisdiction of appeal and deciding case on merits, supreme court decided judgment was final and appealable, and question cannot be raised on second appeal.

Exceptions to Rule That Certiorari will not lie where there is an appeal. See note, 50 L. R. A. 793.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 7 CALIFORNIA.

7 Cal. 1-26, BILLINGS v. HALL.

Act of 1855 Repealed Sixth Section of act of 1850.

Approved in dissenting opinion in People v. McNulty (Cal.), 28 Pac. 823, arguendo.

Settler's Act of 1856 is Retroactive and Void as depriving land owner of land if he refuses to pay trespasser for improvements put thereon by latter.

Approved in The Investment Co. v. Hambach, 37 Wash. 633, 80 Pac. 192, act of 1903, providing that in ejectment value of improvements made in good faith shall be allowed defendant as counterclaim, and if plaintiff refuses to pay their value, defendant may pay value of land and become owner in fee simple, is not retroactive.

Constitutionality of Retroactive Statute creating right of action or of setoff. See note, 52 L. R. A. 937.

7 Cal. 26-30, GLIDDEN v. LUCAS.

Agent's Power to Use Principal's Property for payment of own debt. See note, 14 L. R. A. 235.

Passing of Title to Property by delivery to carrier for transportation to consignee or vendee. See note, 22 L. R. A. 423.

7 Cal. 35-38, YUBA COUNTY v. ADAMS.

Levy of Tax Creates Judgment and Lien having force and effect of execution.

Approved in Estate of Johnson, 4 Cof. Prob. 509, executor must pay taxes on property sold at probate sale.

Effect of Property Being in Custodia Legis on right to enforce payment of taxes. See note, 17 L. R. A. (n. s.) 466.

7 Cal. 40-42, LIVE YANKEE CO. v. OREGON CO.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 774.

7 Cal. 43-46, REYNOLDS v. LATHROP.

Purchaser of Land at Sheriff's Sale may maintain action for rent against tenant in possession under judgment debtor before expiration of redemption period.

Approved in Estate of Johnson, 4 Cof. Prob. 508, purchaser at executor's sale is entitled to rents of property between confirmation and delivery of deed.

7 Cal. 46–50, HOFFMAN v. STONE.

Ditch Company Which Avails Itself of dry ravine to conduct portion of water to dam, where it uses it, does not abandon water thus carried.

Approved in Wutchumna Water Co. v. Pogue, 151 Cal. 111, 90 Pac. 364, an appropriator of waters of natural main stream has right to conduct such waters to point on lower branch of stream and there permit it to flow down natural channel of branch to point of diversion on such branch; Lower Tule River Ditch Co. v. Angiola Water Co., 149 Cal. 498, 499, 86 Pac. 1082, one may by prior actual and complete appropriation acquire water right paramount to title of subsequent appropriator under code manner; Miller v. Wheeler, 54 Wash. 436, 103 Pac. 643, 23 L. R. A. (n. s.) 1065, stream, waters of which have been appropriated, and tributary gulch may be used to conduct waters not naturally tributary to stream and belonging to others, to lands on which they wish to use them.

Rights, as Against Other Appropriators, of one who adds to natural flow of stream. See notes, 23 L. R. A. (n. s.) 1066.

Use of a Natural Stream to convey appropriated water. See note, 51 L. R. A. 930.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

Right of Prior Appropriation of water. See note, 30 L. R. A. 670.

7 Cal. 50–53, PHELPS v. PEABODY.

Equity will Enjoin Judgment at Law, rendered against party by reason of fraud or accident only when latter has not been guilty of any fault or negligence.

Approved in Donovan v. Miller, 12 Idaho, 607, 88 Pac. 83, 9 L. R. A. (n. s.) 524, refusing to enjoin enforcement of judgment on ground of perjury in procuring it.

Equitable Jurisdiction in Regard to injunctions against judgments. See notes, 32 L. R. A. 326.

Negligence as Cause for, and as Bar to, injunctions against judgments. See note, 31 L. R. A. 37.

Injunctions Against Judgments obtained by fraud, accident, mistake, surprise, and duress. See note, 30 L. R. A. 790.

When a Verdict has Been Obtained against a defendant and he has neglected to apply for a new trial, equity will not grant relief on ground that original demand was unconscientious.

Approved in Brum v. Ivins, 154 Cal. 21, 129 Am. St. Rep. 137, 96 Pac. 878, reaffirming rule; Kendall v. Earl (Cal.), 44 Pac. 793, arguendo.

Trial Before Referees are Conducted in same manner as before courts.

Approved in Estate of Burns, 2 Cof. Prob. 46, claimant of doubtful claim which has been referred by executor to referee cannot testify as to any matter of fact occurring before death of decedent.

7 Cal. 54–64, WHITWELL v. BARBIER.

A Judgment cannot be Collaterally Attacked unless want of jurisdiction appears on its face.

Approved in Boyer v. Pacific Mutual Life Ins. Co., 1 Cal. App. 56, 81 Pac. 672, affidavit and order for publication could not be considered though erroneously attached to judgment-roll.

Where Defendant was Served with Process but was not given time allowed by law to appear and answer, there is no such want of jurisdiction as makes judgment a nullity.

Approved in Rice v. Bolton, 126 Iowa, 658, 100 N. W. 635, where on petition by administrator for sale of lands minor was served with notice to appear on certain day but on day of term preceding day specified a guardian ad litem was appointed, judgment not collaterally attackable for premature appointment.

Miscellaneous.—Cited in Deidesheimer v. Brown, 8 Cal. 340, defendant does not waive rights by moving to dismiss.

7 Cal. 65–81, NOUGUES v. DOUGLASS.

The Legislature has No Right to Levy a tax to pay a void debt.

Approved in Miller v. Dunn (Cal.), 11 Pac. 605, where act held unconstitutional, act appropriating money to pay indebtedness incurred thereunder is void.

Necessary and Ordinary Expenses of State are within restrictions of article VIII of Constitution.

Denied in Stein v. Morrison, 9 Idaho, 448, 75 Pac. 253, upholding general appropriation act of 1903, which appropriates public revenues in anticipation of their receipt.

Act of 1856, Providing for Erection of State Capitol at cost not to exceed certain sum is void.

Cited in State v. Candland, 36 Utah, 424, 104 Pac. 292, act of 1909, authorizing university regents to expend money for building violates Constitution, article XIV, sections 1, 2.

7 Cal. 81–84, PHILLIPS v. MAYER.

Law Does not Apply Money so long as it remains in hands of debtor.

Approved in Driver v. Planters' Mutual Ins. Assn., 78 Ark. 129, 93 S. W. 752, where insurer sent premium note to bank for collection and insured directed bank cashier to pay it, he having sufficient deposit, but bank did not credit insurer with money till after fire, there was no payment.

7 Cal. 97–104, PEOPLE v. HILL.

The Only Way in Which the Power of removal can be limited is by first fixing the duration or term of office.

Approved in People ex rel. Sedgwick v. Shear (Cal.), 15 Pac. 93, superintendent of house of correction removable at pleasure of board of supervisors; Farrell v. Police Commissioners, 1 Cal. App. 7, 81 Pac. 675, policeman removable at pleasure of board of police commissioners; Helmick v. County Court of Tucker, 65 W. Va. 233, 64 S. E. 18, county court cannot remove from office a road surveyor appointed by it, under Code of 1906, section 1392.

Right to Remove Officers summarily. See note, 15 L. R. A. 97.

When Time of Holding is not Fixed, tenure of office is at pleasure of appointing power.

Approved in Childs v. State, 4 Okl. Cr. 480, 113 Pac. 548, upholding statute relating to appointment of counsel for governor.

Distinguished in Roth v. State, 158 Ind. 265, 266, 63 N. E. 468, Indianapolis charter, relating to removal of police officers, does not violate Constitution, article XV, section 2, relating to terms of office.

Mandamus to Compel Surrender of office. See note, 31 L. R. A. 350.

7 Cal. 113–116, CHARD v. HARRISON.

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 524.

7 Cal. 117, CHARD v. STONE.

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 553.

7 Cal. 118–121, 68 Am. Dec. 231, WARDROBE v. CALIFORNIA STAGE CO.

Where It Appears That Stage, at time of accident, was driven by servant of owner, latter is liable only for simple negligence.

Approved in Davis v. Hearst, 160 Cal. 165, 116 Pac. 540, discussing liability of newspaper owner for exemplary damages for libel where he has given subordinates carte blanche to do anything and everything to make paper a success.

7 Cal. 121–124, McCANN v. SIERRA COUNTY.

Statute Requiring Presentation to, and rejection by, supervisors before claim against county can be sued on applies to torts as well as to contracts.

Approved in Farmers' etc. Bank v. City of Los Angeles, 151 Cal. 657, 91 Pac. 796, complaint for recovery of taxes paid to city under protest must allege presentation of demand.

Liabilities of Counties for Torts and negligence. See note, 39 L. R. A. 65, 69, 78, 81.

7 Cal. 126–129, WARD v. SEVERENCE.

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 551.

7 Cal. 129–130, PEOPLE v. JOSEPHS.

Evidence and Instructions as to Character of accused. See notes, 103 Am. St. Rep. 897; 20 L. R. A. 612.

7 Cal. 130–133, MERCED MINING CO. v. FREMONT.

An Injunction is not Dissolved by taking an appeal.

Approved in State v. Superior Court, 39 Wash. 120, 109 Am. St. Rep. 862, 80 Pac. 1109, 1 L. R. A. (n. s.) 554, if order restrains as nuisance the operation of shooting-gallery until determination of an action, appeal from such order does not suspend its effect.

Distinguished in Clute v. Superior Court, 155 Cal. 18, 132 Am. St. Rep. 54, 99 Pac. 363, injunction restraining defendant from conducting hotel is mandatory in effect and is suspended by appeal.

Mandamus may Issue to Compel Attachment for contempt, remedy by appeal being inadequate.

Approved in Kirby v. Superior Court, 68 Cal. 605, 10 Pac. 120, granting mandamus to prevent trial court from permitting amendment to pleading after judgment affirmed on appeal; Scott v. Shields, 8 Cal. App. 18, 96 Pac. 388, mandamus will lie to compel judge to order witness to complete deposition; In re Ford, 160 Cal. 346, 116 Pac. 762, granting mandamus to relieve indicted person from prosecution where, without good cause, trial court arbitrarily postponed trial beyond statutory period.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 907.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 74, 108, 109.

Miscellaneous.—Cited in Merced Mining Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262, on another appeal; Weaver v. Conger, 10 Cal. 238, miscited for 7 Cal. 317.

7 Cal. 137–139, GILLAN v. METCALF.

The Conclusion of Fraud does not arise from want of consideration in a deed.

Approved in Schultz v. McLean (Cal.), 25 Pac. 430, reaffirming rule.

7 Cal. 140–144, PEOPLE v. STEWART.

Juror in Capital Case Who Says He is Opposed to capital punishment on principle cannot be challenged by the state for cause.

Distinguished in Demato v. People, 49 Colo. 151, 111 Pac. 705, juror who on voir dire states that under no circumstances would he impose death penalty is disqualified in murder case.

In Qualifications of Jurors Conscience and principle have separate meanings.

Approved in Rhea v. State, 63 Neb. 472, 88 N. W. 792, following rule.

7 Cal. 148–150, 68 Am. Dec. 233, SIMS v. SMITH.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 711.

Liability for Damming back stream. See note, 59 L. R. A. 820.

7 Cal. 150–151, ADAMS v. PUGH.

Where Entire Performance of Contract Prevented by one party or where its terms are varied by agreement, assumpsit is remedy for amount due for work and labor.

Approved in Brown v. Crown Gold Milling Co., 150 Cal. 384, 89 Pac. 90, following rule.

Remedy of Wrongfully Discharged Servant with respect to services actually rendered. See note, 6 L. R. A. (n. s.) 51; 5 L. R. A. (n. s.) 581.

7 Cal. 152–153, McCARRON v. O'CONNELL.

Necessity and Character of Title or possession to sustain action of trespass. See note, 30 L. R. A. (n. s.) 261.

7 Cal. 160–162, KELSEY v. DUNLAP.

When Defects in Certificates of Acknowledgment are fatal. See note, 108 Am. St. Rep. 559.

7 Cal. 162–165, EDWARDS v. BEUGNOT.

Stockholder's Interest in Corporation as subject of garnishment. See note, 18 L. R. A. (n. s.) 1159.

7 Cal. 171–175, 68 Am. Dec. 235, BILLINGS v. MORROW.

Principal who Ratifies Acts of Agent must know character of acts to be ratified.

Approved in Thompson v. Laboringman's Mfg. Co., 60 W. Va. 52, 53 S. E. 911, 6 L. R. A. (n. s.) 311, following rule; McGlessen v. Tyrrell, 5 Ariz. 54, 44 Pac. 1088, payer of note does not by acceptance of interest paid in advance to his agent, without knowledge that it was advance interest, ratify act of agent so as to discharge surety.

Where Authority to Perform Specific Acts is given by power of attorney and general words are also employed, such words are limited to particular acts authorized.

Distinguished in Moore v. Gould, 151 Cal. 728, 91 Pac. 618, holding general power of attorney authorized attorney to execute renewal of note and mortgage made by principal.

Implied Powers under Power of Attorney to transact business. See note, 4 L. R. A. (n. s.) 844.

Power of Attorney by married woman. See note, 84 Am. St. Rep. 768.

7 Cal. 175–181, EX PARTE ROWE.

Witness Committed for Refusing to Answer will be discharged on habeas corpus where it appears that suit has abated.

Approved in Williams v. People, 46 Colo. 186, 103 Pac. 299, where district court called witnesses for purpose of determining whether grand jury should be called, and they refused to testify, it could not, after grand jury called, punish witnesses for contempt without giving them opportunity to purge themselves; United States v. Collins, 146 Fed. 554, person committed for refusing to appear before grand jury will be released after grand jury is discharged.

7 Cal. 181–184, EX PARTE ROWE.

The Warrant of Commitment for Contempt should state all material facts.

Approved in In re Shortridge, 5 Cal. App. 375, 377, 90 Pac. 479, 480, mere statement that attorney interrupted proceedings against order of court insufficient.

Commitment for Contempt "in Refusing to Answer certain questions propounded to witness by grand jury" does not comply with statute.

Distinguished in In re Mills, 19 Haw. 95, upholding mittimus reciting petitioner was adjudged guilty of direct contempt in fighting in courtroom while court was in session.

7 Cal. 184–185, EX PARTE ROWE.

A Witness is Privileged from Answering on the ground that his answer would disgrace him only when it is not pertinent.

Approved in Ex parte Hedden, 29 Nev. 364, 90 Pac. 740, reaffirming rule; People v. Argo, 237 Ill. 182, 86 N. E. 692, construing statute relating to immunity of witnesses in bribery cases.

Constitutional Guaranty Against Self-incrimination and equivalent exemption to witness. See notes, 1 L. R. A. (n. s.) 167.

Exemption from Self-crimination as affected by statutes prohibiting use of testimony against witness. See notes, 14 L. R. A. 407.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 32.

7 Cal. 186–187, LA FRANCE v. HEWITT.

Admissibility in Evidence of Books of account. See note, 138 Am. St. Rep. 466.

Party's Books of Account as evidence in own favor. See note, 52 L. R. A. 587.

What Provable by Books of account. See note, 52 L. R. A. 708.

Admissibility of Account-books in evidence in case of loans or payments by party whose books offered. See note, 2 L. R. A. (n. s.) 404.

7 Cal. 187–206, ADAMS v. HACKETT.

Proceedings Supplementary to Execution are a substitute for creditor's bill.

Approved in Bryant v. Bank of California (Cal.), 7 Pac. 130, statutory remedy must be strictly followed.

Distinguished in Phillips v. Price, 153 Cal. 148, 94 Pac. 618, allowing creditor's bill where person charged with holding debtor's property claims title thereto.

Equitable Remedy to Subject Choses in action to judgment after return of no property found. See note, 63 L. R. A. 693.

Lien Acquired by Service of Notice in supplementary proceedings. See note, 3 L. R. A. (n. s.) 130.

Until Dissolution of Partnership Declared and receiver ordered to make pro rata distribution of assets among creditors, creditors may resort to adverse proceedings and gain preference.

Disapproved in Foster v. Field, 13 Okl. 238, 74 Pac. 193, lien cannot be obtained on assets of insolvent partnership in hands of receiver in partnership dissolution proceedings, superior to claim of intervening creditors.

Where Plaintiff Proceeded to Examine judgment debtor on supplemental proceedings as to judgment held by him against A, and obtained order to apply same to judgment of plaintiff, it is unnecessary to make A party to proceedings.

Cited in In re Downey, 31 Mont. 445, 78 Pac. 773, arguendo.

7 Cal. 208–209, PEOPLE v. MARKHAM.

Imprisonment in Lieu of a Fine is not a punishment but a means of enforcing payment of the fine.

Approved in In re Piipilani, 7 Haw. 102, reaffirming rule.

Failure of Judgment to Specify Term of imprisonment does not render it wholly inoperative when term is fixed by law.

Approved in Perry v. Pernet, 165 Ind. 74, 74 N. E. 611, order committing person for indefinite time for contempt in failing to obey order to pay money is not void though it fails to fix definite time; Ex parte Tani, 29 Nev. 391, 91 Pac. 138, 13 L. R. A. (n. s.) 518, judgment fixing wrong place for imprisonment good on habeas corpus.

Effect of Excessive Sentence. See note, 45 L. R. A. 138.

7 Cal. 209–212, **DABOVICH v. EMERIC.**

Miscellaneous.—Cited in Dabovich v. Emeric, 12 Cal. 178, on subsequent appeal.

7 Cal. 215–242, 68 Am. Dec. 237, **BECKETT v. SELOVER.**

Real and Personal Estate Vests in Heir subject to lien of administrator for payment of debts and expenses of administration.

Approved in Blakemore v. Roberts, 12 N. D. 400, 96 N. W. 1030, executor may sue to quiet title to realty belonging to decedent, pending administration of estate; Mears v. Smith, 19 S. D. 84, 102 N. W. 296, action cannot be maintained on note by heir of deceased indorser without proof by probate records that he is owner of note as distributee.

Limited in Estate of Vance, 152 Cal. 763, 93 Pac. 1011, passing of title to property of decedent to heirs and devisees is subject to control of probate court and to possession of personal representative for purpose of administration and is charged with debts of deceased.

Petition for Letters of Administration describing deceased as late resident of county is sufficient.

Approved in Ewing v. Mallison, 65 Kan. 487, 93 Am. St. Rep. 299, 70 Pac. 370, petition for letters alleging B, "late of county of" A, died at certain place, means that B was last a resident of A county.

Distinguished in Hoffman v. Fleming, 66 Ohio St. 157, 64 N. E. 66, record reciting will as last will of A, "late of Brooke County, West Virginia," does not show deceased was nonresident.

Application for Letters of Administration must be in writing and signed by applicant, and must state jurisdictional facts.

Approved in Otero v. Otero, 11 Ariz. 266, 90 Pac. 603, following rule.

On Application to Sell Realty of Deceased to pay debts, heir may dispute validity of claims upon which petition is based though they have been allowed.

Approved in Haub v. Leggett, 160 Cal. 494, 117 Pac. 557, upholding right of creditor, whose claim against estate has been allowed and approved in part, to sue for whole claim; Milburn v. East, 128 Iowa, 107, 102 N. W. 1118, and Thomas v. Williams, 80 Kan. 638, 103 Pac. 774, both holding allowance of claim against estate is prima facie evidence of debt against heirs in proceeeding to subject realty to its payment.

Presentation of Claim to Administrator is commencement of action upon it.

Approved in Estate of Burns, 2 Cof. Prob. 47, claimant of doubtful claim which has been referred by executor to referee is subject to Code of Civil Procedure, section 1880, subdivision 3.

Collateral Attack on Right of acting administrator. See note, 81 Am. St. Rep. 536, 543, 549, 551.

Rights of Heir in Personal Property of ancestor. See note, 112 Am. St. Rep. 728.

Validity of Acts Under Letters Testamentary or of administration afterward revoked or held invalid. See note, 21 L. R. A. 150.

7 Cal. 244–245, COULTER v. STARR.

When the Appeal is Taken Bona Fide and not for delay, the appellate court will always permit a new undertaking to be filed where the original is defective.

Distinguished in Stimpson etc. Scale Co. v. Superior Court, 12 Cal. App. 540, 107 Pac. 1016, superior court has no jurisdiction of appeal where no undertaking filed.

7 Cal. 245–246, BENEDICT v. BUNNELL.

Actual Residence on Premises by Family is necessary to constitute homestead.

Approved in Ball v. Houston, 11 Okl. 138, 66 Pac. 360, reaffirming rule.

What Constitutes a "Family" under homestead and exemption laws. See note, 4 L. R. A. (n. s.) 389.

7 Cal. 247–250, PARKE v. WILLIAMS.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 634.

Admissibility in Evidence of Copies of Records of other state. See note, 5 L. R. A. (n. s.) 941.

7 Cal. 250–252, LOVE v. WALTZ.

Effect of Judgment Against Tenant as res judicata. See note, 112 Am. St. Rep. 38.

7 Cal. 257–258, BLISS v. WYMAN.

Advice of Counsel as Defense to action for malicious prosecution. See note, 18 L. R. A. (n. s.) 54, 55.

7 Cal. 258–261, McEWEN v. JOHNSON.

Findings of Court may Refer to Pleadings for facts found provided reference is sufficiently distinct and facts are sufficiently stated in pleadings.

Approved in Austin v. Wilcoxson, 149 Cal. 27, 84 Pac. 418, following rule.

7 Cal. 261–264, 68 Am. Dec. 257, MAERIS v. BICKNELL.

Mere Change in Use of Water from one mining locality to another does not forfeit right.

Approved in Farmers & Merchants' Irr. Co. v. Gothenburg Water Power & Irrig. Co., 73 Neb. 227, 102 N. W. 488, one claiming right to extend ditch or change place of use of water must specify lands to be irrigated in application for permit to change place of use.

Miscellaneous.—Cited in Marius v. Bicknell, 10 Cal. 224, on subsequent appeal.

7 Cal. 266–275, SELOVER v. AMERICAN-RUSSIAN COMMERCIAL CO.

What is Community Property. See notes, 126 Am. St. Rep. 101; 4 Cof. Prob. 43.

7 Cal. 276–279, DRAPER v. NOTEWARE.

Mandamus Only Issues to Compel Performance of act or duty enjoined by law and where no adequate remedy at law exists.

Approved in Caven v. Coleman, 100 Tex. 470, 101 S. W. 200, denying mandamus to compel town of Marshal to create board of plumbers under act of 1897; dissenting opinion in Cornell Co. v. Barber, 31 R. I. 421, 76 Atl. 825, majority granting mandamus where claim against town had been allowed and audited.

7 Cal. 279–281, **DORENTE v. SULLIVAN.**

Affidavit of Service of Summons is not presumed to have been made before party to action from mere fact that name of plaintiff and name of officer before whom it was made were identical.

Approved in England Bros. v. Young, 26 Okl. 500, 110 Pac. 897, following rule; Bryan v. Kales, 3 Ariz. 427, 31 Pac. 518, record showing suit brought by B against B, as administrator, is not proof on collateral attack that parties were same person.

7 Cal. 286–287, **THOMAS v. ARMSTRONG.**

Mistake of Law in Awarding Ferry License may be corrected by mandamus or other proper proceeding.

Approved in Inglin v. Hoppin, 156 Cal. 489, 105 Pac. 584, granting mandamus to compel establishment of independent reclamation district.

Character and Extent of Relief by mandamus against officer rendering decision upon ground not within discretion. See note, 7 L. R. A. (n. s.) 527.

Ferry Franchise is not subject to execution.

Disapproved in Evans v. Kroutinger, 9 Idaho, 158, 72 Pac. 884, holding contra.

Execution or Judicial Sale of Corporate franchise or property necessary to its enjoyment. See note, 20 L. R. A. 737.

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 535, 545.

7 Cal. 288–289, **HENSLEY v. TARPEY.**

Judicial Notice. See note, 4 L. R. A. 43.

7 Cal. 292–294, 68 Am. Dec. 260, **CHAMBERLAIN v. BELL.**

Record of Deed, Defective in omitting description, imparts no notice.

Approved in Watkins v. Wilhoit (Cal.), 35 Pac. 650, record made in wrong book gives no notice.

Effect of Defective Recording of legal instrument on rights of third persons. See note, 96 Am. St. Rep. 398.

7 Cal. 312–316, **PORTER v. SCOTT.**

Award of Arbitrators, which does not dispose of entire controversy, is void.

Approved in Boyd v. Bargagliotti, 12 Cal. App. 238, 107 Pac. 154, reaffirming rule.

7 Cal. 317–330, 68 Am. Dec. 262, **MERCED MINING CO. v. FREMONT.**

The Owner of a Mining Claim has, in practical effect, a good vested title.

Approved in Biddle Boggs v. Merced Min. Co., 14 Cal. 313, sustaining mineral claimant as against subsequent patentee from United

States; Chilberg v. Consumers' Milk Co., 3 Alaska, 238, prior existing valid placer claim not affected by patent issued to townsite lot claimant.

Discovery of Mineral in Mining Claim and rights of locators prior thereto. See note, 139 Am. St. Rep. 158.

Injunction will Lie to Restrain Trespass in removing gold-bearing quartz from mining claim.

Approved in Waskey v. McNaught, 163 Fed. 934, 90 C. C. A. 289, plaintiff in ejectment may have ancillary injunction against mining operations of defendant.

Injunction Against Trespass on realty. See note, 99 Am. St. Rep. 732, 747.

7 Cal. 340–342, COKER v. SIMPSON.

Right of Prior Appropriation of water. See note, 30 L. R. A. 677.

7 Cal. 342–346, DORSEY v. McFARLAND.

Joint Mortgage by Husband and Wife on homestead is preferred to prior mortgage by husband alone.

Approved in Glenn v. Bresnan, 123 La. 1018, 49 So. 692, following rule.

7 Cal. 348–352, PEOPLE v. HOUGHTALING.

Money Received by Decedent as Tax Collector is no part of his estate.

Approved in In re Williams Estate (Cal.), 32 Pac. 242, money paid as deposit on bid for property of estate may be recovered from executor individually.

7 Cal. 356–357, PEOPLE v. GILL.

Where Criminal Statute is Changed between commission of offense and conviction but provides that it shall not apply to prior offenses, punishment is regulated by old law.

Approved in State v. Newcomb, 58 Wash. 423, 109 Pac. 358, old law punishing murder was continued in force between enactment of new code of 1909 and its taking effect.

Miscellaneous.—Cited in dissenting opinion in People v. McNulty (Cal.), 28 Pac. 823, historically.

7 Cal. 358–360, TUTTLE v. MONTFORD.

The Lien of the Mechanic and Materialman is favored because they have created the property to which the lien attaches.

Approved in Stimson Mill Co. v. Nolan, 5 Cal. App. 760, 91 Pac. 265, upholding validity of mechanic's lien law.

Relation Back of Subcontractor's Lien to date of original contractor's. See note, 16 L. R. A. 336.

7 Cal. 361–388, HOLLAND v. SAN FRANCISCO.

Municipalities cannot be Controlled by judiciary in exercise of their delegated discretionary governmental powers, but can be so controlled in their reception and disposition of their property.

Approved in Davoust v. City of Alameda, 149 Cal. 71, 84 Pac. 761, 5 L. R. A. (n. s.) 536, city engaged in operating electric plant owned by it for purpose of lighting city and furnishing light to

its inhabitants is liable for death of person caused by its negligent operation.

An Ordinance for Sale of City Property, passed without the required majority, is validated by another ordinance, passed before the sale, disposing of the proceeds thereof.

Disapproved in McCracken v. San Francisco, 16 Cal. 635, holding contrary.

7 Cal. 391–393, LANDECKER v. HOUGHTALING.

Declarations of Vendor Made Before Sale are admissible to impeach sale for fraud.

Approved in Smith v. Goethe, 159 Cal. 638, 115 Pac. 227, an admission by vendor of personalty while owning it is admissible against successors of parties.

7 Cal. 393–395, DOANE v. SCANNELL.

Mandamus to Compel Surrender of office. See note, 31 L. R. A. 344, 350.

7 Cal. 395–398, PEOPLE v. DOUGHERTY.

Indictment for Crime Committed on Vessel in inland waters of state should set forth all facts giving extraterritorial jurisdiction.

Approved in Roberson v. State, 42 Fla. 218, 28 So. 428, indictment alleging infliction of wound in county in this state, but which does not state where wounded party died, is sufficient.

7 Cal. 398–400, BROWN v. TOLLES.

Appeal from Order Granting New Trial must be taken within time allowed by statute.

Approved in Ewing v. Lunn, 22 S. D. 100, 115 N. W. 529, where no timely appeal taken from grant of new trial, and party participated upon second trial, error in granting new trial waived.

Errors in Law Occurring in Court Below will be reviewed on appeal, though new trial not asked.

Approved in Carver v. San Joaquin Cigar Co., 16 Cal. App. 766, 118 Pac. 94, reaffirming rule.

Party Complaining of Error must Show wherein error consists.

Approved in dissenting opinion in Williams v. Spokane Falls etc. Ry. Co., 42 Wash. 606, 84 Pac. 1132, majority holding that excessiveness of verdict was one of grounds of motion for new trial and that opening brief assigns overruling of motion as error, is sufficient to allow defendant to raise question of excessiveness on appeal.

7 Cal. 403–405, PEOPLE v. OLIVERA.

Where Indictment Fully Sets Forth Offense, word "feloniously" need not be used.

Approved in People v. Davenport, 13 Cal. App. 643, 110 Pac. 322, word "feloniously" not necessary in information for rape; Brown v. State, 127 Wis. 203, 106 N. W. 540, holding information for rape not fatally defective for failure to contain word "feloniously."

7 Cal. 405–408, MEIGGS v. SCANNELL.

Lien on Vessel Attaches as soon as service is had in suit.

Approved in Jensen v. Dorr, 159 Cal. 748, 116 Pac. 556, following rule.

7 Cal. 409–418, ELLIS v. JEANS.

Where Plaintiff and Defendant derive title from same person, plaintiff is estopped from denying title of common grantor.

Approved in Gervaise v. Brookins, 156 Cal. 107, 103 Pac. 331, vendee in possession cannot dispute vendor's title.

Under Instrument Providing That A has sold land to B for certain sum then paid and further sum to be paid, on payment of which latter sum A agrees to make deed to land, A has equitable lien on purchase money, holding land as security for lien.

Approved in Estate of Strang, 131 Iowa, 597, 106 N. W. 637, testator who agreed to transfer certain land to children on certain conditions at agreed price and gave them possession, they agreeing to pay interest to testator for life, was mere trustee.

Nature of Interest of Vendor or Vendee in land contract as real or personal property. See note, 57 L. R. A. 644.

Possession of Land as notice of title. See note, 13 L. R. A. (n. s.) 116.

7 Cal. 418–419, BERRY v. METZLER.

A Party is Bound to Know the materiality of testimony except in case of surprise at trial.

Approved in People v. Byrne, 160 Cal. 226, 116 Pac. 525, upholding refusal of new trial in murder case on ground of newly discovered evidence.

7 Cal. 421–422, BUSHNELL v. McCAULEY.

In Action Against Agent for not accounting, a request to account must be alleged and proved.

Approved in Burke v. Maguire, 154 Cal. 470, 98 Pac. 27, where administrator has become custodian of fund not part of estate, no action will lie against him without previous demand.

7 Cal. 432–443, PEOPLE v. SCANNEL.

Quo Warranto is Proper Proceeding to try title to office.

Approved in City Council v. People, 19 Colo. App. 403, 75 Pac. 604, mandamus does not lie to restore contestee who had been unseated by council.

Failure to Approve Proper Official Bond does not release sureties nor forfeit office.

Approved in Gilbert v. Craddock, 67 Kan. 361, 72 Pac. 874, claimant to office need not file bond and take oath until canvassing board has issued certificate, and may maintain quo warranto to determine his election without having done so; Curran Printing Co. v. St. Louis, 213 Mo. 39, 111 S. W. 815, holding mayor's refusal to approve proper bond for printing did not affect printer's rights under contract.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 190.

7 Cal. 443–449, STEARNS v. AGUIRRE.

A Judgment Entered by a Mere Ministerial Officer, without authority of law, is wholly void.

Approved in Old Settlers Investment Co. v. White, 158 Cal. 246, 110 Pac. 927, mere filing by clerk and recording in judgment docket of stipulation of parties that judgment be entered as prayed for in

complaint does not show existence of judgment; San Francisco v. Brown, 153 Cal. 650, 96 Pac. 284, judgment entered by clerk, different from that rendered by court, may be vacated at any time; Dible v. Hanson, 17 N. D. 23, 114 N. W. 372, an order for dismissal of action is not an appealable order.

A Judgment of Reversal in the Supreme Court is not necessarily a bar to further proceedings in the action.

Approved in Bryan v. Berry, 8 Cal. 135, following rule; Talcott v. Delta County Land etc. Co., 19 Colo. App. 16, 73 Pac. 257, where appellate court reversed generally on "evidence as presented in record," appellee is entitled to retrial as of right.

7 Cal. 455–462, GUTTMANN v. SCANNELL.

Rights of Creditors in Personal Services of debtor. See note, 21 L. R. A. 625.

7 Cal. 479–503, STAFFORD v. LICK.

Recording Act Requiring Conveyances made before passage of act to be recorded does not impair obligation of contracts.

Approved in Knights of Maccabees of World v. Nitsch, 69 Neb. 375, 95 N. W. 627, upholding statute requiring certified copy of amendment of by-law to be filed with auditor of public accounts, as applied to benefit certificate issued prior to statute.

7 Cal. 503–511, ALVAREZ v. BRANNAN.

It is Immaterial Whether Vendor Misrepresenting material fact knew it to be false, or did not know whether it was true or false.

Approved in Howe v. Martin, 23 Okl. 568, 569, 138 Am. St. Rep. 840, 102 Pac. 130,131, following rule.

7 Cal. 511–514, MURDOCK v. MURDOCK.

The Law Does not Imply Any Contract by one in loco parentis to pay for services.

Approved in Crane v. Derrick, 157 Cal. 671, 672, 109 Pac. 32, 33, refusing to imply promise by mother to pay son for board and lodging.

Distinguished in Estate of Rohrer, 160 Cal. 576, 117 Pac. 673, allowing compensation to wife of decedent's nephew for services in caring for him during last illness.

Implication of Agreement to Pay for services of relative or member of household. See notes, 133 Am. St. Rep. 255; 11 L. R. A. (n. s.) 885, 899, 901, 911.

7 Cal. 514–518, TAAFFE v. ROSENTHAL.

An Appeal will Lie, After Final Judgment, from order refusing to discharge attachment.

Disapproved in Nail v. Superior Court, 11 Cal. App. 28, 103 Pac. 903, superior court cannot, on appeal from justice's court, review order denying motion to dissolve provisional attachment.

Proceedings to Dissolve Attachment. See note, 123 Am. St. Rep. 1064.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 198.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 606.

7 Cal. 535–542, 68 Am. Dec. 280, SAYRE v. NICHOLS.

Agent cannot Delegate Discretionary Powers, but he may delegate mere mechanical powers or duties.

Approved in Fritz v. Chicago Grain & Elevator Co., 136 Iowa, 707, 114 N. W. 196, holding in action for broker's commissions evidence showed defendant's agent had authority to hire plaintiff to sell elevator for him.

Liability of Principal on Negotiable Paper executed by agent. See note, 21 L. R. A. (n. s.) 1064.

7 Cal. 551–554, BAKER v. BARTOL.

One Receiving Benefit of Bond is estopped from denying its legality.

Approved in Ormsby v. Johnson, 24 S. D. 498, 124 N. W. 438, though authority to insert grantee's name in blank deed must be in writing, grantor who accepts consideration is estopped, as against grantee, from denying validity of deed.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 607.

7 Cal. 554–567, THORNBURGH v. HAND.

Officer Who Seizes Property in Hands of debtor may justify under process; but when he takes property from third person, who claims to be owner, he must show judgment and execution or writ of attachment and proceedings on which it was based.

Approved in Beckstead v. Griffith, 11 Idaho, 750, 83 Pac. 768, and Cheeseman v. Fenton, 13 Wyo. 448, 110 Am. St. Rep. 1010, 80 Pac. 826, both following rule; Old Settlers Investment Co. v. White, 158 Cal. 243, 110 Pac. 926, applying rule where controversy was between officer seizing on execution and chattel mortgagee; Moriund v. Johnson, 140 Mo. App. 354, 124 S. W. 82, applying rule to execution.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 123.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 198.

If Assignment and Delivery of Possession were merely colorable and property still remained in debtor, against whose goods execution issued, sheriff is justified.

Approved in Citizens' Securities Co. v. Hammel, 14 Cal. App. 569, 112 Pac. 733, where judgment debtor could have legally taken possession of attached goods while in plaintiff's alleged possession, attachment under which sheriff took possession was sufficient justification to sheriff without his showing that writ was issued on proper affidavit.

7 Cal. 568–573, NICKERSON v. CHATTERTON.

A Judgment for Plaintiff, in order to hold sureties on replevin bond, must be in the alternative.

Distinguished in Donovan v. Aetna Indemnity Co., 10 Cal. App. 731, 103 Pac. 367, 368, sureties on replevin bond are liable where judgment is for money only.

7 Cal. 573–575, **MINTURN v. FISHER.**

Statement by Indorser to Holder that party primarily liable cannot pay, as waiver of presentment of latter. See note, 27 L. R. A. (n. s.) 517.

7 Cal. 577–579, **SACRAMENTO VALLEY R. R. CO. v. MOFFATT.**

What Title or Interest will support ejectment. See note, 18 L. R. A. 784.

7 Cal. 588–594, **GUNTER v. LAFFAN.**

A Judgment of Reversal becomes the law of the case.

Approved in People's Lumber Co. v. Gillard, 5 Cal. App. 438, 90 Pac. 557, rule not confined to that portion of opinion which is strictly essential to disposition made of case.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 326.

Who may not Purchase at judicial, execution and other compulsory sales. See note, 136 Am. St. Rep. 817.

NOTES

ON THE

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8 Cal. 1-20, PEOPLE v. LANGDON.

Term of Office of Physician of Asylum runs from his election, and never apart from the officer.

Approved in People v. Nickel, 9 Cal. App. 785, 100 Pac. 1076, holding term of port warden runs from date of appointment; Richardson v. Young, 122 Tenn. 498, 521, 125 S. E. 669, 675, upholding act authorizing legislature to appoint board of election.

Power to Appoint to Office is not Exclusive function of executive, but may be exercised by legislature.

Approved in Attorney General v. Bolger, 128 Mich. 360, 87 N. W. 368, upholding act authorizing city council of Detroit to appoint commissioner of parks.

8 Cal. 26-27, ANTHONY v. DUNLAP.

Only Court Which Rendered Judgment can stay proceedings upon it.

Approved in Hawkeye Ins. Co. v. Huston, 115 Iowa, 630, 89 N. E. 32, following rule; In re Burton, 5 Cof. Prob. 237, denying jurisdiction of equity court review and set aside orders made by probate court of another county in probate proceedings; Guardianship of Murphy, 1 Cof. Prob. 108, denying probate court's jurisdiction to appoint guardian for child who had been awarded to parent in divorce case, while divorce court retains right to control custody.

8 Cal. 33, CUNNINGHAM v. HOPKINS.

On Motion to Dismiss Appeal in County Court on ground of insufficient undertaking, it is error to refuse to allow appellant to amend undertaking.

Distinguished in Stimpson etc. Scale Co. v. Superior Court, 12 Cal. App. 540, 107 Pac. 1016, refusing to allow appellant to make deposit in lieu of bond when no bond had been filed.

8 Cal. 34-36, RICKETT v. JOHNSON.

One District Court cannot Restrain Execution of decrees of another court of co-ordinate jurisdiction.

Approved in In re Burton, 5 Cof. Prob. 237, denying jurisdiction of equity court to review and set aside orders of probate court of another county in probate proceedings; Hawkeye Ins. Co. v. Huston, 115 Iowa, 630, 89 N. W. 32, under Code, section 4364, district court of one county has no jurisdiction of action to restrain execution of judgment entered in district court of another county.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 328.

8 Cal. 39–42, VAUGHN v. ENGLISH.

The Term "Officer" Includes All Persons in any public station or employment conferred by government.

Approved in State v. Kelly, 103 Mo. App. 715, 77 S. W. 997, holding member of legislative body of city to be city officer.

Who are Public Officers. See note, 17 L. R. A. 243, 244, 249.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 38.

8 Cal. 42–44, PEOPLE v. COHEN.

Embezzlement. See note, 87 Am. St. Rep. 24.

Duty of Warehouseman in care of property. See note, 136 Am. St. Rep. 215.

8 Cal. 47–49, FRANK v. BRODY.

To Rely on Promise of Witness to Attend Trial is not such exercise of ordinary diligence as to warrant continuance for failure to attend.

Approved in Josephson v. Sigfusson, 13 N. D. 317, 100 N. W. 704, following rule.

8 Cal. 49–50, GORDON v. LEARING.

Secondary Evidence of Contents of Deed is admissible where original is without the state.

Affirmed in Johnson v. Union Pac. R. R. Co., 35 Utah, 301, 100 Pac. 395, following rule; Estate of Miehle, 3 Cof. Prob. 102, arguendo.

Order of Admission of Testimony is within discretion of trial court.

Approved in Brady v. Ranch Mining Co., 7 Cal. App. 183, 94 Pac. 85, following rule.

8 Cal. 52–58, 68 Am. Dec. 290, GILMAN v. CONTRA COSTA CO.

Execution Levy on Revenues of County in hands of treasurer is void.

Approved in People v. San Joaquin etc. Agr. Assn., 151 Cal. 806, 91 Pac. 744, holding property of district agricultural association exempt from execution as being property of public corporation; Buell v. Arnold, 124 Wis. 69, 102 N. W. 339, holding judgment against county is not lien upon land bought in by county for taxes.

8 Cal. 62–66, 68 Am. Dec. 300, ASHBURY v. SANDERS.

Fact That Person had not Been Heard from for sixteen months and that he was passenger on particular vessel, and neither vessel nor crew ever heard from, does not raise presumption of death.

Distinguished in Estate of Kustel, 2 Cof. Prob. 3, where one sails in unseaworthy vessel on night of violent storm and vessel is unheard of for long time after voyage should have been accomplished, fact of death may be presumed, though less than seven years elapse.

8 Cal. 66–74, 68 Am. Dec. 304, REVALK v. KRAMER.

Party cannot Sue in One Court to Restrain Decree of another court of co-ordinate jurisdiction.

Approved in In re Burton, 5 Cof. Prob. 237, denying equity jurisdiction to review and set aside orders of probate court of another county in probate proceedings.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 102, 133.

Husband and Wife have a Species of joint tenancy in homestead.

Criticised in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 354, 107 Pac. 337, holding estate of husband and wife differs from joint tenancy in that there can be no partition by either party.

Right to Homestead Ceases When Claimant Ceases to be head of family.

Approved in Fullerton v. Sherill, 114 Iowa, 513, 87 N. W. 420, holding widow who claimed homestead while living with daughter lost the right upon marriage and removal of daughter.

Continuance of Family as Condition of continuance of homestead where a condition of inception. See note, 16 L. R. A. (n. s.) 111, 115.

Denied in Weaver v. First Nat. Bank of Chicago, 76 Kan. 547, 123 Am. St. Rep. 155, 94 Pac. 275, 16 L. R. A. (n. s.) 110, holding wife continued to hold homestead exemption after death of husband although no one was dependent upon her; Palmer v. Sawyer, 74 Neb. 114, 103 N. W. 1090, holding debtor who had acquired homestead did not lose it by loss of all dependent members of family.

Wife Must be Party to Action to foreclose lien on homestead to affect her rights.

Approved in Houssels v. Taylor, 24 Tex. Civ. App. 75, 58 S. W. 191, holding wife should be party to suit to foreclose tax lien.

What Constitutes a "Family" under homestead and exemption laws. See note, 4 L. R. A. (n. s.) 377.

8 Cal. 77–80, 68 Am. Dec. 310, PARKE v. KILHAM.

Action for Diversion of Water in Ditches is in nature of action for abatement of nuisance.

Approved in Evans v. Ross (Cal.), 8 Pac. 89, following rule.

Cotenancy in Mines. See note, 91 Am. St. Rep. 889.

Miscellaneous.—Cited in dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, to point that where irrigation ditch is owned by several proprietors, without specially defined relation, they are tenants in common.

8 Cal. 84–85, FEENY v. DALY.

Moral Obligation as Consideration for promise. See note, 53 L. R. A. 362.

8 Cal. 85–87, HOPKINS v. DELANEY.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 559.

8 Cal. 87–89, **BELDEN v. HENRIQUES.**

Fraud may Consist in Concealment of material facts.

Approved in Richards v. Fraser, 122 Cal. 461, 55 Pac. 247, holding fraud arose in withholding information in procuring release from obligations.

8 Cal. 109–113, **VISHER v. WEBSTER.**

Filling Blank in Note by Inserting Rate of interest is not an alteration thereof within meaning of rule, and does not invalidate the note.

Approved in Diamond Distilleries Co. v. Gott, 137 Ky. 594, 126 S. W. 134, holding when place of payment was left blank, filling in such blank by holder did not constitute alteration of note.

Distinguished in Reese v. Bell (Cal.), 71 Pac. 90, holding equitable defenses may be interposed where note not duly indorsed, regardless of question of alteration by insertion of interest; National Exchange Bank of Albany v. Lester, 194 N. Y. 465, 87 N. E. 780, holding raising of note which was already completed instrument by filling in unfilled spaces did not render maker liable to innocent purchaser for more than original amount.

Unauthorized Alteration of written instruments. See note, 86 Am. St. Rep. 108.

Alteration of Note as Affecting bona fide holders. See note, 35 L. R. A. 468.

Declarations of Vendor are Competent to impeach sale for fraud.

Approved in Smith v. Goethe, 159 Cal. 638, 115 Pac. 227, following rule.

8 Cal. 113–117, **BURRITT v. DICKSON.**

Where Plaintiff's Partner Drew Up partnership articles of defendant's firm, plaintiff is bound to have knowledge of terms on which such firm was formed.

Approved in State v. Perkins, 90 Mo. App. 611, imputing knowledge by one partner of deed of trust to all partners.

Assumption of Debts on dissolution of partnership. See note, 9 L. R. A. (n. s.) 60.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 986, 988, 991.

8 Cal. 118–129, **SWARTZ v. HAZLETT.**

Participation in Fraud of Vendor which will invalidate transfer for good consideration as against creditors. See note, 32 L. R. A. 72.

8 Cal. 130–135, **BRYAN v. BERRY.**

Trial Court cannot Amend Judgment after appeal is taken.

Approved in Hynes v. Barnes, 30 Mont. 28, 75 Pac. 524, holding trial court could not pending appeal change judgment in replevin to alternative; dissenting opinion in Sullivan v. Woods, 5 Ariz. 202, 50 Pac. 116, majority holding district court retained power over judgment during term, although appeal bond had been filed and notice given.

When Third Parties have Purchased at execution sale, it is too late to move to set aside execution.

Approved in McCarthy v. Speed, 16 S. D. 587, 94 N. W. 413, following rule.

8 Cal. 136–145, CRANDALL v. WOODS.

Parties Holding Possessory Rights in separate parcels of land, title being in the United States, have rights of riparian owners in waters of stream flowing naturally over both parcels.

Approved in Lux v. Haggin (Cal.), 4 Pac. 922, 926, holding every riparian proprietor has equal right to unimpeded flow in natural course and reasonable use of water flowing in natural stream over his land.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 739.

Water Rights are Acquired by five years' adverse user.

Approved in Wutchumna Water Co. v. Ragle, 148 Cal. 764, 84 Pac. 165, following rule.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 712, 714, 729.

Right of Prior Appropriation of water. See note, 30 L. R. A. 672.

8 Cal. 145–152, DEWEY v. BOWMAN.

Note Payable After Date at Time certain with space for interest rate left blank draws interest from date.

Approved in Hornstein v. Cifuno, 86 Neb. 104, 125 N. W. 136, following rule.

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 751.

8 Cal. 152–158, ADAMS v. WOODS.

Creditors of Firm can Pursue Their Remedy at law after bill for dissolution is filed by one partner and before decree of dissolution.

Distinguished in Foster v. Field, 13 Okl. 239, 74 Pac. 193, holding lien cannot be obtained on assets of partnership in hands of receiver appointed in suit for dissolution superior to claims of creditors who have intervened.

8 Cal. 165–203, WELCH v. SULLIVAN.

Stability of Judicial Decision is of utmost consequence.

Approved in State v. Forbes, 111 La. 486, 35 So. 715, holding common-law rule binding even when question comes before state court for first time.

Under Act of Congress of 1851, title to ungranted lands within city limits vested in city.

Approved in dissenting opinion in Hart v. Burnett, 15 Cal. 619, 623, majority holding municipal lands to which San Francisco succeeded were held in trust for public use and were not subject to execution.

Miscellaneous.—Cited in Bianchi v. Del Valle, 117 La. 592, 42 So. 150, as to right of tenant to make needed repairs

8 Cal. 207–217, SELIGMAN v. KALKMAN.

Where Insolvent Conceals the Fact and purchases goods on credit, sale is void.

Citèd in Slayden-Kirksey Woolen Mills v. Weber, 46 Tex. Civ. App. 438, 102 S. W. 474, holding question on purchase of goods by insolvent to be perjury.

8 Cal. 217-226, POTTER v. SEALE.

In Suit for Malicious Prosecution, probable cause is mixed question of law and fact, and jury have sole right to decide whether alleged circumstances exist.

Approved in Hynes v. Nelson (Cal.), 2 Pac. 37, holding where uncontradicted evidence in malicious prosecution suit tended to show probable cause, and verdict of jury was contrary to instructions, court properly set aside verdict.

8 Cal. 227-260, DAVISON v. DALLAS.

Ordinary Rules for Interpretation of written instrument apply to power of attorney.

Approved in White v. Furgeson, 29 Ind. App. 150, 64 N. E. 51, following rule.

Indemnitors of Sheriff are Liable With Him for unlawful seizure or detention of property at their instance.

Distinguished in Cummings v. Reins Copper Co., 40 Mont. 620, 107 Pac. 911, holding surety company which agrees to indemnify another company for its losses is not liable with it as joint tort-feasor; Northam v. Casualty Co., 177 Fed. 983, holding liability insurance company not liable on original action for injury caused by insured's negligence to its servant.

Power of Attorney Considered and Word "Any" as applied to its purposes held to mean "every."

Approved in White v. Furgeson, 29 Ind. App. 152, 64 N. E. 52, construing power of attorney to remonstrate against "any" application for liquor license, as meaning any and all applications; Heyler v. City of Watertown, 16 S. D. 27, 91 N. W. 334, holding "any" as used in act authorizing city to construct sewerage system means "every."

8 Cal. 260-268, 68 Am. Dec. 318, PAYNE v. BENSLEY.

Assignment of Negotiable Promissory Note as collateral security for pre-existing debt is valid as against defenses in favor of maker, no consideration being necessary to support it.

Approved in Bank of Yolo v. Bank of Woodland, 3 Cal. App. 567, 86 Pac. 822, holding consideration not necessary for order assigning claims due as collateral security for existing debt.

Mortgage of Personal Property cannot Constitute security for debt.

Approved in Mark Means etc. Co. v. Mackinzie, 9 Idaho, 173, 73 Pac. 137, holding where note was given for goods sold on condition that title to goods sold should not pass until note was paid, creditor could not attach in action for purchase price without showing security beyond his reach.

8 Cal. 268-271, CHIPMAN v. HIBBARD.

Courts of Co-ordinate Jurisdiction have no power to restrain judgments of each other.

Approved in Hawkeye Ins. Co. v. Huston, 115 Iowa, 630, 89 N. W. 32, following rule; In re Burton, 5 Cof. Prob. 237, denying equity jurisdiction to review and set aside orders of probate court of another county in probate proceedings.

Injunctions Against Judgment for Matters subsequent to rendition. See note, 30 L. R. A. 561.

8 Cal. 271-275, 68 Am. Dec. 322, LASSEN v. VANCE.

Lien for Purchase Money of homestead. See note, 86 Am. St. Rep. 176, 186.

8 Cal. 275-280, THOMPSON v. LEE.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 833.

8 Cal. 281-287, STILL v. SAUNDERS.

When Debt Sued on is Shown to Exist, burden of proving payment is on defendant.

Approved in Barrett-Hicks Co. v. Glas, 14 Cal. App. 300, 111 Pac. 765, following rule.

8 Cal. 294-296, CHAPIN v. BOURNE.

Trial Court may Refuse New Trial on ground of excessive verdict if successful party will consent to reduction of judgment

Approved in Bently v. Hurlburt, 153 Cal. 803, 96 Pac. 893, following rule.

Title to Land Between High and Low water mark. See note, 45 L. R. A. 239.

Right of State to Grant tide lands. See note, 22 L. R. A. (n. s.) 340.

8 Cal. 301-303, PEOPLE v. McCALLA.

When Several Defendants are Tried Together, they cannot sever their challenges, but all must join therein.

Approved in Booth v. Territory, 9 Ariz. 205, 206, 80 Pac. 354, 355, following rule.

8 Cal. 303-305, PLACER COUNTY v. ASTIN.

Where Officer Receives Public Revenue, he is estopped to deny his liability therefor, regardless of his right to collect it.

Approved in State v. Patterson, 66 Kan. 460, 71 Pac. 864, holding it no defense to city treasurer, in trial for embezzlement, that money was collected from liquor dealers under unlawful arrangement; Yamhill County v. Foster, 53 Or. 134, 99 Pac. 290, holding public officer could not refuse to pay over to state money received by him on ground it was illegally exacted; Board of Commrs. v. Hickey, 86 Minn. 339, 90 N. W. 779, holding county could compel clerk to pay into treasury receipts from sale of abstracts made by him from files and records in his custody.

Liability of Agent Toward Principal and third person respectively for money or property received in course of agency. See note, 2 L. R. A. (n. s.) 658.

8 Cal. 306-322, ADAMS v. WOODS.

Question as to Who is Aggrieved Party on appeal is, Would the party have had the thing if the erroneous judgment had not been given?

Approved in Schino v. Cinquini, 7 Cal. App. 247, 94 Pac. 84, holding assignee of garnishee, when fund is ordered to be paid into court, is aggrieved party, although not party to action; Brown v. Frenkeen, 87 Ark. 162, 112 S. W. 208, holding trustee in bankruptcy could appeal from adverse judgment as aggrieved party; Washington County Abstract Co. v. Stewart, 9 Idaho, 381, 74 Pac. 957, holding one not

party to suit in controversy could not demand writ of review; dissenting opinion in Steger v. Hume, 97 Tex. 328, 33 Tex. Civ. 404, 79 S. W. 21, arguendo.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 747, 762.

8 Cal. 323–324, LEIGH CO. v. INDEPENDENT DITCH CO.

Locator of Public Land with View of appropriating it to his own use is entitled to all privileges which appertain to the soil, including riparian rights.

Approved in Lux v. Haggin (Cal.), 4 Pac. 926, holding water diverted by occupant while land belonged to United States was duly appropriated.

Right of Prior Appropriation of water. See note, 30 L. R. A. 676.

8 Cal. 327–336, 8 Am. Dec. 325, BEAR RIVER ETC. MINING CO. v. NEW YORK MINING CO.

Owner of Ditch is Entitled to have Water flow thereto into natural channel without material interruption.

Approved in Cole v. Richards Irr. Co., 27 Utah, 209, 101 Am. St. Rep. 962, 75 Pac. 378, holding appropriation of waters of natural stream gives interest in stream from point of diversion to sources.

Right of Prior Appropriation of water. See note, 30 L. R. A. 673.

Pollution of Stream by mining. See note, 24 L. R. A. 67.

8 Cal. 336–339, HILL v. KING.

Right to Appropriate Waters of Streams of state for mining and other purposes is too well settled to admit of any doubt.

Approved in Lower Tule River Ditch Co. v. Angiola Water Co., 149 Cal. 499, 86 Pac. 1082, holding right to use water by prior and complete appropriation superior to later acquired right obtained under mode prescribed in code; Lux v. Haggin (Cal.), 4 Pac. 932, upholding appropriation of water from stream for irrigation.

Right of Prior Appropriation of water. See note, 30 L. R. A. 673.

Owners of Ditch Whose Appropriation is prior to location of claims below point where water is diverted from stream have superior right.

Approved in Cole v. Richards Irr. Co., 27 Utah, 209, 101 Am. St. Rep. 962, 75 Pac. 378, following rule.

Pollution of Stream by mining. See note, 24 L. R. A. 67.

8 Cal. 339–340, DEIDESHEIMER v. BROWN.

Defendant Does not Waive Rights so as to cure defective summons by answering after denial of motion to dismiss.

Approved in Fisher v. Crowley, 57 W. Va. 319, 50 S. E. 424, following rule; Tomkin v. Woods, 125 Iowa, 375, 101 N. W. 138, holding service of summons sufficient.

Overruled in In re Clarke, 125 Cal. 392, 58 Pac. 23, holding defendant submits to jurisdiction of court by demurring after denial of motions made on special appearance.

Disapproved in Corbett v. Physicians' Casualty Assn., 135 Wis. 513, 115 N. W. 368, 16 L. R. A. (n. s.) 177, holding defendant who answers to merits after having raised question of defective summons cannot avail himself of any such defect on appeal.

Contest on Merits After Special Appearance, as waiver of objections to jurisdiction over person. See note, 16 L. R. A. (n. s.) 178.

8 Cal. 341-344, PEOPLE v. PAYNE.

Verbal Modification of Written Instruction asked is erroneous.

Approved in dissenting opinion in Boggs v. United States, 11 Okl. 144, 65 Pac. 929, majority holding conversation between court and jury after they had declared themselves unable to agree did not amount to giving oral instructions.

Distinguished in Williams v. United States, 158 Fed. 35, holding under Oklahoma statute oral instructions may be given when written instructions are waived by parties.

Where Trespasser Goes With Intent and Means to commit felony, if necessary, to accomplish intended purpose, owner of property may repel force by force to extent of killing the aggressor.

Approved in dissenting opinion in State v. Clarke, 51 W. Va. 473, 41 S. E. 211, majority holding bare trespass on property of another, not his dwelling, did not warrant owner in using deadly weapon in defense.

Expulsion of Trespasser. See note, 93 Am. St. Rep. 259.

Right to Use Deadly Weapon in resisting trespass. See note, 22 L. R. A. (n. s.) 726.

Homicide to Prevent Criminal or unlawful acts. See note, 67 L. R. A. 539, 540.

8 Cal. 344-347, MONTROSE v. CONNER.

Notice of Mechanic's Lien Considered and description of property held insufficient.

Approved in Union Lumber Co. v. Simon, 150 Cal. 758, 89 Pac. 1079, holding imperfect description by metes and bounds may be aided by other statements in notice.

8 Cal. 359-362, PEOPLE v. GEHR.

Fact that Juror Says He Could Try Cause impartially does not make him competent when he admits that it would require proof to change opinion then existing in his mind.

Approved in Shane v. Butte Electric Ry. Co., 37 Mont. 603, 97 Pac. 960, following rule.

8 Cal. 378-384, UPHAM v. SUPERVISORS OF SUTTER CO.

Legislature may Delegate Power to voters of county to select county seat.

Approved in State v. Long, 43 Mont. 413, 117 Pac. 107, construing act of 1909, creating Lincoln county and providing for county seat.

While Legislature cannot Delegate its general legislative powers, it can authorize other bodies to do those things which it cannot advantageously do itself.

Approved in In re Pfahler, 150 Cal. 91, 88 Pac. 278, 11 L. R. A. (n. s.) 1092, holding legislature could delegate power to make local legislation to municipalities.

Constitutionality of Local option laws. See note, 114 Am. St. Rep. 321.

8 Cal. 384–389, PALMER v. BOLING.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 339.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 706.

8 Cal. 390–392, PEOPLE v. HURLEY.

"Retreat to the Wall" in homicide. See note, 2 L. R. A. (n. s.) 70.

Standpoint of Determination as to danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 536, 544, 546.

Weakness of Mind as Affecting criminal responsibility. See note, 10 L. R. A. (n. s.) 1002.

8 Cal. 392–398, TUOLUMNE WATER CO. v. CHAPMAN.

Diversion of a Watercourse is a private nuisance.

Approved in Evans v. Ross (Cal.), 8 Pac. 89, holding action to restrain diversion of stream a suit in equity to abate nuisance.

Right of Prior Appropriation of water. See note, 30 L. R. A. 677.

8 Cal. 398–406, WALKER v. SEDGWICK.

Party Entering into Possession of Land of another in subordination to his title is estopped to question his grantor's title.

Approved in Gervaise v. Brookins, 156 Cal. 107, 103 Pac. 331, holding assignee of vendee estopped to question grantor's title.

Right of Grantee in Possession to question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 377.

Setoff on Mortgage Foreclosure. See note, 21 L. R. A. 322.

8 Cal. 412–418, PRICE v. WHITMAN.

Ten Days Allowed by Constitution for return of bills by governor are computed by excluding day on which bill is presented to governor.

Approved in State v. Sessions, 84 Kan. 859, 115 Pac. 642, applying rule in construing Constitution, article II, section 14.

First and Last Days in computation of time. See note, 49 L. R. A. 196, 197.

8 Cal. 423–424, PEOPLE v. DEMINT.

It is Error to Give Oral Instruction in criminal cases except by consent of parties.

Approved in dissenting opinion in Boggs v. United States, 11 Okl. 144, 65 Pac. 929, majority holding conversation between court and jury when they had declared themselves unable to agree did not amount to giving of instructions.

8 Cal. 424–435, LEE v. EVANS.

Maxim "Once a Mortgage always a mortgage." See note, 131 Am. St. Rep. 916.

8 Cal. 435–443, PEOPLE v. BUTLER.

Indictment may be Found by fourteen members of grand jury, nine being excluded.

Approved in Jones v. United States, 162 Fed. 422, 89 C. C. A. 303, holding improper discharge of juror did not vitiate indictment, the number necessary to find indictment remaining.

Number of Grand Jurors Necessary to concur in indictment. See notes, 28 L. R. A. 35; 27 L. R. A. 846.

Insulting Words or Conduct as provocation to homicide. See note, 4 L. R. A. (n. s.) 154.

8 Cal. 443–445, 68 Am. Dec. 338, WHITE v. TODD'S VALLEY WATER CO.

Right of Prior Appropriation of water. See note, 30 L. R. A. 673.

8 Cal. 445–446, SWIFT v. MUYGRIDGE.

There is No Necessity of Finding as to fact admitted by pleadings.

Distinguished in Newman v. Maldonado (Cal.), 30 Pac. 834, holding pleadings did not show such admission of fact as to render finding unnecessary.

8 Cal. 446–448, GINICA v. ATWOOD.

Where Plaintiff in Replevin Gives Statutory undertaking and takes property, and on nonsuit judgment is entered against him for costs and return of property, his sureties are liable for damages for failure to return property, but not for original taking, its value not being found by jury.

Approved in Donovan v. Aetna Indemnity Co., 10 Cal. App. 731, 103 Pac. 367, holding liable sureties on replevin bond, when only personal judgment was rendered in favor of defendant against plaintiff, and was unpaid.

Elements of Damages Recoverable on replevin bond. See note, 30 L. R. A. (n. s.) 367, 368, 369, 370.

8 Cal. 449–461, KANE v. COOK.

Judgment Against Nonresident on publication of summons is conclusive against property of which court has jurisdiction.

Approved in Salemonson v. Thompson, 13 N. D. 194, 101 N. W. 323, following rule.

Service of Process Sufficient to constitute due process of law. See note, 50 L. R. A. 578.

Judgments of Courts of other states. See note, 103 Am. St. Rep. 308, 309.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 857.

Demand as Condition of Action to recover money collected by agent. See note, 28 L. R. A. (n. s.) 632.

How Far Statutes will be Regarded as abrogating maxim that one cannot profit by his own wrong. See note, 25 L. R. A. 566.

8 Cal. 461–469, 68 Am. Dec. 340, BRYAN v. RAMIREZ.

Certificate of Acknowledgment of Notary must state specifically the fact of acknowledgment.

Approved in Lalakea v. Hilo Sugar Co., 15 Haw. 575, holding certificate did not show sufficiently fact of acknowledgment.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 563.

Possession of Land as notice of title. See note, 13 L. R. A. (n. s.) 51.

Rights of Partners Inter Se in partnership realty. See note, 28 L. R. A. 101.

8 Cal. 469–499, 68 Am. Dec. 345, BOSWELL v. LAIRD.

Respondeat Superior Does not Apply to Cases in which injury results from negligent acts of independent contractor.

Approved in Luce v. Holloway, 156 Cal. 163, 164, 103 Pac. 886, 887, holding general contractor liable for injury due to negligent acts of subcontractor on city contract under ordinance imposing such liability; Stewart v. California Imp. Co. (Cal.), 61 Pac. 281, holding city liable for injury caused by use of steam roller, hired with its engineer, from improvement company, injury being caused by engineer in proper exercise of duties; City of Elwood v. Laughlin, 29 Ind. App. 676, 65 N. E. 21, holding city by acceptance of street work so made as to constitute nuisance became liable for injury caused thereby; Winslow v. Commercial Bldg. Co., 147 Iowa, 242, 124 N. W. 321, holding owner of building liable for injury to his servant due to negligence of independent contractor in failing to properly attach fire-escape; Hoff v. Shockley, 122 Iowa, 723, 101 Am. St. Rep. 289, 98 N. W. 574, 64 L. R. A. 538, holding owner not liable for injury to passer-by caused by building contractor's failure to barricade and put out warning lights; Vogel v. Mayor etc. of New York, 92 N. Y. 19, 44 Am. Rep. 349, holding employer of contractor to do work which becomes a nuisance by reason of contractor's manner of doing it, becomes responsible, if he accepts work in that condition; Southern Oil Co. v. Church, 32 Tex. Civ. 327, 74 S. W. 798, holding oil company which furnished independent contractor with derrick for use in drilling its wells was not liable to servant of such contractor for injury caused by defect in derrick.

Distinguished in Colegrove v. Smith (Cal.), 33 Pac. 116, holding person who lays pipes in streets of city by means of independent contractor liable for injury resulting from negligence of contractor.

Exceptions to Rule That an Employer is not liable for acts of independent contractor. See note, 14 L. R. A. 830.

Liability of Contractor to Third Persons for defects after completion and acceptance. See note, 26 L. R. A. 506.

General Rules as to Absence of Liability of employer for torts of independent contractor. See note, 65 L. R. A. 630, 648.

Liability for Acts of Independent Contractor where injury is direct result of work contracted for. See note, 65 L. R. A. 744, 752, 754.

Liability of Employer After Assuming Control of subject matter of work executed by contractor. See note, 3 L. R. A. (n. s.) 602.

After Acceptance of Work, Liability of contractor for subsequent injuries ceases.

Approved in Thornton v. Dow, 60 Wash. 642, 111 Pac. 906, 32 L. R. A. (n. s.) 968, contractor not liable as for nuisance for insufficiency of balcony rail constructed according to specifications where building has been accepted by owner.

Who are Independent Contractors. See note, 65 L. R. A. 466.

8 Cal. 507–510, IN RE BUCHANAN'S ESTATE.

Pretermitted Heirs. See note, 115 Am. St. Rep. 586.

Tenancy by Entireties. See note, 30 L. R. A. 314.

8 Cal. 511-512, WELCH v. SULLIVAN.

Certificate of Acknowledgment Need not State that party was known personally to the notary.

Approved in Henderson v. Grewell, 8 Cal. 584, following rule.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 176.

8 Cal. 520-521, PHELAN v. SMITH.

One Court cannot Restrain Proceedings of another court of co-ordinate jurisdiction.

Approved in In re Burton, 5 Cof. Prob. 237, denying jurisdiction of equity court to review and set aside orders of probate court of another county in probate proceedings.

8 Cal. 522-538, MARZIOU v. PIOCHE.

Taking Distinct Appeals may Affect Question of costs, and party may take them subject to that condition.

Approved in Welch v. Farmers' Loan etc. Co., 165 Fed. 570, 91 C. C. A. 399, holding defendant may object to splitting cause of action on ground of costs.

When Authority of Agent is Coupled with an interest, it is irrevocable.

Approved in Harrison v. Rice, 78 Neb. 657, 111 N. W. 595, following rule; Shepard v. McNail, 122 Mo. App. 420, 99 S. W. 494, holding authority given agent to collect debts and recoup himself for sums previously due him from principal to be power coupled with interest and not revoked by death of principal.

Revocation of Power of Attorney. See note, 110 Am. St. Rep. 857.

Where First Advance Made by Agent to collect debts to principal was secured by pledge, proceeds from sale thereof must be applied to that advance.

Approved in Citizens' Sav. Bk. of Olin v. Wood, 134 Iowa, 236, 111 N. W. 931, holding debtor not entitled to marshaling of assets, but only creditors.

8 Cal. 540-545, NAGLEE v. MINTURN.

Pending Proceedings for Dissolution of Partnership and before dissolution and appointment of receiver, creditors may resort to adverse proceedings and so gain preference over other creditors.

Distinguished in Foster v. Field, 13 Okl. 239, 74 Pac. 193, holding by obtaining judgment and filing creditor's bill lien could not be obtained on assets of insolvent partnership in hands of receiver in suit for dissolution, superior to claims of creditors who have intervened.

8 Cal. 547-549, PEOPLE v. McMAKIN.

Drawing of Weapon Accompanied by Threat to Use is sufficient to justify finding of intent to commit bodily injury.

Approved in People v. Piercy, 16 Cal. App. 15, 116 Pac. 322, applying rule where pistol taken from accused before he had committed actual violence.

8 Cal. 549-551, SWAIN v. GRAVES.

An Appeal Bond will be so Construed as to carry out obvious intentions of parties.

Approved in Austin v. Union Paving etc. Co., 4 Cal. App. 615, 88 Pac. 733, correcting amount in stay bond from "$200.00, being double amount in judgment" to $2,000, where latter sum was double amount of judgment.

8 Cal. 554–562, VANCE v. BOYNTON.

Whether Presumption of Fraud Flowing from retention of chattel by vendor may be overcome. See note, 24 L. R. A. (n. s.) 1139.

8 Cal. 562–569, GRAY v. HAWES.

Judgment Void for Want of Jurisdiction of person is not cured by appearance of party for purpose of vacating it.

Approved in Rea v. Rea, 123 Iowa, 245, 98 N. W. 789, following rule.

8 Cal. 570–573, DIXEY v. POLLOCK.

Filing Complaint Signed by Attorney in fact who is not attorney at law is of no effect.

Distinguished in Canadian Bank of Commerce v. Leale, 14 Cal. App. 308, 309, 111 Pac. 760, holding filing of unassigned complaint tolled statute of limitations.

Right of Creditors to Question validity of attachment. See note, 35 L. R. A. 778.

Miscellaneous.—Cited in Faricy v. St. Paul Inves. & Sav. Society, 110 Minn. 317, 125 N. W. 678, to point that intervention is proper by person having claim or lien upon funds which are subject of action.

8 Cal. 575–580, TURNER v. McILHANEY.

Defeat of Proof may be Cured by Testimony introduced by adversary.

Approved in Minah Consol. Min. Co. v. Briscoe, 47 Fed. 279, applying rule in ejectment to recover mining ground.

8 Cal. 580–581, HARWOOD v. MARYE.

Ejectment by Executor or Administrator. See note, 136 Am. St. Rep. 83.

Miscellaneous.—Cited in Minah Consol. Min. Co. v. Briscoe, 47 Fed. 279, apparently miscited for 8 Cal. 575, to point that defendant may supply defect of proof in plaintiff's case.

8 Cal. 581–584, HENDERSON v. GREWELL.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 531, 572.

8 Cal. 592–598, McDEVITT v. SULLIVAN.

Tenant Should File Bill of Interpleader when there are adverse claimants for rent of property leased.

Approved in Spangler v. Spangler, 11 Cal. App. 325, 104 Pac. 997, following rule.

Right of Interpleader. See note, 91 Am. St. Rep. 607.

A Tenant may Show That His Landlord's Title has terminated.

Approved in Teich v. Arms, 5 Cal. App. 479, 90 Pac. 964, holding lessee in unlawful detainer action may show lessor's title has terminated, although estopped from denying title of lessor.

Estopped to Deny Landlord's Title. See note, 89 Am. St. Rep. 79.

Distinguished in Ashton v. Golden Gate Lumber Co. (Cal.), 58 Pac. 3, holding lessee under lessor holding under deed of trust cannot question lessor's title in action for rent accruing after death of beneficiary, when lessor could only make valid lease for life of beneficiary.

Unlawful Detainer. See note, 120 Am. St. Rep. 60.

8 Cal. 603–609, HORR v. BARKER.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 35.

8 Cal. 609–615, HORR v. BARKER.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 52.

8 Cal. 615–617, GOODWIN v. GARR.

Possession of Personal Property is prima facie evidence of ownership.

Approved in Churchill v. More, 4 Cal. App. 224, 88 Pac. 292, following rule.

Possession of Personal Property of Master by servant in possession by master.

Approved in Michaelson v. Fish, 1 Cal. App. 119, 81 Pac. 662, following rule.

8 Cal. 619–626, PORTER v. HERMANN.

Complaint Alleging Defendant Collected Moneys as attorney in fact or agent is insufficient to sustain conviction for fraud in appropriating such moneys to his own use.

Approved in Southern Railway Co. v. Bunt, 131 Ala. 596, 32 So. 509, holding allegation that engineer caused cars to move "with knowledge or notice" that plaintiff was between cars does not allege either knowledge or notice and states no cause of action for wantonness.

By Attorneys in Fact are Meant persons who are acting under special power created by deed.

Approved in White v. Furgeson, 29 Ind. App. 149, 64 N. E. 51, holding power of attorney is instrument by which authority of one person to act instead of another as attorney in fact is set out.

8 Cal. 626–638, McFARLAND v. PICO.

Promissory Note may be Protested in this state.

Approved in Stanley v. McElrath (Cal.), 22 Pac. 675, holding indorser may waive protest.

Miscellaneous.—Cited in Bank of Montpelier v. Montpelier etc. Co., 16 Idaho, 735, 102 Pac. 686, to point that waiver of protest and notice of protest of note is waiver of presentment and demand.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 9 CALIFORNIA.

9 Cal. 1–7, 70 Am. Dec. 617, BIRD v. LISBROS.

In Action of Ejectment Brought Solely on prior actual possession of plaintiff, defendant being mere trespasser, latter cannot justify by showing title outstanding in third person.

Approved in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987, following rule.

What Title or Interest will support ejectment. See note, 18 L. R. A. 785.

Distinguished in Atchison, Topeka etc. Ry. Co. v. Davenport, 65 Kan. 215, 216, 69 Pac. 198, holding where lands were devised to testamentary trustee's widow, who would have succeeded to half interest in lands if husband had died intestate, is necessary party to action for damages to lands brought by such trustees, in absence of showing whether she elected to take under will.

9 Cal. 7–13, LUDLUM v. FOURTH DISTRICT COURT.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 895.

9 Cal. 13–15, BARRETT v. TEWKSBURY.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 873, 875.

9 Cal. 15–16, PHELAN v. SAN FRANCISCO.

Reversal of Judgments. See note, 96 Am. St. Rep. 128.

9 Cal. 18–19, FREMONT v. MERCED MINING CO.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 907.

9 Cal. 19–21, PEOPLE ex rel. GALVIN v. JUDGE OF TENTH JUDICIAL DISTRICT.

No Jury can be Impaneled in mandamus cases.

Approved in Marler v. Wear, 117 Tenn. 246, 96 S. W. 448, following rule.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 75.

9 Cal. 21–23, KRITZER v. MILLS.

Extrinsic Evidence to Show who is liable as maker of note. See note, 20 L. R. A. 712.

9 Cal. 23–24, ORTMON v. DIXON.

On Appeal from Injunction, violation of injunction pending appeal is contempt of court.

Approved in Wilkinson v. Dunkley-Williams Co., 141 Mich. 412, 104 N. W. 773, following rule.

9 Cal. 24–30, ADAMS v. WOODS.

Filing of Bill by Partner for Dissolution and appointment of receiver does not prevent creditor from proceeding by attachment and gaining priority over other creditors.

Distinguished in Foster v. Field, 13 Okl. 239, 74 Pac. 193, holding by taking judgment and filing creditor's bill, lien cannot be obtained on partnership assets in hands of receiver in dissolution suit superior to claims of creditors who have intervened.

9 Cal. 30–32, PEOPLE v. WALLACE.

Indictment must Contain Statement of Facts constituting offense charged.

Approved in Ex parte Goldman (Cal. App.), 88 Pac. 821, holding insufficient indictment for receiving stolen property and concealing evidence about to be introduced; State v. Sly, 11 Idaho, 112, 113, 80 Pac. 1126, upholding as sufficiently particular information in murder case; State v. Rathbone, 8 Idaho, 167, 67 Pac. 187, upholding information charging larceny in taking two horses.

Charge of Time and Place in indictment for homicide. See note, 3 L. R. A. (n. s.) 1020, 1022, 1026, 1028.

9 Cal. 32–33, PEOPLE v. COX.

Indictment must Contain Statement of Facts constituting offense charged.

Distinguished in State v. Sly, 11 Idaho, 112, 113, 80 Pac. 1126, upholding sufficiency of murder indictment where substantial facts necessary to constitute crime appear; State v. Martin, 54 Or. 407, 103 Pac. 513, holding information for murder to be in substantial compliance with statute.

Charge of Time and Place in indictment for homicide. See note, 3 L. R. A. (n. s.) 1020, 1022, 1026, 1028.

9 Cal. 33–39, CURTIS v. RICHARDS.

Denial of Indebtedness, Without Denial of Facts from which indebtedness follows as conclusion of law, raises no issue.

Approved in Fox v. Monahan, 8 Cal. App. 710, 97 Pac. 766, holding allegation of indebtedness without stating facts constituting same is subject to general demurrer.

When Facts of Verified Complaint are within defendant's knowledge, he must answer positively, and denial upon information and belief will be treated as evasion.

Approved in Zany v. Rawhide Gold Min. Co., 15 Cal. App. 375, 114 Pac. 1027, following rule.

When Denials on Information and Belief are permissible. See note, 133 Am. St. Rep. 109.

Denials upon Information and Belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 780.

Appellant Need not Join with sureties in undertaking on appeal.

Approved in Elliott v. Bozorth, 52 Or. 395, 97 Pac. 633, holding joint appeal perfected when joint undertaking on appeal was executed by one appellant and sureties although not signed by other appellant.

9 Cal. 46–51, DICKINSON v. MAGUIRE.

Threatened Violence is Sufficient Ground for forcible detainer suit.

Approved in Wegner v. Lubenow, 12 N. D. 105, 95 N. W. 446, following rule.

Right to Civil Action for Forcible Entry and detainer. See note, 121 Am. St. Rep. 372, 399.

9 Cal. 54–56, PEOPLE v. LLOYD.

In Indictment for Murder It must be Alleged wound was mortal and that party died of the wound.

Approved in State v. Keerl, 29 Mont. 512, 101 Am. St. Rep. 579, 75 Pac. 363, holding information for murder defective in not directly alleging death resulted from wound; State v. Sly, 11 Idaho, 112, 113, 80 Pac. 1126, holding information for murder sufficiently averred death resulted from wounds.

9 Cal. 56–59, POLK v. COFFIN.

Ferryman as a Common Carrier. See note, 68 L. R. A. 159.

9 Cal. 59–64, 70 Am. Dec. 621, HUMPHREYS v. McCALL.

Right of Prior Appropriation of water. See note, 30 L. R. A. 677.

9 Cal. 67–68, CANEY v. SILVERTHORNE.

Right to New Trial is Waived by failure to give notice in statutory time of intention to move for new trial.

Approved in dissenting opinion in Kerns v. Dean (Cal.), 6 Pac. 705. majority granting new trial after lapse of statutory time.

9 Cal. 71–72, HILL v. KEMBLE.

Sureties on Official Bond of Officer are only responsible for his official acts, and not his private debts.

Approved in Hewlett v. Beede, 2 Cal. App. 566, 83 Pac. 1087, holding sureties of one of two coexecutors who have been compelled to pay deficit of other who is deceased cannot maintain an individual action for contribution against sureties on bond of other coexecutor; Wright v. Deaver, 52 Tex. Civ. App. 133, 114 S. W. 166, where justice had collected costs for county attorney, who told him he might use money, sureties not consenting were absolved.

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 547.

9 Cal. 76–77, WILLIAMS v. GREGORY.

Notice of Intention to Move for new trial may be waived.

Approved in Gibson v. Berryman, 14 Cal. App. 333, 111 Pac. 927, following rule.

9 Cal. 77, GORHAM v. TOOMEY.

A Court cannot **Restrain Execution** of judgment of another court of co-ordinate jurisdiction.

Approved in In re Burton, 5 Cof. Prob. 237, denying jurisdiction of court of equity to review and set aside orders of probate court of another county in probate proceedings.

9 Cal. 78–81, STROUT v. NATOMA WATER ETC. CO.

Lien of Attaching Creditor on Stock Assigned by his debtor to third party is merged in higher right created by transfer on books to name of third party when he purchases judgment obtained by such creditor.

Criticised in National Bank of the Pacific v. Western Pac. Ry. Co., 157 Cal. 577, 578, 108 Pac. 678, holding transfer of unregistered stock valid as against mere levy of attachment or execution by creditors against person in whose name it remains on books.

Validity of Pledge or Other Transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers. See note, 67 L. R. A. 669.

9 Cal. 81–85, 70 Am. Dec. 638, ROBINSON v. MAGEE.

Obligation of a Contract cannot be impaired by statute.

Approved in American Assn. v. Innis, 109 Ky. 611, 60 S. W. 393, holding statute requiring surveys made prior to its taking effect to be returned in one year impairs obligation of contract.

Effect of Statutes Making Pre-existing contracts illegal. See note, 120 Am. St. Rep. 470.

9 Cal. 85–89, PEOPLE v. FOWLER.

Constitutionality of Statute Denying Right of appeal in certain classes of cases. See note, 19 L. R. A. (n. s.) 377, 379, 381.

9 Cal. 96–97, MARSH v. MARKS.

Wife is Necessary Party in Suit to foreclose mortgage on homestead in order to affect her interest.

Approved in Houssels v. Taylor, 24 Tex. Civ. App. 75, 58 S. W. 191, holding wife should be joined in suit to foreclose tax lien on homestead.

9 Cal. 97–103, DOMINGO v. GETMAN.

Maker of Fraudulent Note may Sue in equity for cancellation assignor after maturity without recourse and his assignee.

Approved in dissenting opinion in Northwestern Mut. Life Ins. Co. v. Amos, 136 Mich. 216, 98 N. W. 1021, majority refusing to allow suit in equity to cancel insurance policies on ground that no fraud was alleged.

9 Cal. 107–112, WARE v. ROBINSON.

Judgment Obtained by Publication may be set aside for fraud where affidavit on which publication is made is false in point of fact.

Approved in Hanley v. Hanley, 4 Cof. Prof. 479, equity may relieve against homestead procured to be set apart by fraud.

Service of Process Sufficient to constitute due process of law. See note, 50 L. R. A. 588.

9 Cal. 112–115, PEOPLE ex rel. BOSQUI v. CROCKETT.

Compelling Issue of Stock. See note, 133 Am. St. Rep. 725.

9 Cal. 119–123, McGREARY v. OSBORNE.

Tenant Who Put Up Machinery in leased house by means of bolts has right to remove it.

Approved in Gordon v. Miller, 28 Ind. App. 615, 63 N. E. 776, holding machinery affixed to building by lessee could be mortgaged as personalty.

Intention of Mechanic's Lien Act was to give mechanics and artisans lien for all work done by them on any description of property, and upon whatever interest person had who caused work to be done.

Approved in Williamson v. Shank, 41 Ind. App. 517, 83 N. E. 642, holding materialman entitled to lien on building constructed on lot which person for whom house was built occupied as tenant at will.

Mechanics' Liens upon Buildings distinct from land. See note, 62 L. R. A. 381.

9 Cal. 123–129, BELLOC v. ROGERS.

No Sale of Any Property of an Estate is valid unless made under order of probate court.

Approved in Jones v. Wheeler, 23 Okl. 775, 101 Pac. 1114, holding executors could not transfer notes of deceased except under order of court.

9 Cal. 130–137, CHASE v. SWAIN.

It is No Ground for Setting Aside Judgment by default that defendant was ignorant of the law requiring answer in ten days.

Approved in People v. Simmons, 7 Cal. App. 563, 95 Pac. 49, holding court cannot extend statutory time to serve draft of bill of exceptions without good cause shown on affidavit.

9 Cal. 173–175, WICKS v. LUDWIG.

It is Essential to Validity of Judgment that it be rendered by a court of competent jurisdiction at the time and place, and in the form prescribed by law.

Cited in Hanley v. Medford, 56 Or. 183, 108 Pac. 193, arguendo.

Power of Officials to Act, as determined by place of performance. See note, 33 L. R. A. 88.

View by Jury. See note, 42 L. R. A. 386.

9 Cal. 181–198, 70 Am. Dec. 643, HALLECK v. GUY.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 242, 243.

Whether, When, and How a purchaser at judicial sale may object to title. See note, 135 Am. St. Rep. 918.

9 Cal. 198–202, CANY v. HALLECK.

Where Party Receives Regular Monthly Salary for services, presumption is that all services similar to regular duties are rendered for such pay.

Approved in Jerome v. Wood, 39 Colo. 202, 88 Pac. 1069, holding evidence showed promise to pay extra for additional services.

Right of Servant to Remuneration for extra work. See note, 30 L. R. A. (n. s.) 656.

9 Cal. 211–212, MUSGROVE v. PERKINS.

Granting or Refusing a Continuance rests in sound discretion of trial court.

Approved in State v. Phillips, 18 S. D. 8, 98 N. W. 174, following rule; Sheldon v. Landwehr, 159 Cal. 781, 116 Pac. 45, upholding refusal of continuance for illness of defendant who was also witness, where plaintiff had attached mining stock which had been advertised to be sold for nonpayment of assessment; Abrook v. Ellis, 6 Cal. App. 454, 92 Pac. 397, holding motion for continuance properly refused.

9 Cal. 213–229, PEABODY v. PHELPS.

Action for False Representations as to Title in vendor of real estate cannot be maintained by vendee in possession under conveyance with express covenants.

Approved in Dunn v. Mills, 70 Kan. 660, 79 Pac. 148, holding vendee in possession could not resist payment of purchase price on ground of failure of title of vendor; Bianconi v. Smith, 3 Ariz. 326, 28 Pac. 881, holding conplaint in suit for damages for fraudulent representations as to title by defendant was not sufficient in not alleging representations were in regard to matters peculiarly with defendant's knowledge.

Necessity of Request to Defend in order to bind covenantor by decree against grantee. See note, 13 L. R. A. (n. s.) 734.

9 Cal. 234–236, PEOPLE v. WINKLEE.

Indictment for Larceny States Value of property if expressed in dollars without stating "lawful money of United States."

Approved in State v. Quackenbush, 98 Minn. 521, 108 N. W. 956, holding "good and lawful money under laws of state" means money in common circulation.

9 Cal. 246–247, McCANN v. LEWIS.

Burden of Proof in Action on negotiable instrument by purchaser. See note, 17 L. R. A. 326.

Performance of Existing Contract obligation as consideration for new promise. See note, 34 L. R. A. 34.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 536, 538.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 754, 813.

9 Cal. 247, WING v. OWEN.

Party Waives Right to New Trial by failure to file statement setting forth grounds on which he intends to rely.

Approved in dissenting opinion in Kerns v. Dean (Cal.), 6 Pac. 705, majority granting new trial.

9 Cal. 250–251, PEOPLE v. MacKINLEY.

Larceny of Own Property. See note, 88 Am. St. Rep. 596.

9 Cal. 251-259, 70 Am. Dec. 650, GERKE v. CALIFORNIA STEAM NAV. CO.

Declaration of Agent will Bind Principal if made during agency and at very time of transaction.

Approved in Durkee v. Central Pac. R. Co. (Cal.), 9 Pac. 101, holding admissible as res gestae statements of engineer three minutes after injury in action for injury to child caused by train.

Declaration and Acts of agents. See note, 131 Am. St. Rep. 331.

One is Bound to Use His Own so as not to injure that which belongs to others.

Approved in Fleming v. Lockwood, 36 Mont. 388, 122 Am. St. Rep. 375, 92 Pac. 963, 14 L. R. A. (n. s.) 628, holding owner of irrigation ditch liable for injury to another caused by seepage from ditch.

9 Cal. 259-260, PEOPLE v. WILSON.

Effect of Excessive Sentence. See note, 45 L. R. A. 156.

9 Cal. 262-267, ROBERTS v. LANDECKER.

Debtor of Execution Debtor is not Directly Liable to execution creditor, as is garnishee to judgment debtor.

Approved in Nordstrom v. Corona City Water Co., 155 Cal. 211, 132 Am. St. Rep. 81, 100 Pac. 244, holding lien is fixed by garnishment, and death of judgment debtor, though prior to suit against garnishee, does not prevent procedure against garnishee by executor.

Judgment Debtor may Bring Suit directly against garnishee on his liability under garnishment for value of goods garnisheed if they are disposed of.

Approved in Finch v. Finch, 12 Cal. App. 282, 283, 107 Pac. 597, holding court may order garnishee to pay over money of judgment debtor garnisheed, although garnishee had already paid over to sheriff on execution on judgment in another suit levied after the garnishment.

Privilege of Examination of Garnishee under oath is for benefit of plaintiff.

Approved in Brooks v. Fields, 25 Okl. 430, 106 Pac. 829, holding sufficient answer of garnishee without oath when not demanded by plaintiff.

9 Cal. 268-271, GARNER v. MARSHALL.

Want of Express Statement of Facts in complaint is cured by verdict, provided complaint contains terms sufficiently general to comprehend facts in reasonable intendment.

Approved in Mini v. Mini (Cal.), 45 Pac. 1044, holding allegation in divorce complaint that plaintiff is possessed of "considerable property, real and personal, situate in state of California," sufficient to admit evidence of definite description, no special demurrer being interposed; Hollister v. State, 9 Idaho, 660, 77 Pac. 341, upholding complaint in condemnation suit in absence of special demurrer for uncertainty and sustaining default judgment thereon.

What Title or Interest will support ejectment. See notes, 116 Am. St. Rep. 570; 18 L. R. A. 786.

9 Cal. 271-273, BACON v. SCANNELL.

Continued Change of Possession by vendee of goods sold is essential to bar attachment at suit of creditor of vendor.

Approved in Reynolds v. Beck, 108 Mo. App. 203, 83 S. W. 297, upholding, as against creditor of vendor, sale of carriage and team which was later kept by vendor for vendee at his livery barn.

9 Cal. 273–276, PEOPLE v. STEVENTON.

Indictment for Murder need not describe weapon used.

Approved in Molina v. Territory, 12 Ariz. 16, 95 Pac. 103, upholding indictment not alleging means or weapon by which wound was inflicted; McHugh v. Territory, 17 Okl. 5, 86 Pac. 434, and Heatley v. Territory of Oklahoma, 15 Okl. 74, 78 Pac. 80, both upholding indictment which stated offense in ordinary language; Flowers v. State, 4 Okl. Cr. 323, 111 Pac. 676, holding allegation that defendant shot at another with a pistol sufficiently averred pistol was loaded; State v. Sly, 11 Idaho, 113, 80 Pac. 1126, holding sufficient indictment stating substantial facts necessary to constitute crime.

9 Cal. 277–278, MURHOLZ v. SESSIONS.

Judgment or Order will not be Disturbed on appeal prosecuted by party who consented thereto in court below.

Approved in Hibernia Savings etc. Society v. Waymire, 152 Cal. 287, 92 Pac. 646, and Gibson v. Berryman, 14 Cal. App. 333, 111 Pac. 927, both following rule.

9 Cal. 278–286, TISSOT v. DARLING.

Complaint Against Sureties on Appeal Bond need not aver execution was issued, but nonpayment of judgment can be shown without it.

Approved in Palmer v. Caywood, 64 Neb. 376, 89 N. W. 1035, following rule.

9 Cal. 286–294, PEOPLE v. EDWARDS.

Official Bond Given as Tax Collector does not embrace liability for breach of duties as sheriff when office is held by same person.

Approved in Milwaukee v. United States Fidelity etc. Co., 145 Wis. 607, 129 N. W. 787, holding bond given as clerk of municipal court did not cover duties as clerk of district court.

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 505, 551, 553.

Defect in Approval of Official Bond cannot be set up as defense in action on bond against sureties.

Approved in Deer Lodge Co. v. United States Fidelity etc. Co., 42 Mont. 327, 112 Pac. 1064, following rule.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 190.

9 Cal. 298–313, PEOPLE v. PLUMMER.

Court may Postpone Consideration of Motion to change venue on ground that fair trial cannot be secured until attempt is made to impanel jury.

Approved in People v. Staples, 149 Cal. 412, 86 Pac. 888, following rule; State v. Dwyer, 29 Nev. 427, 91 Pac. 305, holding trial court abused discretion in refusing change of venue.

Objection to Competency of Juror may first be taken after verdict.

Approved in Territory v. Chartz, 4 Ariz. 9, 32 Pac. 167, and State v. Mott, 29 Mont. 297, 300, 303, 74 Pac. 730, 731, 732, both holding

bias of juror against defendant concealed upon his voir dire and discovered after verdict was ground for new trial.

Overruled in People v. Amer, 151 Cal. 305, 90 Pac. 699, holding Penal Code, section 1181, enumerates all grounds upon which new trial may be had.

New Trial for Disqualification of juror. See note, 18 L. R. A. 478.

Miscellaneous.—Cited in People v. Plummer, 12 Cal. 256, on another appeal.

9 Cal. 315–321, ALDERSON v. BELL.

Judicial Notice. See note, 4 L. R. A. 34.

9 Cal. 322–324, OWENS v. JACKSON.

Title to Swamp Lands Under Act of 1850 passed to state directly without patent.

Approved in Foss v. Johnstone, 158 Cal. 130, 131, 110 Pac. 299, land covered by permanent non-navigable lake situated on government land does not come within grant of swamp lands to state.

9 Cal. 328–335, CLAY v. WALTON.

Promise of Owner to be Responsible to Plaintiff for bricks furnished to builder who had contract to build house is within statute of frauds.

Distinguished in Doe v. Allen, 1 Cal. App. 566, 82 Pac. 571, holding promise of consignee to pay freightage on consignment of coal in consideration of its being delivered free of lien for freightage comes within exceptions in Code of Civil Procedure, section 2974.

Contemporary Promise to Pay where benefit inures to another as within statute of frauds. See note, 15 L. R. A. (n. s.) 220.

9 Cal. 338–341, REYNOLDS v. HARRIS.

Where Party Orally Contracts for Purchase of house and furniture and enters into possession, and vendor subsequently fails to make conveyance, vendee may quit premises and return the personalty.

Disapproved in Frey v. Stangl, 148 Iowa, 525, 125 N. W. 869, vendee cannot repudiate oral agreement for sale of lands and recover money paid in part performance if vendor is ready and able to perform.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 62.

9 Cal. 341–351, MYERS v. ENGLISH.

Constitutional Provision for Salaries of District Judges does not avoid necessity for appropriation for such salaries by legislature.

Approved in Menefee v. Askew, 25 Okl. 626, 107 Pac. 160, holding constitutional provision for reimbursement of game warden for expenses is not valid appropriation.

Requisites of Appropriation for official salary or expenses. See notes, 16 L. R. A. (n. s.) 632.

Self-executing Constitutional Provisions. See note, 16 L. R. A. 285.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 38.

9 Cal. 353–363, BRANGER v. CHEVALIER.

What Constitutes an Account Stated. See note, 27 L. R. A. 818.

9 Cal. 363–365, COFFEE v. MEIGGS.

Where from Nature of Contract it is not practicable to ascertain amount of damage sustained by breach, measure is price agreed to be paid.

Approved in Scheinesohn v. Lemonek, 84 Ohio, 434, 95 N. E. 915, allowing attorney compensation as per contract where client, without cause and without giving sufficient time to collect, took away from attorney account placed for collection.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 74.

9 Cal. 365–421, 70 Am. Dec. 655, McMILLAN v. RICHARDS.

Sale of Property Under Mortgage Foreclosure is not consummated until deed is given by sheriff.

Approved in Mullenary v. Burton, 3 Cal. App. 265, 84 Pac. 160, holding certificate of sale to plaintiff on execution insufficient to show title in plaintiff, and estate remained in judgment debtor until execution of sheriff's deed; North Dakota etc. Cattle Co. v. Serumgard, 17 N. D. 488, 138 Am. St. Rep. 717, 117 N. W. 462, holding sale in exercise of power in mortgage which conveys title of mortgagor is sale as completed by execution of deed at expiration of period allowed for redemption.

Right to Strict Foreclosure. See note, 20 L. R. A. 371.

Bank is Liable on Certificate of Deposit to holder of certificate on presentation, not to refund to original depositor.

Approved in Woltere v. Rossi (Cal.), 57 Pac. 75, following rule.

Provision That Actions Against Public Officer for acts done by him in virtue of his office may be brought where cause or some part thereof arose applies only to affirmative acts, and not to neglects of official duty.

Approved in Bonestell, Richardson & Co. v. Curry, 153 Cal. 420, 95 Pac. 887, and State Commission in Lunacy v. Welch, 154 Cal. 777, 778, 99 Pac. 182, both holding Code of Civil Procedure, section 393, subdivision 2, applies only to affirmative acts interfering with personal rights or property.

Attachment cannot Reach Money deposited in bank upon which negotiable certificates of deposit have been issued.

Approved in De Ruiter v. De Ruiter, 28 Ind. App. 13, 91 Am. St. Rep. 107, 62 N. E. 102, reaffirming rule.

Where Realty Subject to Lien is Sold under execution to judgment creditor for less than amount of judgment, judgment creditor still has lien on property for balance, and redemptioner cannot redeem without paying full amount of judgment.

Overruled in McQueeney v. Toomey, 36 Mont. 291, 292, 122 Am. St. Rep. 358, 92 Pac. 563, holding in such case one who subsequently purchases judgment debtor's interest and redeems takes free of lien for deficiency judgment.

Mortgage is Mere Security for Debt and vests no title either before or after condition broken.

Approved in Stearns-Rogers Co. v. Aztec Co., 14 N. M. 332, 93 Pac. 714, holding mortgagee had no such interest in mortgaged prop-

erty as to require him to post notice of nonliability under mechanic's lien law.

Where Money is Paid Under Compulsion, law raises obligation to refund.

Approved in Gaar, Scott & Co. v. Shannon, 52 Tex. Civ. App. 643, 115 S. W. 364, holding as voluntary payment of illegal corporation tax on simple demand of Secretary of State.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 416.

Maxim "Once a Mortgage always a mortgage." See note, 131 Am. St. Rep. 915.

Miscellaneous.—Cited in Marshall v. Shafter, 32 Cal. 189, 192, 197, 200, referring historically to principal case.

9 Cal. 423–426, SUBLETTE v. TINNEY.

Demurrer Lies to Bill in Equity barred upon face by limitations.

Approved in Phillips v. Piney Coal Co., 53 W. Va. 548, 97 Am. St. Rep. 1040, 44 S. E. 777, holding bad on demurrer bill showing unreasonable laches.

Action for Relief on Ground of Fraud must Begin within three years of discovery of fraud, and complaint must allege discovery within that time if fraud occurred earlier.

Approved in Smith v. Irving (Cal.), 22 Pac. 171, holding bad on demurrer complaint alleging fraud thirty years before, but not alleging time of discovery.

9 Cal. 426–430, NAGLE v. MACY.

Mortgage Does not Vest Any Estate in land in mortgagee, as it is mere security for debt.

Approved in Stearns-Rogers Mfg. Co. v. Aztec Gold Min. etc. Co., 14 N. M. 332, 93 Pac. 714, following rule.

Execution Sale Irregularly Made is not void, but voidable, and good until regularly set aside.

Approved in Bechtel v. Wier, 152 Cal. 447, 93 Pac. 77, 15 L. R. A. (n. s.) 459, following rule.

What Title or Interest will support ejectment. See note, 18 L. R. A. 784.

Right to Strict Foreclosure. See note, 20 L. R. A. (n. s.) 372.

9 Cal. 430–452, BAGLEY v. McMICKLE.

Where Better Evidence is Withheld and secondary evidence offered, the better evidence is presumed to be adverse.

Approved in Del Campo v. Camarillo, 154 Cal. 660, 98 Pac. 1056, following rule.

Presumption Against the Spoliator of Evidence. See note, 34 L. R. A. 583.

9 Cal. 453–475, SAN FRANCISCO GAS CO. v. SAN FRANCISCO.

Courts may Render Judgment Against Municipalities on executed contracts, although officers entering into same were not authorized thereto.

Approved in Goldtree v. City of San Diego, 8 Cal. App. 510, 97 Pac. 218, holding court could render judgment against certain fund in city treasury, in suit on laborer's lien by laborers under subcontractor

who had abandoned his contract; Town of Tahlequah v. Guinn, 5 Ind. Ter. 497, 82 S. W. 892, upholding power of city to grant by ordinance exclusive privilege of supplying water for sixty years.

Assumpsit Lies to Recover for Labor rendered to and accepted by municipal corporation.

Approved in dissenting opinion in Allsman v. Oklahoma City, 21 Okl. 145, 95 Pac. 469, 16 L. R. A. (n. s.) 511, majority holding action will not lie to recover unnamed portion of liquor license paid to city when prohibitory act terminated license.

Liability of Municipality or Other Public Corporation on implied contract. See note, 27 L. R. A. (n. s.) 1117, 1118.

Rule That Answer to Verified Complaint must deny allegations either positively or on information and belief applies to corporations as well as to individuals.

Approved in Zany v. Rawhide Gold Min. Co., 15 Cal. App. 376, 377, 114 Pac. 1027, holding insufficient answer of corporation denying allegations of verified complaint when it had knowledge of facts alleged.

Municipal Corporation has Double Character, public and political, and private, in which it exercises powers of individual or private corporation.

Approved in Davoust v. City of Alameda, 149 Cal. 71, 73, 84 Pac. 761, 762, 5 L. R. A. (n. s.) 536, holding city liable for injury arising from exercise of its mere proprietary and private rights.

What Municipal Corporations are Answerable for injuries due to defects in streets and other public places. See note, 108 Am. St. Rep. 169.

Liability of Municipality for Negligent Operation of electric light plant. See note, 5 L. R. A. (n. s.) 536.

City may Become Liable on Executed Contract although not authorized by ordinance.

Approved in Kerker v. Bocher, 20 Okl. 752, 95 Pac. 990, upholding assessment for completed street improvement contested on ground it was not legally authorized; Ogden City v. Waterworks & Irr. Co., 28 Utah, 42, 76 Pac. 1074, where water system was constructed under contract to furnish water to city, decree holding contract void and declaring city owner of works would amount to taking private property for public use without compensation; Whitworth v. Webb City, 204 Mo. 603, 103 S. W. 93, holding city could not refuse to pay for sewer constructed in substantial compliance with terms of contract therefor, although formal acceptance was refused.

Overruled in Paul v. Seattle, 40 Wash. 299, 300, 82 Pac. 603, fact that benefit of irregularly executed contract has been received by city did not estop it from denying liability thereon.

9 Cal. 475–477, WASHBURN v. WASHBURN.

Where Necessaries of Life are Provided by either spouse, there is no willful neglect such as is contemplated by statute, as ground for divorce.

Approved in Locke v. Locke, 153 Cal. 59, 94 Pac. 245, holding while wife supported herself, she had no cause of action for divorce on ground of nonsupport.

What is Community Property. See notes, 126 Am. St. Rep. 115; 4 Cof. Prob. 57.

9 Cal. 479–499, WELLS v. STOUT.

Validity and Effect of separation agreements. See notes, 83 Am. St. Rep. 862, 863, 868, 871, 875; 12 L. R. A. (n. s.) 850, 852.

Attacks by Creditors on Conveyances made by husbands to wives. See note, 90 Am. St. Rep. 517.

9 Cal. 499–500, WHITWELL v. THOMAS.

Test of Materiality of Averment in Pleading is whether averment could be stricken out and have pleading sufficient.

Approved in Zany v. Rawhide Gold Min. Co., 15 Cal. App. 377, 114 Pac. 1027, holding immaterial allegations as to assignment and reassignment of claim sued on.

9 Cal. 500–501, WILLIAMSON v. BLATTAN.

Failure to Aver in Complaint in Action on undertaking to release property from attachment that property was released is fatal and may be taken advantage of on general demurrer.

Approved in Burke v. Maguire, 154 Cal. 462, 98 Pac. 24, holding failure to aver in complaint that claim in contract against estate has been filed with administrator is subject of general demurrer.

9 Cal. 502–529, EX PARTE NEWMAN.

Sabbath Observance Act of 1858 does not conflict with Constitution, sections 1 and 4 (dissenting opinion).

Cited in Ex parte Kair, 28 Nev. 147, 113 Am. St. Rep. 817, 80 Pac. 466, upholding eight hour law; State v. Dolan, 13 Idaho, 709, 711, 712, 92 Pac. 999, 1000, 1002, 14 L. R. A. (n. s.) 1259, upholding Sunday law of 1907; dissenting opinion in Walling v. Bown, 9 Idaho, 751, 76 Pac. 322, majority upholding "two mile limit" law.

Constitutionality of Sunday Law. See note, 22 L. R. A. 721.

Provision of Constitution as to Title of legislative acts is directory.

Cited in Clark v. Los Angeles, 160 Cal. 41, 116 Pac. 726, arguendo.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 455, 456.

9 Cal. 529–538, THRALL v. SMILEY.

Objection to Juryman That His Name was not on venire returned by sheriff cannot be made after verdict.

Approved in People v. Duncan, 8 Cal. App. 197, 96 Pac. 419, holding substitution of father for son on jury without objection cannot be objected to after verdict.

Where Declarations of Party in Conversation are given in evidence, whole conversation must be taken together, but jury are not bound to give same weight to all parts of it.

Approved in Nitro Powder Co. v. Kearns, 50 Colo. 10, 114 Pac. 399, applying rule in action for goods sold and delivered.

Justification in Slander and Libel. See note, 91 Am. St. Rep. 293.

Truth as Defense to Libel or Slander. See note, 21 L. R. A. 511.

9 Cal. 554–556, SUMMERS v. DICKINSON.

Grant to State to Swamp Land Act of 1850 was in praesenti.

Approved in Foss v. Johnstone, 158 Cal. 130, 110 Pac. 299, land covered by permanent non-navigable lake situated on government land does not come within grant of swamp lands to state.

9 Cal. 557–562, HARTMAN v. BURLINGAME.

Duty Owed by Creditor to Survey. See note, 115 Am. St. Rep. 93.

9 Cal. 562–564, DOUGLASS v. KRAFT.

Where Property Connected has fixed value, measure of damage is that value with legal interest from date of conversion.

Approved in Austin v. Vanderbilt, 48 Or. 211, 120 Am. St. Rep. 800, 85 Pac. 521, 6 L. R. A. (n. s.) 298, following rule; Lynch v. McGhan, 7 Cal. App. 134, 93 Pac. 1044, holding that interest on value of connected property is in lieu of value of use; Salt River Canal Co. v. Hickey, 4 Ariz. 243, 36 Pac. 172, holding measure of damages for conversion of corporate stock is value at time of conversion.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 29.

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 768, 769.

9 Cal. 568–571, PACKER v. HEATON.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 410.

9 Cal. 573–575, HAYDEN v. DAVIS.

Duty of Carrier to Recognize Demands of stranger on property delivered for transportation. See note, 12 L. R. A. (n. s.) 257, 259.

9 Cal. 576–584, PEOPLE v. DOLAN.

Indictment Following Language of statute is sufficient.

Approved in State v. Sly, 11 Idaho, 113, 80 Pac. 1126, upholding indictment on ground it stated substantial facts necessary to constitute offense.

Indictment for Murder in First Degree is good, as that offense includes manslaughter.

Approved in State v. Cream, 43 Mont. 54, 114 Pac. 605, upholding conviction for manslaughter under information for murder in first degree.

Conviction of Lower or Different Degree in prosecution for homicide. See note, 21 L. R. A. (n. s.) 2, 4.

9 Cal. 584–588, 70 Am. Dec. 676, NASH v. HERMOSILLO.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 52, 57.

9 Cal. 589–591, O'KEIFFE v. CUNNINGHAM.

One Claiming in Subordination to His Grantor's Title cannot question it.

Approved in Gervaise v. Brookins, 156 Cal. 107, 103 Pac. 331, holding lessee of vendee holding under contract to purchase cannot dispute vendor's title.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 771.

9 Cal. 591–593, KENDALL v. MILLER.

Guardian cannot Sell any Property of ward without order of court.

Approved in Gentry v. Bearss, 82 Neb. 791, 118 N. W. 1079, following rule.

Common-law Powers of Guardians. See note, 89 Am. St. Rep. 265, 268, 301.

9 Cal. 600-607, McGEE v. STONE.

Where Boundary Line is Fixed by Agreement of owners, although fixed by mistake as to true boundaries, subsequent purchasers take with view to this line.

Approved in Montana Min. Co. v. St. Louis Min. etc. Co., 183 Fed. 65, holding boundary line agreed upon by adjacent owners binding upon purchaser; Taylor v. Reising, 13 Idaho, 241, 89 Pac. 948, holding parties buying land in township which had been resurveyed by water company under contract to furnish water in township when government surveys were obliterated were found by such new survey; Turner v. Creech, 58 Wash. 443, 108 Pac. 1085, holding location of line by common grantor binding upon grantees.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 682.

9 Cal. 607-615, UHLFELDER v. LEVY.

One Court cannot Restrain by Injunction proceedings of another court of co-ordinate jurisdiction.

Approved in Hawkeye Ins. Co. v. Huston, 115 Iowa, 630, 89 N. W. 32, following rule; In re Burton, 5 Cof. Prob. 237, denying jurisdiction of court of equity to review and set aside order of probate court of another county in probate proceedings.

Injunctions Against Judgments entered on confessions. See note, 30 L. R. A. 237.

9 Cal. 616-641, GRAY v. PALMER.

"Claim" is synonymous with legal demand.

Approved in Knutsen v. Krook, 111 Minn. 357, 127 N. W. 13, following rule; In re Estate of Gladough, 1 Alaska, 654, holding claim based on mining partnership properly presented to administrator of estate.

Failure to Serve Summons on Minor under fourteen as required by statute is not waived by appearance of mother in her own behalf.

Approved in Cummings v. Landes, 140 Iowa, 86, 117 N. W. 24, holding parent or guardian could not waive timely service of notice on infant under fourteen.

Surviving Partner may, by Decree in Equity, have realty, title to which was in name of deceased partner, declared to belong to partnership.

Approved in Chase v. Angell, 149 Mich. 8, 118 Am. St. Rep. 568, 108 N. W. 1108, holding land held in name of one partner and belonging to partnership could be divided upon dissolution by compulsory partition.

Position of Surviving Partners in partnership realty. See note, 28 L. R. A. 132.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 450, 477.

Rights of Partners Inter Se in partnership realty. See note, 26 L. R. A. 87.

Rights of Tenants in Dower and by the curtesy, and of heirs, etc., of deceased partner, in partnership realty. See note, 27 L. R. A. 343, 348.

Decree Settling Partnership Affairs and ordering account is interlocutory.

Approved in Doudell v. Shoo, 159 Cal. 453, 114 Pac. 581, following rule.

Validity of Parol Partnership to deal in real property. See notes, 4 L. R. A. (n. s.) 428; 16 L. R. A. 747.

9 Cal. 642–643, PEARKES v. FREER.

Objection to Venue on Grounds Appearing in complaint must be made at or before filing of demurrer.

Approved in Smith v. Pelton Water Wheel Co., 151 Cal. 401, 90 Pac. 933, following rule.

9 Cal. 643–662, GUNTER v. JANES.

Where Mortgage was Given to Secure Loan and mortgagee authorized to collect rents and apply on mortgage loan, executor of deceased mortgagee is liable for rents collected in excess of debt to mortgagor as upon a trust fund, and claim for such against estate need not be presented.

Approved in Reiter v. Rothschild (Cal.), 33 Pac. 851, holding where lessee of property gave lessor five hundred dollars as security for rent, to be returned on expiration of lease, lessee may sue lessor's executor therefor without presenting claim against lessor's estate; In re Williams' Estate (Cal.), 32 Pac. 242, holding money paid to executor for real estate of estate sold by him, under deed of trust, but confirmation of sale by probate court reversed on appeal, not claim against estate; Franklin v. Trickey, 9 Ariz. 285, 80 Pac. 353, holding administrator of deceased partner's estate may demand accounting of administrator of later deceased partner's estate without presenting any claim against the estate.

Confusion of Goods. See note, 101 Am. St. Rep. 916.

Claimant of Specific Property is not Creditor within meaning of probate law, and need not present claim to administrator.

Approved in Probate Court v. Williams, 30 R. I. 158, 73 Atl. 387, holding claimant of property held by decedent in trust is not creditor of estate; Kline v. Gingery, 25 S. D. 19, 124 N. W. 959, holding demand for rescission of sale of horse and return of purchase notes not a claim to be presented to executor.

9 Cal. 662–683, 70 Am. Dec. 678, LAFFAN v. NAGLEE.

Covenant in Lease to Lessee, "His Heirs, and Assigns," giving refusal in case of sale, passes to assignee of lessee, as covenant running with land.

Approved in Fulton v. Messenger, 61 W. Va. 483, 56 S. E. 832, where option is given for valuable consideration to one and his assigns, it may be assigned, and assignee has all rights of original optionee.

Rights Conferred by a "Refusal" or "option." See note, 21 L. R. A. 133.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 424.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 482, 486.

9 Cal. 683–696, ELLIG v. NAGLEE.

Care Demanded of Trustee to sell real estate. See note, 3 L. R. A. (n. s.) 417.

9 Cal. 697–736, WARNER v. STEAMSHIP UNCLE SAM.

Action Brought of Contract of Carriage causing injuries to passenger sounds in tort.

Approved in Kirk v. Kimball Co., 152 Cal. 184, 92 Pac. 86, following rule.

NOTES

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10 Cal. 1-7, PEOPLE ex rel. ATTORNEY GENERAL v. ADDISON.

Intention of Legislature to Create Office of gauger by act of May 3, 1852, is too clear to admit of doubt.

Approved in State v. Mayor of Butte, 41 Mont. 383, 109 Pac. 712, holding office of member of examining and trial board of police department, created by section 3304, Revised Codes.

10 Cal. 9-12, 70 Am. Dec. 689, ALVERSON v. JONES.

Sheriff may be Enjoined from Selling wife's property under execution against husband, and sale casting a cloud on wife's title.

Approved in Englund v. Lewis, 25 Cal. 367, holding sheriff's sale of property on execution against grantor creates cloud on grantee's title.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 107, 112.

What is Community Property. See notes, 126 Am. St. Rep. 121; 4 Cof. Prob. 63.

10 Cal. 17-18, 70 Am. Dec. 691, KENDALL v. CLARK.

No Action for Damages can Arise against sheriff for sale of homestead on execution, since his deed conveys nothing.

Approved in Johnson v. Twichell, 13 N. D. 429, 101 N. W. 319, following rule.

10 Cal. 19-20, PEOPLE v. COUNTY COURT OF ELDORADO.

County Court on Appeal from Justice's Court can only retry issue tried in court below.

Approved in Smith v. Clyne, 15 Idaho, 262, 97 Pac. 42, and 16 Idaho, 468, 101 Pac. 819, both following rule; Maxson v. Superior Court (Cal.), 54 Pac. 520, refusing trial de novo on appeal from default judgment in justice court.

Criticised in Armantage v. Superior Court, 1 Cal. App. 135, 81 Pac. 1035, holding amendments may be allowed in superior court on appeal from justice's court and all issues thereon tried.

10 Cal. 22–31, 70 Am. Dec. 692, PIERCY v. SABIN.

Release of Cause of Action Should be Specially Pleaded to be available as defense.

Approved in Grunwald v. Freese (Cal.), 34 Pac. 75, following rule; Puritan Co. v. Toti & Gradi, 14 N. M. 431, 94 Pac. 1023, holding fraud to be defense by way of new matter, and proof of it not admissible under general denial.

Sham Pleadings. See note, 113 Am. St. Rep. 640, 651.

New Matter is That Which Under the Rules of evidence defense must affirmatively establish.

Approved in Hogen v. Klabo, 13 N. D. 323, 100 N. W. 849, following rule.

10 Cal. 31–32, HASTINGS v. HALLECK.

Filing of Notice of Appeal Should Precede or be contemporaneous with service thereof.

Approved in State v. District Court, 34 Mont. 115, 115 Am. St. Rep. 522, 85 Pac. 872, holding rule applies to appeals from justices' courts to district courts.

10 Cal. 32–37, PEOPLE v. GLENN.

Verbal Dying Declarations of Deceased are Admissible where written declarations have been first introduced or absence accounted for.

Approved in Kirby v. State, 151 Ala. 73, 44 So. 41, holding dying declaration may be evidenced partly by writing and partly by parol; Hunter v. State, 59 Tex. Cr. 452, 129 S. W. 133, upholding admission of oral evidence to show dying declaration, where written dying declaration had already been admitted.

Dying Declarations as Evidence. See note, 56 L. R. A. 354, 426, 430, 433, 443.

Constitutional Right of Accused to be confronted by witnesses. See note, 129 Am. St. Rep. 38.

10 Cal. 38–49, PEOPLE v. WHITMAN.

State Controller Holds Office Until His Successor is elected and qualifies, and vacancy is not created by expiration of his term, his duly elected successor not having qualified.

Approved in People v. Nye, 9 Cal. App. 155, 98 Pac. 243, holding when controller re-elected for second term died before expiration of first term, appointment to the "vacancy" was for remainder of first term only; Pruitt v. Squires, 64 Kan. 859, 68 Pac. 644, holding under section 3, article IX, Constitution, term of county office is for two years certain and until successors are qualified; City of Grand Haven v. United States Fidelity etc. Co., 128 Mich. 108, 92 Am. St. Rep. 446, 87 N. W. 104, holding time between election of successor to office and time he actually qualifies is part of preceding term, though party elected is his own successor; State v. Acton, 31 Mont. 42, 77 Pac. 301, holding upon tie vote for county officer incumbent held over and vacancy did not occur at end of term for which elected; State v. Gormley, 53 Wash. 553, 102 Pac. 438, holding county officer held over beyond end of second term when successor failed to qualify, although constitution limits incumbency of officer to two terms.

10 Cal. 49–50, NELSON v. LEMMON.

All Intendments are in Favor of sustaining judgment of court of original jurisdiction.

Appproved in Billups v. Utah Canal etc. Extension Co., 7 Ariz. 214, 63 Pac. 714, refusing to reverse for instruction not in consonance with law when evidence was not in accord.

10 Cal. 50–60, PEOPLE v. RODRIGUEZ.

Challenge may be Allowed for Good Cause after juror is sworn, but peremptory challenge may not then be taken.

Approved in People v. Schmitz, 7 Cal. App. 347, 94 Pac. 410, holding juror cannot be peremptorily challenged after jury is sworn without good cause shown.

10 Cal. 60–63, BULLARD v. KINNEY.

Power and Authority of voluntary associations. See note, 17 L. R. A. 205.

10 Cal. 66–67, PEOPLE v. BERNAL.

Competency of Children to Testify is to be determined, not by age, but by degree of understanding and knowledge.

Approved in Clark v. Finnegan, 127 Iowa, 645, 103 N. W. 970, holding child of seven years to be competent witness; State v. King, 117 Iowa, 489, 91 N. W. 770, holding understanding of oath by girl of twelve, prosecutrix in rape case, was not shown; Republic of Hawaii v. Ah Wong, 10 Haw. 525, holding court erred in failing to question girl of five as to understanding, and in admitting her testimony.

Competency of Children as witnesses. See notes, 124 Am. St. Rep. 289, 302; 19 L. R. A. 606, 607, 609.

10 Cal. 68–70, PEOPLE v. BEARSS.

Conviction for Murder of One Person is immaterial to guilt of another who stood by and abetted.

Approved in Williams v. United States, 1 Ind. Ter. 564, 45 S. W. 118, following rule.

10 Cal. 71–83, 70 Am. Dec. 689, ISAAC v. SWIFT.

Pendency of Levy of Execution Made during life of judgment does not operate to prolong judgment lien.

Approved in Miller & Co. v. Melone, 11 Okl. 256, 67 Pac. 484, 56 L. R. A. 620, holding proceeding in equity to have certain defendants account to codefendants for property conveyed and have proceeds applied in satisfaction of judgment fails upon expiration of judgment lien.

Priority of Judgment Over Conveyance made after beginning of term. See note, 38 L. R. A. 248.

10 Cal. 83–88, PEOPLE v. HONSHELL.

Right of Self-defense by original aggressor. See note, 109 Am. St. Rep. 826.

Homicide in Commission of unlawful act. See note, 63 L. R. A. 385.

10 Cal. 90–92, TAYLOR v. WOODWARD.

When Right of Action is Given by law, repeal of the law cannot devest a party of right of action already vested.

Approved in James v. Oakland Traction Co., 10 Cal. App. 797, 103 Pac. 1087, holding right of action for injury accrued under statute limiting speed of street-car is not devested by repeal of statute.

10 Cal. 95–110, BRANNAN v. MESICK.

Situation of Parties and Subject Matter at time of contracting should be considered in arriving at intention in construction of deed.

Approved in Pavkovich v. Southern Pacific R. R. Co., 150 Cal. 46, 87 Pac. 1098, following rule in construing limitation on grant of railway right of way; Maxwell v. Harper, 51 Wash. 356, 98 Pac. 758, holding deed ambiguous on face should be construed in light of surrounding circumstances.

Condition Precedent in Contract must be strictly and punctually performed.

Approved in Adams v. Johnson, 227 Pa. 456, 76 Atl. 174, holding devise of lands failed by reason of nonperformance of condition precedent.

10 Cal. 110–120, 70 Am. Dec. 703, HAYNES v. MEEKS; S. C., 20 Cal. 310.

Collateral Attack on Right of acting administrator. See note, 81 Am. St. Rep. 536.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 48.

10 Cal. 126–149, BAGLEY v. EATON.

Secondary Evidence is Admissible to prove contents of deed destroyed under erroneous impression of its effect and under circumstances free from suspicion or intended fraud.

Approved in Gibbs v. Potter, 166 Ind. 478, 77 N. E. 945, holding voluntary alteration of deed by grantee with intention to give life estate to another did not estop her from giving secondary evidence of contents before alteration.

Actions on Lost Instruments. See note, 94 Am. St. Rep. 466.

Presumption Against the Destroyer (spoliator) of evidence. See note, 34 L. R. A. 583.

10 Cal. 150–166, ARGUELLO v. EDINGER.

Where Equitable Defense is Offered in ejectment, court must first pass on questions in equity, and if defense is not sustained, jury may then determine issues at law.

Approved in Kenny v. McKenzie, 25 S. D. 495, 127 N. W. 601, reaffirming rule; Schumacher v. Crane-Churchill Co., 66 Neb. 443, 92 N. W. 610, holding order transferring to equity docket suit in ejectment in which equitable defenses had been set up did not prevent plaintiff from having jury trial on purely legal issues.

Taking Possession of Realty is part performance sufficient to take contract out of statute of frauds.

Approved in Davis v. Judson, 159 Cal. 132, 113 Pac. 152, following rule.

Taking Possession of Realty as part performance to satisfy statute of frauds. See note, 3 L. R. A. (n. s.) 795.

10 Cal. 167–172, DUNN v. TOZER.

Defect of Parties Apparent on Face of complaint must be taken by demurrer, otherwise it is deemed waived.

Approved in Van Gordon v. Goldamer, 16 N. D. 331, 113 N. W. 612, following rule.

Effect of Conveyance or encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 911.

Abandonment of Homestead. See note, 102 Am. St. Rep. 408.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 100.

10 Cal. 181–185, PARTRIDGE v. McKINNEY; S. C., 13 Cal. 158.

Cotenants in Mines. See note, 91 Am. St. Rep. 867.

Effect of Possession of real property as notice. See notes, 104 Am. St. Rep. 337; 13 L. R. A. (n. s.) 51, 83, 109.

Gain or Loss of Title by abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 903.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

10 Cal. 185–187, MOKELUMNE HILL CANAL ETC. CO. v. WOODBURY.

Where Sureties on Undertaking on Appeal justify to double amount of three hundred dollars, though less than double amount specified in undertaking, such undertaking is sufficient on appeal, though not to stay execution.

Approved in Thomas v. Hawkins, 12 Cal. App. 333, 107 Pac. 580, holding appeal from justice court perfected by cash deposit with justice in lieu of bond, although greatly in excess of necessary amount; Pacific Window Glass Co. v. Smith, 8 Cal. App. 767, 97 Pac. 900, holding excessive deposit in lieu of bond does not invalidate appeal; Edminston v. Steele, 12 Idaho, 617, 87 Pac. 678, upholding bond on appeal for costs though insufficient for stay bond.

Pollution of Stream by mining. See note, 24 L. R. A. 67.

Right of Prior Appropriation of water. See note, 30 L. R. A. 673.

10 Cal. 188–189, MOKELUMNE HILL CANAL ETC. CO. v. WOODBURY.

Where Errors in Record on Appeal are not pointed out by counsel, court will not examine record, but will affirm decision.

Approved in Faris v. Lampson, 73 Cal. 191, 14 Pac. 675, following rule.

10 Cal. 189–192, PERKINS v. THORNBURGH.

Where Motion for Nonsuit was Improperly Refused, error is cured by defendant's subsequent introduction of testimony supplying defect in plaintiff's evidence.

Approved in Bowley v. Mangrum & Otter, 3 Cal. App. 232, 84 Pac. 997, following rule.

Where Statute Assumes to Specify Effects of certain provision, it will be presumed all effects intended by lawmakers are there stated.

Approved in Indiana Chicago Coal Co. v. Neal, 166 Ind. 463, 77 N. E. 851, following rule.

Effect of Judgment, as against attaching officer not party thereto, establishing title to property seized under execution. See note, 14 L. R. A. (n. s.) 530.

10 Cal. 193–196, TUOLUMNE ETC. WATER CO. v. COLUMBIA ETC. WATER CO.

Miscellaneous.—Cited in Pearce v. Butte Electric Ry. Co., 41 Mont. 307, 109 Pac. 276, to point that if there be in complaint language showing limits of plaintiff's claim, so that defendant may not be misled, such allegation serves purpose of formal prayer for judgment.

10 Cal. 211–215, 70 Am. Dec. 711, FREMONT v. CRIPPEN.

Neither Remedy by Criminal Prosecution nor action on case for neglect of duty will supersede mandamus to compel sheriff to execute writ of restitution, since it cannot compel specific act to be done, and is not equally effectual.

Approved in Gowan v. Smith, 157 Mich. 458, 122 N. W. 291, holding mandamus proper remedy to compel police officers to report violations of liquor law; State v. Stokes, 99 Mo. App. 238, 73 S. W. 254, holding mandamus lay to compel constable to execute alias execution on judgment awarding possession of land; Cornell Co. v. Barber, 31 R. I. 385, 76 Atl. 811, holding mandamus rather than suit at law proper remedy to compel town treasurer to pay allowed and audited claim; State v. Chicago etc. R. R. Co., 83 Neb. 526, 120 N. W. 164, mandamus proper remedy against railroad to compel furnishing cars to shipper; Armstrong v. Stansel, 47 Fla. 131, 36 So. 763, mandamus lies to compel sheriff to levy execution; State v. Collins, 41 Mont. 528, 110 Pac. 527, holding mandamus proper remedy to compel sheriff to deliver property to plaintiff in claim and delivery after defendant's sureties had failed to justify.

Mandamus as Proper Remedies against public officers. See note, 98 Am. St. Rep. 867, 872.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 379.

10 Cal. 217–224, MARIUS v. BICKNELL.

Right of Prior Appropriation of water. See note, 30 L. R. A. 675.

10 Cal. 233–238, WEAVER v. CONGER.

Where Defendant Pleads Another Suit pending but in which no summons was issued and no appearance by defendant, there is no suit pending, so as to bar the later action.

Distinguished in Wilson v. Atlanta etc. Ry. Co., 115 Ga. 176, 41 S. E. 702, upholding plea in abatement based upon former action.

Right of Prior Appropriation of water. See note, 30 L. R. A. 673.

10 Cal. 239–246, 70 Am. Dec. 714, FOGARTY v. FINLAY.

Liability of Notaries. See note, 82 Am. St. Rep. 380, 383, 385, 386, 388.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 529.

10 Cal. 249–258, 70 Am. Dec. 717, CONANT v. CONANT.

Under Constitution, Article VI, Section 4, supreme court has appellate jurisdiction when subject in litigation is capable of pecuniary consideration and amount must exceed two hundred dollars, unless question of legality of tax, toll, impost, or municipal fine is also drawn in question.

Approved in Keech v. Joplin, 157 Cal. 4, 106 Pac. 224, holding constitutional provision should be construed so as to give district courts of appeal full jurisdiction of all matters assigned to them; Courtwright v. Bear River etc. Min. Co., 30 Cal. 583, 584, holding county court has concurrent jurisdiction with district courts to abate nuisance; History Co. v. Dougherty, 3 Ariz. 394, 29 Pac. 650, holding appeal lies to supreme court in all civil cases.

Applicant for Divorce must be Innocent Party to be entitled to absolute decree.

Approved in Eikenberry v. Eikenberry, 33 Ind. App. 75, 70 N. E. 839, denying divorce at suit of wife on ground of desertion when, since the desertion, she had been guilty of adultery; Bordeaux v. Bordeaux, 30 Mont. 43, 75 Pac. 527, holding recriminatory defense not sustained and divorce properly granted; Stoneburner v. Stoneburner, 11 Idaho, 612, 83 Pac. 941, holding recriminatory defense sustained.

Loss of Right to Divorce after it is perfected. See note, 84 Am. St. Rep. 137.

Desertion not Long Continued Enough to be ground for divorce cannot be shown in recrimination.

Approved in McCannon v. McCannon, 73 Vt. 148, 50 Atl. 800, following rule.

Recrimination as Defense in divorce proceeding. See note, 86 Am. St. Rep. 336.

10 Cal. 258–261, SANDS v. PFEIFFER.

As Against Vendor, Fixtures for Trade or otherwise pass with realty to vendee.

Approved in McGrillis v. Cole, 25 R. I. 159, 105 Am. St. Rep. 875, 55 Atl. 197, holding machinery placed in mill by one who stood as mortgagor, but with agreement that title of machinery should remain in seller until paid for, passed to mortgagee on foreclosure.

Engine as Fixture When Installed by owner of realty. See note, 8 L. R. A. (n. s.) 379.

10 Cal. 269–278, DANA v. STANFORDS.

Execution of Mortgage by Insolvent Debtor to certain creditors of all his property to secure his indebtedness to them is not an assignment in trust to use of mortgagor prohibited by statute of frauds.

Approved in Kennedy v. Conroy (Cal.), 44 Pac. 796, holding bill of sale of ranch stock to son living at home void as to creditors; Wylly-Gabbett Co. v. Williams, 53 Fla. 933, 42 So. 928, upholding mortgage of whole of insolvent's property to preferred bona fide creditors.

Participation in Fraudulent Intent of debtor which will invalidate transfer to pay or secure debt as to other creditors. See notes, 31 L. R. A. 616, 620.

Preference by Mortgage or Sale as assignment for creditors. See note, 37 L. R. A. 340.

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 339, 340.

Conveyance by Insolvent Giving Preference to creditor is not fraudulent, though creditor be aware of his insolvency, but to avoid conveyance there must be real design to prevent application of property to payment of debts.

Approved in Jackson v. Citizens' Bank etc. Co., 53 Fla. 300, 44 So. 527, reaffirming rule.

10 Cal. 278–281, FOSTER v. COLEMAN.

Board of Supervisors cannot Create Debt or liability on behalf of county for any purpose except as provided by law.

Distinguished in Morse v. Jacky, 34 Mont. 169, 85 Pac. 884, holding injunction did not lie at suit of taxpayer to restrain township high school board, whose election was void, from proceeding to act as trustees and enter into contracts.

10 Cal. 282–292, AUD v. MAGRUDER.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 453.

10 Cal. 292–296, HICKMAN v. O'NEAL.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 108.

10 Cal. 296–298, MOSS v. WAGNER.

Residence of Husband, With Family, upon premises impresses them with character of homestead.

Approved in Grace v. Grace, 96 Minn. 297, 113 Am. St. Rep. 625, 104 N. W. 971, 4 L. R. A. (n. s.) 786, following rule.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 916.

Effect of Insanity and Imprisonment as abandonment of homestead. See note, 3 L. R. A. (n. s.) 515.

10 Cal. 299–300, ROLLINS v. FORBES.

Prayer for General Relief Allows Such Relief as case stated in bill in equity authorizes, and objection to prayer cannot be made by general demurrer.

Approved in De Leonis v. Hammel, 1 Cal. App. 394, 82 Pac. 351, and Oliver v. Blair (Cal.), 8 Pac. 613, both following rule.

10 Cal. 301, PEOPLE v. AH LOY.

To Justify Interference With Verdict in criminal action, there must be absence of evidence against the prisoner and decided preponderance in his favor.

Approved in Territory v. Miramontez, 4 Ariz. 180, 36 Pac. 36, and Territory v. Booth, 4 Ariz. 149, 36 Pac. 38, both upholding conviction of defendant when there was evidence to support verdict; People v. Jones (Cal.), 8 Pac. 612, holding verdict sustained by evidence.

10 Cal. 301–302, WEDDLE v. STARK.

Where Evidence is Conflicting, granting or refusing new trial is in discretion of trial court.

Approved in Austin v. Gagan (Cal.), 30 Pac. 790, refusing to reverse order granting new trial where evidence was conflicting.

10 Cal. 303–304, GLAZER v. CLIFT.

General Denial in Replevin puts in issue all facts stated in complaint.

Approved in Gila Valley etc. Co. v. Gila Co., 8 Ariz. 294, 71 Pac. 914, holding answer in replevin containing general denial not subject to general demurrer.

Officer, to Justify Seizure of Property in possession of stranger to writ which he has executed, must plead specially such justification.

Approved in Beckstead v. Griffith, 11 Idaho, 750, 83 Pac. 768, holding officer must allege all jurisdictional facts to justify seizure by virtue of writ of attachment and his possession thereunder.

10 Cal. 305–309, SCARBOROUGH v. DUGAN.

Legislature cannot Impair, by Destroying Remedy, obligation of contract arising from a judgment.

Approved in Keyser v. Lowell, 117 Fed. 405, 407, 54 C. C. A. 574, holding unconstitutional statute of Colorado destroying remedy on judgment of sister state.

Whether a Judgment is a contract. See note, 17 L. R. A. 614.

10 Cal. 309–310, PEOPLE v. MURRAY.

It is Sufficient That Indictment for murder charges the crime in the words of the statute.

Approved in People v. Davenport, 13 Cal. App. 643, 110 Pac. 322, holding information for rape sufficient when in language of statute, although not charged to be feloniously or willfully done; Andrews v. People, 33 Colo. 198, 108 Am. St. Rep. 76, 79 Pac. 1033, holding indictment for murder in first degree need not allege it was committed in attempt to rob, in order to justify conviction under evidence that it was so committed.

Reputation of Deceased cannot be given in evidence unless circumstances of case raise question of self-defense.

Approved in People v. Lamar, 148 Cal. 570, 575, 83 Pac. 996, 997, admitting evidence of reputation of deceased for violence when intoxicated.

Admissibility of Evidence of Character or reputation of deceased in homicide cases. See notes, 124 Am. St. Rep. 1027; 3 L. R. A. (n. s.) 352, 354, 362.

10 Cal. 310–312, PEOPLE v. CHOISER.

Indictment for Murder Describing Weapon used as "loaded pistol" is sufficient though it fails to state manner in which weapon was charged.

Approved in McHugh v. Territory, 17 Okl. 5, 86 Pac. 434, and Heatley v. Territory of Oklahoma, 15 Okl. 74, 78 Pac. 80, both upholding indictment for assault with intent to kill, as stating facts charged in sufficient ordinary language; Flowers v. States, 4 Okl. Cr. 323, 111 Pac. 676, holding allegation in indictment that defendant shot at another impliedly averred pistol was loaded.

10 Cal. 312–313, PEOPLE v. GOLDBURY.

Judgment of Lower Court will be Affirmed where no assignments of error are made by appellant.

Approved in Chase v. Alaska F. & L. Co., 2 Alaska, 84, holding insufficient motion for new trial making no specification of grounds relied on.

10 Cal. 313–315, PEOPLE v. JUDD.

Indictment of Murder Considered and held to sufficiently aver wound was mortal.

Approved in State v. Sly, 11 Idaho, 113, 80 Pac. 1126, holding indictment for murder sufficiently averred death ensued, and means by which homicide was perpetrated.

10 Cal. 315–317, PIERPONT v. CROUCH.

Where a Subsequent Act is Repugnant to a prior one, the latter operates as a repeal of the former without any repealing clause.

Approved in State v. Conkling, 19 Cal. 513, holding act licensing auctioneers of 1859 repeals by implication former acts on same subject; State v. McCafferty, 25 Okl. 9, 105 Pac. 994, where section expressly amendatory to another section purports to set out in full all it is intended to contain, matter in original section not in amendatory section is repealed by omission.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 297.

Provision of Constitution Relative to titles of statutes is directory.

Cited in Clark v. Los Angeles, 160 Cal. 41, 116 Pac. 726, arguendo.

10 Cal. 317–333, 70 Am. Dec. 725, GREEN v. COVILLAD.

Negligence of Party to Perform for Twenty-two Months his agreement for sale of land raises presumption of abandonment of contract and does not entitle him to specific performance.

Approved in Leavitt v. Lassen Irrigation Co., 157 Cal. 94, 106 Pac. 409, holding continued refusal to pay for water, as required by law, constituted abandonment of irrigation contract; Reed v. Sefton, 11 Cal. App. 93, 103 Pac. 1098, refusing specific performance of contract to purchase land because of lapse of time and change of circumstances; Eshleman v. Henrietta Vineyard Co. (Cal.), 33 Pac. 778, refusing specific performance where not shown plaintiff did not discover error in deed on which claim is based thirty-five months before action commenced; Joffrion v. Cumbel, 123 La. 406, 48 So. 1013, holding option to purchase lost by unreasonable delay.

Distinguished in Donovan v. Boeck, 217 Mo. 93, 116 S. W. 549, holding rule of laches did not apply, the contract sued on not being optional; Liskey v. Snyder, 56 W. Va. 622, 49 S. E. 520, holding time not to be of essence of contract of release of equity of redemption.

10 Cal. 333–334, GOODWIN v. GLAZER.

Mandamus Does not Lie when there is adequate remedy at law.

Approved in State v. District Court, 13 N. D. 220, 100 N. W. 250, holding mandamus did not lie to compel court to hear and determine matter which it had dismissed on ground of lack of jurisdiction, remedy being by appeal.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 867.

10 Cal. 334-335, PEOPLE v. COLEMAN.

Indictment for Murder Considered and held sufficient.

Approved in State v. Sly, 11 Idaho, 112, 80 Pac. 1126, holding indictment for murder sufficiently averred death ensued, and means by which homicide was perpetrated.

Charge of Time and Place in indictment for homicide. **See note, 3 L. R. A. (n. s.) 1020, 1022, 1026, 1028.**

10 Cal. 335-336, FARMER v. ROGERS.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 53.

10 Cal. 336, PEOPLE v. WAY.

Forgery of Worthless Instruments. See note, 24 L. R. A. 42.

10 Cal. 337-339, FREEBORN v. GLAZER.

Complaint in Ordinary Common-law Form of indebitatus assumpsit for money paid and expended is sufficient.

Approved in Miller v. Abrahamson, 9 Cal. App. 397, 99 Pac. 535, following rule; Castagnino v. Balletta (Cal.), 21 Pac. 1098, holding count in assumpsit good to recover balance due on special contract to erect building.

Distinguished in Truro v. Passmore, 38 Mont. 550, 100 Pac. 968, holding count for money had and received not alleging facts of indebtedness did not state cause of action for fraud.

Notice of Motion to Discharge Attachment on ground that it was improperly issued must specify wherein it will be urged that the writ was improperly issued.

Approved in Cupit v. Bank of Park City (Utah), 40 Pac. 707, following rule; Jackson v. Barrett, 12 Idaho, 469, 86 Pac. 272, holding motion to dismiss appeal for insufficient undertaking did not sufficiently state grounds.

Proceedings to Dissolve Attachment. See note, 123 Am. St. Rep. 1053, 1055.

10 Cal. 341-342, HASTINGS v. THE UNCLE SAM.

Opinions of Witnesses are Generally Only Admissible when they relate to matters of science or art, or skill in some particular profession or business.

Approved in Whipple v. Rich, 180 Mass. 480, 63 N. E. 6, holding it error, in personal injury suit, to permit opinion evidence as to value of time of one who had no regular occupation or salary.

10 Cal. 343, O'BRIEN v. SHAW'S FLAT ETC. CANAL CO.

To Bind Corporation, Service of Summons must be upon agent provided by statute.

Approved in Karns v. State Bank & Trust Co., 31 Nev. 175, 101 Pac. 566, holding insufficient service of summons on assistant cashier of bank who was in charge of branch bank.

10 Cal. 344-346, PEOPLE ex rel. DE FRIES v. MARIN CO.

Supervisors Exercise Judicial Powers in passing upon bond of officer.

Distinguished in Hammer v. Smith, 11 Ariz. 424, 94 Pac. 1121, holding letting contract for public printing by supervisors not judicial act and not subject to review.

10 Cal. 347–353, SUMMERS v. PARISH.

Injunction Bond Given to Several Obligees by name necessarily creates several liability.

Approved in Harrington v. Gordon, 42 Wash. 696, 80 Pac. 188, holding where garnishment bond was given to two defendants, recovery may be had on bond, though only one suffered damage.

10 Cal. 354–369, DUPONT v. WERTHEMAN.

Purchase of Equitable Title Takes Property subject to all existing equities.

Approved in Mills v. Rossiter Eureka etc. Mfg. Co., 156 Cal. 169, 103 Pac. 897, holding as between two assignees of vendee in possession of land under executory contract of sale, assignee first in time is not necessarily entitled to prevail; Hunter v. Eastham, 95 Tex. 653, 69 S. W. 67, holding void conveyance of land by agent upon consideration running to himself when no power to sell without consideration to owner was given.

Miscellaneous.—Cited in McDonald v. Bear River etc. Co., 13 Cal. 234, to point that deed of attorney must purport to be deed and executed in name of principal.

10 Cal. 369–370, DENNIS v. TABLE MOUNTAIN WATER CO.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 752.

10 Cal. 372–373, STEWART v. STREET.

Agreements and Conditions destroying negotiability of writing. See note, 125 Am. St. Rep. 196.

10 Cal. 378–380, WALDMAN v. BRODER.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 481.

10 Cal. 380–386, 70 Am. Dec. 740, CARR v. CALDWELL.

Lien for Purchase Money of homestead. See note, 86 Am. St. Rep. 178, 179, 181.

Right of Subrogation. See note, 99 Am. St. Rep. 489.

10 Cal. 386–387, DANGLADA v. DE LA GUERRA.

Limitations Do not Run Against Claims upon estate when no administration exists.

Distinguished in Colonial & United States Mortgage Co. v. Flemington, 14 N. D. 187, 116 Am. St. Rep. 670, 103 N. W. 930, holding failure to appoint administrator of estate of deceased mortgagor did not prevent limitations from running in favor of mortgagor's heirs against foreclosure.

Limitation of Actions. See note, 116 Am. St. Rep. 673.

10 Cal. 387–390, McDOWELL v. JACOBS.

One Who is Joint Maker of Note and also payee can enforce equitable share of obligation against comakers.

Approved in Enscol v. Fletcher, 1 Cal. App. 666, 82 Pac. 1078, holding note distributed to joint maker on death of original payee extinguished as to such maker's equitable liability.

10 Cal. 390–391, TARPEY v. SHILLENBERGER.

Sureties on Injunction Bond are Entitled to stand on precise terms of contract, and liability cannot in any way be extended.

Approved in Buggeln v. Cameron, 11 Ariz. 212, 90 Pac. 327, holding complaint on injunction bond defective in failing to show breach of conditions of bond.

10 Cal. 392–393, MIDDLESWORTH v. SEDWICK.

In Trover, Plaintiff must Either Have Possession or immediate right to possession.

Distinguished in Swank v. Elwert, 55 Or. 495, 105 Pac. 905, where mortgagee is lawfully in possession and has irregularly foreclosed mortgage and sold property to another, mortgagor may treat transaction as conversion of property.

10 Cal. 393–394, CALHOUN v. KNIGHT.

Party Claiming Exemption of Property from execution must show that his case is within statute of exemptions.

Approved in Briggs v. McCullough, 36 Cal. 545, holding party claiming exemption of insurance policy must show it comes within statute.

10 Cal. 394–395, VAN PELT v. LITTLER.

Miscellaneous.—Cited in Van Pelt v. Littler, 14 Cal. 194, on another appeal.

10 Cal. 396–402, SHAVER v. BEAR RIVER ETC. MIN. CO.

Instance Where Acts of Corporation amounted to ratification of acts of agent in entering into contract.

Approved in Judell v. Goldfield Realty Co., 32 Nev. 359, 108 Pac. 458, where corporation took over business of another, who was indebted to third persons and held out its secretary as having authority to settle claims, and corporation accepted several such settlements, third person could enforce note executed by secretary in corporation's name in settlement of claim.

10 Cal. 402–404, HARDENBURG v. KIDD.

Tax Sale for Taxes, Part of which were illegally levied, is void in its entirety.

Approved in Beggs v. Paine, 15 N. D. 464, 109 N. W. 334, holding void tax sale for more than was legally chargeable.

Assessment of Taxes in legislative act.

Approved in Kettle v. City of Dallas, 35 Tex. Civ. App. 638, 80 S. W. 877, holding what property shall be embfaced in tax district to be political question to be determined by legislature.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 702.

10 Cal. 404–410, 70 Am. Dec. 742, EMERIC v. GILMAN.

Execution cannot Issue on Judgment recovered against county.

Approved in People v. San Joaquin etc. Agricultural Assn., 151 Cal. 806, 91 Pac. 744, holding execution cannot issue against property of district agricultural association as being that of public corporation.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 883.

10 Cal. 411–413, DAVIS v. ROBINSON.

Judgment of Imprisonment Recovered in action on contract cannot be made unless fraud on which arrest is sought is alleged in complaint.

Approved in Ledford v. Emerson, 143 N. C. 531, 55 S. E. 970, 10 L. R. A. (n. s.) 362, following rule.

Distinguished in Ex parte Howitz, 2 Cal. App. 757, 84 Pac. 231, holding mesne process for arrest may issue when complaint does not charge fraud; Banning v. Roy, 47 Or. 123, 114 Am. St. Rep. 908, 82 Pac. 710, holding where defendant had been provisionally arrested and order had not been vacated, execution against person could issue upon return of property execution unsatisfied, although judgment did not state fraud.

Constitutionality of Imprisonment for debt. See note, 34 L. R. A. 642.

10 Cal. 413–418, HOFFMAN v. TUOLUMNE COUNTY WATER CO.

Where Liability of One Who Erects Dangerous structure on his own land for damages to neighbor's property is in question, the question is what discreet and prudent men should ordinarily do, in such cases, if all risk were their own.

Distinguished in Southern Pac. Co. v. Hetzer, 135 Fed. 281, 68 C. C. A. 26, 1 L. R. A. (n. s.) 288, holding reasonable care for employee's safety is not that which employer uses to protect his own person.

Liability for Escape of Dangerous Substance stored on premises. See note, 15 L. R. A. (n. s.) 542.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 726.

Sufficiency of General Allegations of negligence. See note, 59 L. R. A. 272.

10 Cal. 419–429, WILLIAMS v. COVILLAUD.

Transfer of Title to Note by indorsement in form of guaranty. See note, 36 L. R. A. 232.

Release of Indorser of Note by failure to enforce liability of maker. See note, 18 L. R. A. (n. s.) 534.

10 Cal. 436–441, PEASE v. BARBIERS.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 562.

10 Cal. 441–445, ROWE v. TABLE MOUNTAIN WATER CO.

Judgment by Default is Confession of all material facts of complaint.

Approved in Madison v. Octave Oil Co., 154 Cal. 770, 99 Pac. 177, holding default on cross-complaint waived by consent to later filing of amended complaint in action to quiet title.

Sheriff's Return of Summons is prima facie evidence of truth of statements therein.

Approved in Vadnais v. East Butte E. C. Min. Co., 42 Mont. 545, 113 Pac. 748, holding where sheriff's return recites service of summons on president of corporation, it will be presumed party served was president on motion to set aside default.

10 Cal. 445–446, PRESTON v. KEHOE.

Action of Forcible Entry and Detainer does not lie against party claiming right to land, but is not in actual possession.

Approved in Bell v. Haun, 9 Cal. App. 44, 97 Pac. 1127, holding complaint insufficient in not alleging detention of premises.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 377.

10 Cal. 446–449, JOHNSON v. PARKS.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 774, 843.

10 Cal. 449–450, FORD v. RIGBY.

Injunctions Against Execution Sales or other proceedings under final process. See notes, 111 Am. St. Rep. 100; 30 L. R. A. 116.

10 Cal. 450–456, CAYTON v. WALKER.

Instrument Conveying Property with trust stipulation attached is not invalid for failure of one of parties of first part to sign it, where such party does not complain.

Approved in Kyle v. Hamilton (Cal.), 68 Pac. 485, holding contract to return deed not invalid for lack of signature where no obligation is imposed on grantor who delivers deed, and delivery of control is not conditional on his signing it.

10 Cal. 461–464, McCARTY v. BEACH.

Seal is Only Prima Facie Showing of consideration of instrument.

Approved in Olston v. Or. Water Power & Ry. Co., 52 Or. 354, 96 Pac. 1098, 20 L. R. A. (n. s.) 915, holding fraud in consideration of sealed instrument may be proved.

Averment of Damage in Complaint is only necessary where right of action itself depends upon special injury received.

Approved in Sherlag v. Kelley, 200 Mass. 236, 128 Am. St. Rep. 414, 86 N. E. 294, 19 L. R. A. (n. s.) 633, holding sufficient general averment of damages in ad damnum clause in action for breach of contract where there were previous averments showing liabilities.

Want of Averment of Special Damage in complaint on breach of contract cannot be reached by demurrer.

Approved in Moody v. Peirano (Cal. App.), 84 Pac. 784, and Moody v. Peirano, 4 Cal. App. 415, 88 Pac. 381, both following rule.

10 Cal. 465–479, TEVIS v. PITCHER.

Under Mexican Law a Will Took Effect as conveyance immediately on death of testator.

Approved in Estate of Patterson, 155 Cal. 636, 132 Am. St. Rep. 116, 102 Pac. 944, holding will takes effect as conveyance on death of testator, and probate of same is not source of title.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 543.

10 Cal. 482–483, ESTATE OF TAYLOR.

Claim of Administrator as Creditor Against Estate must be presented in same time as claims of other creditors.

Approved in Estate of Long, 9 Cal. App. 755, 100 Pac. 892, following rule.

10 Cal. 486–489, **WILSON v. BRODER.**

Act of April 29, 1851, Providing for Summary Proceeding against sheriffs, is final in character and must be strictly construed.

Approved in Craig v. Smith, 74 Ark. 366, 85 S. W. 1125, holding similar statute must be strictly construed.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 131.

Sheriff's Duty as to Adverse Claims to proceeds of judgment in his hands, except in cases of rival executions. See note, 47 L. R. A. 737.

10 Cal. 491–495, **RANDALL v. BUFFINGTON.**

Payment of Mortgage on Homestead by insolvent debtor is not act in fraud of creditors.

Approved in Hunter & Hunter v. Griffith, 12 Okl. 445, 72 Pac. 363, holding purchase of property for homestead by insolvent with nonexempt assets, but on faith of which credit was not given, was not act in fraud of creditors.

Effect of Purchase of Homestead with nonexempt property. See note, 95 Am. St. Rep. 384.

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 338.

10 Cal. 495–502, **POND v. POND.**

In Contest of Will Before Probate, Jury is allowable on demand under act of 1855, and district court alone has power to determine questions of fact by jury.

Cited in Estate of Dolbeer, 153 Cal. 657, 658, 96 Pac. 268, 269, discussing history of jury in probate trials.

10 Cal. 512–517, **FISK v. FOWLER.**

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 62.

10 Cal. 520–522, **NICKERSON v. CALIFORNIA STAGE CO.**

Where Cause and Object of Two Actions are different, though point in dispute is same in both, prior judgment does bar subsequent action.

Approved in Baumhoff v. St. Louis & Kirkwood R. R. Co., 205 Mo. 267, 120 Am. St. Rep. 745, 104 S. W. 10, following rule.

10 Cal. 522–523, **PRIMM v. GRAY.**

To Support Plea in Abatement founded on pendency of prior action, it is necessary to show process was issued in such action.

Distinguished in Wilson v. Atlanta etc. Ry. Co., 115 Ga. 176, 41 S. E. 702, upholding plea in abatement based on pendency of another action.

10 Cal. 523–526, 70 Am. Dec. 746, **FULLER v. HUTCHINGS.**

Check Given for Gaming Debt is without legal consideration and void as against all but innocent indorsee for value.

Approved in Union Collection Co. v. Buckman, 150 Cal. 161, 119 Am. St. Rep. 164, 88 Pac. 709, 9 L. R. A. (n. s.) 568, following rule.

Defenses to Notes and Other Obligations given for gambling debts. See note, 119 Am. St. Rep. 174, 175, 176, 178.

When Consideration for Check is Illegal, burden is on holder to show receipt in good faith, without notice of nature of consideration.

Approved in Union Collection Co. v. Buckman, 150 Cal. 162, 166, 119 Am. St. Rep. 164, 88 Pac. 709, 711, 9 L. R. A. (n. s.) 568, and Le Tourneux v. Gilliss, 1 Cal. App. 552, 82 Pac. 629, both following rule.

Burden of Proof in Action on negotiable instrument by purchaser. See note, 17 L. R. A. 328.

Surprise at Ruling of Court on Trial as to admission of testimony is not ground for new trial.

Approved in Porter v. Anderson, 14 Cal. App. 726, 113 Pac. 350, holding unexpected judgment of court could not be "surprise"; Le Tourneux v. Gilliss, 1 Cal. App. 555, 82 Pac. 630, refusing new trial on ground of mistake of law by plaintiff as burden of proof.

Negotiability of Check. See note, 26 L. R. A. 571.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 765, 809.

10 Cal. 527–528, BAKER v. BAKER.

Miscellaneous.—Cited in Baker v. Baker, 13 Cal. 87, on another appeal.

10 Cal. 529–531, CUMMINGS v. COE.

Estate Remains in Judgment Debtor until consummation of execution sale by sheriff.

Approved in Mullenary v. Burton, 3 Cal. App. 265, 84 Pac. 160, holding certificate of sheriff's sale insufficient to show title in purchaser.

10 Cal. 533–597, LETTERS v. CADY.

Living Together as Man and Wife is not marriage, nor is an agreement so to live a contract of marriage.

Approved in Estate of Mackay, 3 Cof. Prob. 330, 331, following rule.

Common-law Marriages. See notes, 124 Am. St. Rep. 113; 3 Cof. Prob. 205.

Defenses to Notes and Other Obligations given for gambling debts. See note, 119 Am. St. Rep. 176.

10 Cal. 538–541, BEEM v. McKUSICK.

Grantee in Escrow Deed Held Only Entitled to delivery of it on strict compliance on his part with contract.

Cited in Bartley v. Fraser, 16 Cal. App. 565, 117 Pac. 685, arguendo.

Performance of Conditions and occurrence of contingencies of escrows. See note, 130 Am. St. Rep. 959.

10 Cal. 541–545, WOLF v. ST. LOUIS ETC. WATER CO.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 726.

Liability for Escape of Dangerous Substance stored on premises. See note, 15 L. R. A. (n. s.) 542.

10 Cal. 545–546, MARZIOU v. PIOCHE.

New Trial may be Ordered by appellate court as to part only of the issues.

Approved in Robinson v. Muir, 151 Cal. 125, 90 Pac. 524, following rule.

10 Cal. 547–554, 70 Am. Dec. 748, WHITNEY v. HIGGINS.

Decree for Sale Under Mechanic's Lien has same effect on rights of prior purchasers and encumbrancers as decree for sale on foreclosure of mortgage.

Approved in Holt Mfg. Co. v. Collins, 154 Cal. 271, 97 Pac. 518, holding owner placing property in hands of party where it may become subject to mechanic's lien subjects it to statutory liens, but must be joined in suit to foreclose lien, to affect his interest; Fleming v. Prudential Ins. Co., 19 Colo. App. 128, 73 Pac. 753, holding beneficiary of trust deed, though not necessary party to suit to foreclose mechanic's lien on premises, was not bound by judgment, not having been made party.

Persons Acquiring Interest in or lien upon property after foreclosure suit is brought are bound by decree therein though not necessary parties.

Approved in Kaston v. Storey, 47 Or. 154, 114 Am. St. Rep. 912, 80 Pac. 218, following rule.

Right to Strict Foreclosure. See note, 20 L. R. A. 372.

10 Cal. 555–562, HENTSCH v. PORTER.

Objection to Complaint Defeating plaintiff's present right to recover must be made in court of original jurisdiction.

Distinguished in Burke v. Maguire, 154 Cal. 463, 98 Pac. 24, holding defendant demurring to complaint entitled to decision on appeal on all questions presented by demurrer and necessary to decision.

Objection to Complaint that it does not state cause of action may be made for first time in appellate court.

Approved in Goldberg v. Sisseton Loan & Title Co., 24 S. D. 49, 140 Am. Rep. 775, 123 N. W. 270, holding on appeal from judgment court could examine into sufficiency of complaint.

Grounds for Demurrer are Fixed by statute and limited thereto.

Approved in Mader v. Plano Mfg. Co., 17 S. D. 556, 97 N. W. 845, holding demurrer on ground of "defect of parties" good as meaning nonjoinder of parties.

10 Cal. 563–574, PEOPLE v. BOND.

Act of May 1, 1851, for Funding Debt of San Francisco is a trust deed, and terms cannot be changed by legislature.

Distinguished in James v. Oakland Traction Co., 10 Cal. App. 795, 103 Pac. 1087, holding legislature could not affect vested right to recover for injuries by repeal of speed ordinance; San Francisco v. Beideman, 17 Cal. 462, holding bill to enjoin sale of real estate could not be maintained on ground of trust.

Effect of Statutes Making Pre-existing Contracts illegal. See note, 120 Am. St. Rep. 470.

10 Cal. 574–578, LEWIS v. TOBIAS.

Equity will not Compel Surrender and cancellation of written instrument when party has clear remedy at law.

Approved in Lawlor v. Merritt, 81 Conn. 721, 72 Atl. 145, following rule; Miller v. Kettenbach, 18 Idaho, 258, 138 Am. St. Rep. 192, 109 Pac. 507, refusing to release guarantor in absence of showing of circumstances which could not be shown as defense in action at law based on contract of guaranty.

Jurisdiction of Equity to Cancel Instrument notwithstanding remedy at law. See note, 5 L. R. A. (n. s.) 1053.

Action Lies to Cancel Promissory Note where it is alleged same has been paid.

Approved in Harrison v. Russell & Co., 17 Idaho, 201, 105 Pac. 49, holding action at law under statute lies to cancel notes alleged to have been satisfied by return of property for which given.

10 Cal. 579–584, MYERS v. SOUTH FEATHER WATER CO.

Assignment of Contract Transfers all rights of assignors thereunder.

Approved in Frese v. Moore, 1 Cal. App. 592, 82 Pac. 544, holding assignee took rights of assignor of contract, but assignor was bound by its burdens.

10 Cal. 589–634, FERRIS v. COOVER.

Land can Only be Abandoned when holder has no title.

Approved in Patterson v. Mills (Cal.), 68 Pac. 1036, holding right to use of ditch acquired by license could be lost by abandonment.

Gain or Loss of Title by abandonment not including questions under statute of limitations. See note, 135 Am. St. Rep. 895, 896.

Breach of Condition Subsequent to Acquisition of title does not revest title eo instante.

Approved in Catron v. Laughlin, 11 N. M. 635, 72 Pac. 33, holding forfeiture of title not shown in action to quiet title.

Location of Boundaries. See note, 129 Am. St. Rep. 1001.

NOTES

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CALIFORNIA REPORTS.

CASES IN 11 CALIFORNIA.

11 Cal. 12–14, MARTIN v. BROWNER.
Location of Mining Claim. See note, 7 L. R. A. (n. s.) 771.

11 Cal. 14–20, RAUN v. REYNOLDS.
Expression "Rate of Interest" has Reference to percentage of interest and not to manner of computing.
Approved in dissenting opinion in Philadelphia v. Philadelphia Rapid Transit Co., 228 Pa. 332, 77 Atl. 503, holding total charge of twenty-five cents for six rides on street railway not a "rate of fare" as used in contract relating thereto.

11 Cal. 22–27, PHELPS v. OWENS.
Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 37.

11 Cal. 27, RITTER v. STEVENSON.
Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

11 Cal. 38–41, SHERMAN v. ROLLBERG.
Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 779.

11 Cal. 42–47, PEOPLE v. SUPERVISORS.
Mandamus Requiring Board of Supervisors to audit certain accounts does not require board to allow such accounts.
Approved in People v. Board of Supervisors, 28 Cal. 431, holding mandamus proper method to determine whether board of supervisors has power to allow claim; Grieve v. Gulick, 5 Haw. 76, 83, holding mandamus lies to compel minister of interior to present to king in privy council a petition for charter of incorporation.
Distinguished in Crandall v. Amador County, 20 Cal. 75, refusing mandamus to enforce claim against county.

11 Cal. 47–48, McGREGOR v. SHAW.
Allegations of Complaint are confessed by default.
Approved in Madison v. Octave Oil Co., 154 Cal. 770, 99 Pac. 177, holding defendants after default on cross-complaint waive right to judgment thereon by consent to filing amended complaint.

11 Cal. 49–68, 70 Am. Dec. 754, PEOPLE ex rel. McKUNE v. WELLER.

Proclamation of Governor is Essential to validity of special election for office of district judge.

Approved in O'Laughlin v. Kirkwood, 107 Mo. App. 318, 81 S. W. 517, holding ordinance passed one week before special election designating polling places gave sufficient notice of election, although general ordinance as to general elections provided for two weeks' notice; Marsden v. Harlocker, 48 Or. 93, 120 Am. St. Rep. 786, 85 Pac. 329, holding void local option election where members of county court did not meet and inspect petition for election.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 65, 67.

Necessity of Notice or proclamation of election. See note, 120 Am. St. Rep. 795.

11 Cal. 70, PEOPLE v. COMEDO.

Appeal will be Dismissed where no assignment is made of errors.

Approved in Chase v. Alaska F. & L. Co., 2 Alaska, 84, refusing motion for new trial when no specification of grounds relied on.

11 Cal. 71–76, DICKINSON v. OWEN.

What is Community Property. See notes, 126 Am. St. Rep. 110; 4 Cof. Prob. 52.

11 Cal. 77–88, PEOPLE ex rel. BRODIE v. WELLER.

Where Election for Office of District Judge was held at general election in 1858, and term of incumbent did not expire till January, 1861, such election was unauthorized and person elected not entitled to commission.

Approved in State v. Chatterton, 11 Wyo. 16, 70 Pac. 468, refusing mandamus to compel Secretary of State to accept certificate of independent nominee at election of November, 1902, when upon advice of attorney general that term of incumbent of office of district judge did not expire until 1905, he made no proclamation for election to such office.

Person Duly Elected District Judge is entitled to hold office for term of six years.

Approved in State v. Schnitger, 17 Wyo. 89, 96 Pac. 244, holding district judge holds office for six years, whether elected at general or special election.

Election of District Judge without proclamation of governor held invalid.

Approved in State v. Chatterton, 12 Wyo. 173, 73 Pac. 963, holding void election for district judge where legal notice of election had not been given.

11 Cal. 93–103, RUSSELL v. CONWAY.

Equity will Compel Setoff when parties have mutual demands which cannot be set off in suit at law.

Approved in Potter v. Lohse, 31 Mont. 98, 77 Pac. 421, holding judgment could not be set off in action of conversion, but remedy was by bill in equity.

Setting Off One Judgment against another. See note, 109 Am. St. Rep. 138.

Setoff Against Judgment in hands of assignee. See note, 23 L. R. A. 338.

Injunctions Against Judgments for defenses existing prior to rendition. See note, 31 L. R. A. 766.

11 Cal. 113-114, STOCKTON v. COUNTY OF SHASTA.

Court can Give No Pay to Sheriff beyond that provided by legislature.

Approved in Avery v. Pima County, 7 Ariz. 35, 60 Pac. 705, holding court could not allow extra amount to sheriff for caring for United States prisoners while in county jail.

11 Cal. 114-120, HARVEY v. CHILTON.

Liability for Damming back stream. See note, 59 L. R. A. 873.

11 Cal. 120-129, ROGERS v. HOBERLEIN.

Public Administrator Having Administration of estate continues such after expiration of term of office, and until his appointment is revoked.

Approved in O'Rourke v. Harper, 35 Mont. 350, 89 Pac. 66, following rule; Estate of Bergin, 3 Cof. Prob. 289, public administrator is not entitled to letters of administration with will annexed, as against resident devisee in foreign will who files authenticated copy thereof and of its foreign probate, with petition for letters.

Validity of Acts Under Letters Testamentary or of administration afterward revoked or held invalid. See note, 21 L. R. A. 156.

11 Cal. 129, SAYRE v. SMITH.

Where There are No Assignments of Error, appeal will be dismissed.

Approved in Chase v. Alaska F. & L. Co., 2 Alaska, 84, refusing new trial where grounds relied on were not specified.

11 Cal. 133-142, ROSE v. DAVIS.

Estoppel to Deny landlord's title. See note, 89 Am. St. Rep. 106.

11 Cal. 143-154, 70 Am. Dec. 769, BUTTE CANAL CO. v. VAUGHN.

First Appropriator of Water of Stream flowing through public lands has right to use to extent of original appropriation and no more.

Approved in Pomona Land etc. Co. v. San Antonio Water Co., 152 Cal. 623, 93 Pac. 884, holding under contract for division of waters of stream, one party to contract could appropriate to his own use water saved by collecting seepage; Cole v. Richards Irr. Co., 27 Utah, 209, 101 Am. St. Rep. 962, 75 Pac. 378, holding right of prior appropriator of water of stream extends to sources of stream.

Right of Prior Appropriation of water. See note, 30 L. R. A. 672.

Where Waters from Ditch are Led into natural stream for purpose of conducting to point of use, party so doing may take again from stream only amount originally added.

Approved in Miller v. Wheeler, 54 Wash. 437, 103 Pac. 644, 23 L. R. A. (n. s.) 1065, holding one using natural stream as conduit, waters of which are appropriated by others, can take out only what has been let in.

Rights, as Against Other Appropriators, of one who adds to natural flow of stream. See note, 23 L. R. A. (n. s.) 1066.

Use of Natural Stream to convey appropriated water. See note, 51 L. R. A. 930.

Where Amount of Water to be Taken by diversion cannot be exactly determined, quantity must be approximated by evidence.

Approved in Pomona Land etc. Co. v. San Antonio Water Co., 152 Cal. 630, 93 Pac. 886, following rule.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

11 Cal. 161–162, PILOT ROCK CREEK CANAL CO. v. CHAPMAN.

Right of Prior Appropriation of water. See note, 30 L. R. A. 673.

11 Cal. 163–169, DYE v. DYE.

Where Pleader Wishes to Avail Himself of statutory privilege, facts which statute requires as foundation of right must be pleaded.

Approved in Sherwood v. Stephens, 13 Idaho, 406, 90 Pac. 348, following rule; Estate of Renton, 3 Cof. Prob. 529, 531, allegation of contestants to will that they are adopted and only children and heirs of decedent, without statement of particular facts upon which claim of adoption rests, is insufficient.

Conflict of Laws as to matrimonial property. See note, 57 L. R. A. 363.

11 Cal. 175–186, FERRIS v. COOVER.

What Adjudications of State Courts can be brought up in United States supreme court by writ of error. See note, 62 L. R. A. 515.

11 Cal. 190–193, MONTGOMERY v. TUTT.

Writ of Assistance is Proper Remedy to place purchaser of mortgaged premises under foreclosure decree in possession, after obtaining sheriff's deed.

Approved in Fox v. Stubenrauch, 2 Cal. App. 93, 83 Pac. 84, following rule; Emerick v. Miller, 159 Ind. 323, 64 N. E. 30, right to possession of property on foreclosure sale passes with execution of sheriff's deed, and writ of assistance may be issued to give possession; Mossman v. Dole, 14 Haw. 371, holding possession may be enforced by writ of possession in action to quiet title.

When Court Possesses Jurisdiction to make decree, it possesses power to enforce its execution.

Approved in Taylor v. Huelett, 15 Idaho, 272, 97 Pac. 40, 19 L. R. A. (n. s.) 535, following rule; Jenner v. Murphy, 6 Cal. App. 437, 92 Pac. 406, holding judgment in suit is admissible as evidence in suit to set aside conveyance in fraud of execution on the judgment.

Jurisdiction of Equity to Put Party in possession in aid of decree. See note, 93 Am. St. Rep. 155.

Lien for Purchase Money of homesteads. See note, 86 Am. St. Rep. 174, 176.

Right to Strict Foreclosure. See note, 20 L. R. A. 372.

11 Cal. 194–199, JENNY LIND CO. v. BOWER.

Use of Word With Settled Meaning in instrument, but which consistently admits two interpretations, is not such patent ambiguity as forbids explanation by parol testimony.

Approved in **Fireman's Fund Ins. Co. v. Aachen-Munich Fire Ins. Co.**, 2 Cal. App. 697, 84 Pac. 255, holding as latent ambiguity in insurance policy and explainable by parol testimony the word "warehouse," referring either to grain elevator or flour warehouse.

On Motion for New Trial on Ground of newly discovered evidence, affidavit of defendant as to what witness will testify to is insufficient. It must be by witness himself.

Distinguished in Soebel v. Boston Elevated Ry., 197 Mass. 52, 83 N. E. 4, holding where nonresident witness refused to make affidavit to newly discovered evidence, court should consider hearsay affidavit.

Patent Ambiguity may Sometimes be explained by evidence aliunde.

Approved in Shannon Copper Co. v. Potter, 13 Ariz. 251, 108 Pac. 488, admitting parol to explain ambiguity in contract for sale of corporate stock.

11 Cal. 200–205, 70 Am. Dec. 774, JOHNSON v. JOHNSON.

Land Purchased After Marriage and Paid for with common funds is community property, although husband had possession but without title.

Approved in Davidson v. Woodward, 156 Fed. 919, 84 C. C. A. 495, holding land acquired after marriage by deed showing money consideration, although husband contracted for purchase and had made part payments before marriage, is community property.

What is Community Property. See notes, 126 Am. St. Rep. 102; 4 Cof. Prob. 44.

11 Cal. 106–211, PEOPLE ex rel. O'DONNELL v. SAN FRANCISCO.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 475.

11 Cal. 212–214, WILLIAMS v. PRICE.

Partner of Deceased Presenting Account to executor, which is allowed and approved by court, cannot later set up claim based on partnership.

Approved in Kingsley v. Miller, 45 Cal. 96, following rule.

11 Cal. 215–222, PEOPLE v. BUSTER.

Discharge of One of Cosureties on official bond releases all.

Approved in Spencer v. Houghton (Cal.), 6 Pac. 857, and County of Cochise v. Ritter, 3 Ariz. 212, 73 Pac. 449, both following rule.

11 Cal. 222–227, EX PARTE ELLIS.

Intent of Whole Statute Taken Altogether must prevail even over the literal sense of the terms, and control the strict letter of the law, when letter would lead to possible injustice.

Approved in Laidlaw v. Pacific Bank (Cal.), 67 Pac. 899, holding corporation formed under acts of 1862 and 1864 have power to incur all liabilities necessary to fulfill objects thereof; Perry v. Strawbridge, 209 Mo. 643, 123 Am. St. Rep. 510, 108 S. W. 647, 16 L. R. A. (n. s.) 244, holding provision of law that widower take one-half of deceased's wife's property did not apply where he became widower by murder of wife.

11 Cal. 250–259, HUNT v. SAN FRANCISCO.

Judgment by Default on Complaint containing several counts, one of which is defective, is sustained by the valid counts.

Distinguished in Harris v. The Munro Co., 10 Cal. App. 589, 102 Pac. 822, holding judgment by default improper for amount of two notes sued on where one was not due at time judgment was obtained.

Necessity of Jury to Compute Damages on default judgment. See note, 20 L. R. A. (n. s.) 7.

11 Cal. 262–279, HUNT v. ROBINSON.

Property Held by Party Under Bond in action of replevin is in custody of the law.

Approved in Farmers' Bk. of Arkansas v. Stephenson, 23 Okl. 705, 102 Pac. 995, following rule.

Failure of Property in Replevin Suit can only be recovered when thing itself cannot be had.

Approved in Glass v. Basin & Bay State Min. Co., 31 Mont. 29, 77 Pac. 303, reaffirming rule.

11 Cal. 280, LINHART v. BUIFF.

Greatest Liberality and Indulgence should be extended to applications to amend complaints in justices' courts.

Approved in Goodman v. City of Ft. Collins, 164 Fed. 972, 91 C. C. A. 98, allowing amendment as to jurisdictional allegations to complaint in condemnation suit in county court.

11 Cal. 281–298, 70 Am. Dec. 779, BOURS v. ZACHARIAH.

Right to Attach or Correct Certificate of acknowledgment after its oath. See note, 22 L. R. A. (n. s.) 216.

11 Cal. 298–303, LAWRENCE v. KNIGHT.

Lessee cannot Maintain Action for Value of improvements upon his eviction after breach of covenants of lease, which provided for appraisement of improvements erected by him and payment by lessor at end of term.

Distinguished in Toellner v. McGinnis, 55 Wash. 438, 104 Pac. 645, 24 L. R. A. (n. s.) 1082, holding, where tenant refused to pay rent, his right to compensation for building erected by him in pursuance of lease, which bound landlord to purchase at end of term, were unaffected by pending unlawful detainer proceedings instituted by landlord.

Rights Under Landlord's Covenant to Pay for improvements at expiration of term, where lease is forfeited. See note, 24 L. R. A. (n. s.) 1086.

11 Cal. 307–327, MONTGOMERY v. TUTT.

That No Default is Entered is of no consequence after decree, since default merely cuts off right to answer.

Approved in Carter v. Paige (Cal.), 20 Pac. 730, following rule.

11 Cal. 328, FUNKENSTEIN v. ELGUTTER.

On Authority of People v. County Court of Eldorado Co., appeal from justice court is ordered dismissed by county court.

Approved in Smith v. Clyne, 15 Idaho, 262, 97 Pac. 42, and Maxson v. Superior Court (Cal.), 54 Pac. 520, both following rule; Smith v.

Clyne, 16 Idaho, 468, 101 Pac. 819, holding there could be no appeal from judgment of probate court where issues of fact had not been raised by reason of facts being admitted.

Distinguished in Armantage v. Superior Court, 1 Cal. App. 135, 81 Pac. 1035, holding certiorari does not lie to review judgment of superior court rendered after trial, on appeal from justice's court on questions of law and fact.

11 Cal. 341, GRAY v. GRAY.

Costs on Appeal Including Costs of Making up appeal in court below and of transcript are costs in appellate court, and section 510 of Code does not apply.

Approved in Candler v. Washoe Lake etc. Ditch Co., 28 Nev. 424, 82 Pac. 459, holding method of taxing costs on appeal governed by supreme court rule, not by Civil Practice Act.

Motion to Amend Judgment of Supreme Court is equivalent to petition for rehearing.

Approved in Brandon v. West, 29 Nev. 142, 88 Pac. 141, following rule.

11 Cal. 342, CHANDLER v. BOOTH.

Assignment in Trust cannot Interfere with rights of creditors who do not choose to be bound thereby.

Distinguished in Lam Yip v. Ching Sing, 5 Haw. 591, holding invalid attachment levied on property in hands of trustee for benefit of creditors, by a creditor not included in list made out by assignor of property.

11 Cal. 351–359, PEOPLE ex rel. TALLANT v. FOGG.

Mandamus to Compel Payment of municipal debt. See note, 14 L. R. A. (n. s.) 776, 778.

11 Cal. 361–362, FREMONT v. MARIPOSA COUNTY.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 709.

11 Cal. 363–366, STEPHENS v. MANSFIELD.

There can be No Such Thing as Abandonment of land in favor of particular person or for consideration.

Approved in Reynolds v. Clowdus, 4 Ind. Ter. 687, 76 S. W. 279, following rule; St. Peter's Church v. Bragaw, 144 N. C. 130, 55 S. E. 690, 10 L. R. A. (n. s.) 633, holding sale and conveyance of property could not be abandonment within the law; Watts v. Spencer, 51 Or. 271, 94 Pac. 42, holding parol sale of land is not abandonment of vendor's water rights; Cutwright v. Union Sav. & Inves. Co., 33 Utah, 495, 94 Pac. 987, holding parol surrender of rights under contract of sale constituted abandonment of such rights.

Gain or Loss of Title by abandonment not including questions under statute of limitations. See note, 135 Am. St. Rep. 890, 909.

Necessity of Beneficiary's Knowledge of trust. See note, 10 L. R. A. (n. s.) 633.

11 Cal. 366–372, WARING v. CROW.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 404, 405.

Cotenancy in Mines. See note, 91 Am. St. Rep. 881, 884.

Rights of Owner of Surface as against owner of minerals thereunder. See note, 135 Am. St. Rep. 141.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 893, 902.

11 Cal. 393–405, 70 Am. Dec. 791, HORR v. BARKER.

Contracts of Sale of Flour in Storage considered and held to pass present title although there was no separation of lots sold from the mass.

Approved in Seldomridge v. Farmers' & Merchants' Bank, 87 Neb. 534, 127 N. W. 872, holding where special quantity of grain identical in kind and uniform in value is sold from mass, separation from mass is not necessary to pass title when parties intended it to pass.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 35, 53, 56, 67.

Agent's Power to Use Principal's Property for payment of own debt. See note, 14 L. R. A. 235.

11 Cal. 405, BROTHERTON v. HART.

Appeal Does not Lie When Made by party consenting to judgment appealed from.

Approved in Hibernian Savings etc. Society v. Waymire, 152 Cal. 287, 92 Pac. 646, following rule; Gibson v. Berryman, 14 Cal. App. 333, 111 Pac. 927, holding party gaining advantage from stipulation for new trial could not object to lack of notice of intention to move for new trial.

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CASES IN 12 CALIFORNIA.

12 Cal. 11–20, AMES v. HOY.

Where Record-book Containing a Judgment has been destroyed by fire, secondary evidence is admissible to establish fact of existence of such judgment and its contents.

Approved in Seaboard National Bank v. Ackerman, 16 Cal. App. 57, 116 Pac. 92, and Estate of Heywood, 154 Cal. 315, 97 Pac. 826, both following rule; Hibernia Savings etc. Society v. Boyd, 155 Cal. 200, 100 Pac. 242, applying rule to records destroyed by conflagration of April 18–20, 1906.

Whether a Judgment is a Contract. See note, 17 L. R. A. 614.

12 Cal. 20–27, TEWKSBURY v. PROVIZZO.

Effect of Compulsory Partition. See note, 101 Am. St. Rep. 875.

Effect of Deed in Partition, as distinguished from ordinary deeds. See note, 57 L. R. A. 337.

12 Cal. 27–50, KIMBALL v. GEARHART.

Failure of One Partner in a ditch to pay his proportion of expenses of concern does not forfeit his right in a common property.

Approved in Nightingale v. Scannell, 18 Cal. 327, holding that a recapture of certain property by member of partnership is a joint recapture of himself and other partner.

Deed to Property Conveying Future Right to use of water does not convey right to damages for past illegal use.

Distinguished in Rianda v. Watsonville Water etc. Co., 152 Cal. 530, 93 Pac. 81, holding title to riparian right acquired by adverse possession passes by conveyance of land to which it is appurtenant.

Act of Commencing Ditch With Intention of appropriating water is not sufficient of itself to give party exclusive right to water of stream.

Approved in Miles v. Butte Electric Co., 32 Mont. 69, 79 Pac. 554, holding until claimant is in position to use water of stream subject to appropriation his water right does not exist in such sense that mere diversion of water by another is ground for damages.

Prior Actual Appropriation and use of water gives title to it.

Approved in Lower Tule River Ditch Co. v. Angiola Water Co., 149 Cal. 499, 86 Pac. 1082, following rule.

Right of Prior Appropriation of water. See note, 30 L. R. A. 676.

Mere Order Permitting Amendment of pleading is of no effect unless complied with.

Approved in Satterlund v. Beal, 12 N. D. 127, 95 N. W. 520, following rule.

12 Cal. 50–56, **PEOPLE v. BIRCHAM.**

Legislative Power to Grant Pardon or amnesty. See note, 34 L. R. A. 252.

12 Cal. 56–72, **STATE OF CALIFORNIA v. MOORE.**

Several Persons may have, in the same land, a property which is subject to taxation.

Approved in Graciosa Oil Co. v. Santa Barbara, 155 Cal. 144, 99 Pac. 486, 20 L. R. A. (n. s.) 211, following rule.

Mining Claim is Property and subject to taxation.

Approved in Topeka Commercial Security Co. v. McPherson (Okl.), 52 Pac. 399, holding that lots in territory not deeded are subject to taxation; State National Bank v. City of Memphis, 116 Tenn. 653, 94 S. W. 609, 7 L. R. A. (n. s.) 663, holding state bonds not exempt from taxation; Harvey Coal etc. Co. v. Dillon, 59 W. Va. 615, 635, 53 S. E. 941, 6 L. R. A. (n. s.) 628, holding mining lease taxable as well as land itself.

What Constitutes Real Estate for purposes of taxation. See note, 15 L. R. A. 297.

Exemption from Taxation or assessment of lands owned by governmental bodies or in which they have an interest. See note, 132 Am. St. Rep. 293, 348.

12 Cal. 73–76, **KILLEY v. SCANNELL.**

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 125.

12 Cal. 76–85, 73 Am. Dec. 518, **BURNETT v. SACRAMENTO.**

Assessments for Improvements by front-foot rule. See notes, 17 L. R. A. 331; 28 L. R. A. (n. s.) 1127, 1128, 1129, 1132, 1138.

Personal Liability to Pay Assessment for local improvement. See note, 35 L. R. A. 58, 59.

12 Cal. 89–90, **FRATT v. CLARK.**

Assumpsit Lies for Property tortiously taken, the tort being waived.

Approved in Lehmann v. Schmidt (Cal.), 22 Pac. 974, and Fountain v. Sacramento, 1 Cal. App. 462, 82 Pac. 637, both following rule.

Right to Waive Tort and sue in assumpsit. See note, 134 Am. St. Rep. 191.

12 Cal. 92–99, 73 Am. Dec. 522, **WHEATLEY v. STROBE.**

Where an Order is Given for a valuable consideration, and for amount of the demand against the drawee, though worthless as a bill, it operates as an assignment of the debt or fund against which it is drawn.

Approved in Brady v. Ranch Mining Co., 7 Cal. App. 184, 94 Pac. 86, and Bank of Yolo v. Bank of Woodland, 3 Cal. App. 567, 86 Pac. 822, both following rule; Provident Nat. Bank v. Hartnett Co., 100 Tex. 219, 97 S. W. 692, where creditor drew draft on debtor and attached account, and creditor procured bank to cash draft, the claim was assigned to bank, and upon protest it could hold both creditor and debtor for sum advanced.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 593.

12 Cal. 107–111, HEYMAN v. LANDERS.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 14.

12 Cal. 114–125, IN RE TOMPKINS' ESTATE.

Homestead is No Part of Assets of deceased husband.

Approved in Estate of Adamson, 5 Cof. Prob. 398, where statutory homestead from community property has been set apart in probate to widow, its value is not considered in determining whether estate exceeds fifteen hundred dollars.

Rights of Children in Homestead of parent. See note, 56 L. R. A. 49, 51.

Liability of Community Property for debts. See note, 19 L. R. A. 234.

12 Cal. 128–134, 73 Am. Dec. 526, CLOUD v. EL DORADO COUNTY.

In Whose Name Deputy Officers should act. See note, 19 L. R. A. 178.

Who may Proceed to Set Aside Judgments against other parties. See note, 54 L. R. A. 760, 768.

12 Cal. 134–138, SACRAMENTO v. CALIFORNIA STAGE CO.

Stage Company Doing Business from city of Sacramento is liable to city for license tax for privilege of doing business.

Approved in Topeka v. Jones, 74 Kan. 170, 86 Pac. 164, upholding city license tax on express company; Nebraska Tel. Co. v. Lincoln, 82 Neb. 71, 117 N. W. 288, upholding license tax on telephone company.

License Fee for Use of Streets by vehicles. See note, 36 L. R. A. 414.

12 Cal. 139–140, MUDGETT v. DAY.

One Dealing With an Agent having knowledge of his agency is bound to inquire into the extent of his authority.

Approved in Davis v. Trachsler, 3 Cal. App. 559, 86 Pac. 612, holding purchaser of real property bound to look into extent of authority of agent making contract of sale.

Authority of Agent to Accept Chattel in payment of debt. See note, 19 L. R. A. (n. s.) 325.

12 Cal. 148–168, STANLEY v. GREEN.

It is not Essential to Validity of Deed that it should contain such description of land conveyed as to enable identification to be made without aid of extrinsic evidence.

Approved in County of Los Angeles v. Hannon, 159 Cal. 42, 112 Pac. 880, upholding sufficiency of description of deed to land at junction of two railroads; Lauge v. Waters, 156 Cal. 145, 103 Pac. 891, holding much greater liberality to prevail in admitting extrinsic evidence to explain description in contract of sale of land than in deed.

"One Square Mile, More or Less," used in describing quantity of land in conveyance, held merely descriptive of premises conveyed.

Distinguished in Wood v. Dillingham, 5 Haw. 641, holding description calling for six hundred and fifty acres, more or less, not satisfied by tract of two hundred and fifty-eight acres, and refusing specific performance.

Declarations of Grantor are Admissible as against himself or parties claiming under him, if they tend to restrict his own premises, or lessen his title.

Approved in Collins v. McKay, 36 Mont. 134, 122 Am. St. Rep. 334, 92 Pac. 298, admitting declarations of intestate made subsequent to conveyance, pointing out property transferred, as against administrator of his estate.

Declarations of Former Owners of Land as evidence against their successors in title. See note, 134 Am. St. Rep. 619.

Where Declarations of Grantor Controlled Grantee in purchase of land, grantor is estopped to set up any interest in opposition to title of grantee.

Approved in Thompson v. Borg, 90 Minn. 213, 95 N. W. 898, holding party estopped to deny division line between his own and adjoining land is true boundary as against purchaser of adjoining land, if such purchaser was induced by his representations to purchase with reference to such line.

12 Cal. 168–171, 73 Am. Dec. 529, CONNER v. CLARK.

One Making Contract in Representative Capacity may exempt himself from personal liability by using clear and explicit words to show that intention.

Approved in Erskine v. Russell, 43 Colo. 453, 96 Pac. 250, holding lease signed by party as trustee to bind firm for which taken and not signer alone; Gavazzer v. Plummer, 53 Wash. 15, 101 Pac. 371, holding "treasurer" attached to name of party signing contract to be mere description of person and signer personally bound.

One Who Signs a Writing as "agent," "trustee" or president." See note, 79 Am. St. Rep. 137.

Liability of Principal on Negotiable Paper executed by agent. See note, 21 L. R. A. (n. s.) 1051, 1083.

Personal Liability of Officers on Note made for corporation. See note, 19 L. R. A. 679.

Extrinsic Evidence to Show who is liable as maker of note. See note, 20 L. R. A. 710.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 462.

12 Cal. 181–191, LOW v. BURROWS.

Administrator in Foreign State may Assign for value judgment obtained there by intestate during his life against person who has removed from that state.

Distinguished in Low v. Horner, 10 Haw. 538, holding recovery on judgment may be had by administration being granted in state to

which judgment debtor has removed and suit there brought by administrator.

Admissibility in Evidence of Copies of records of other states. See note, 5 L. R. A. (n. s.) 967.

12 Cal. 191-200, JONES v. THOMPSON.

Where Partner in Suit for Partnership Accounting asked court to join judgment creditors of other partners and restrain levy of execution on partnership property, he cannot object that such persons are not parties and have no right to appeal from judgment.

Approved in First Nat. Bank v. Farmers' etc. Bank, 171 Ind. 331, 86 N. E. 420, where suit was tried on theory that beneficiary and trustee of trust deed were cross-complainants on behalf of beneficiary, parties would be held to same theory on appeal and such cross-complainants could be joint appellants.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 485, 491, 492, 493.

12 Cal. 200-208, 73 Am. Dec. 531, ESTATE OF KNIGHT.

Administrator cannot Pay Out Money of estate to remove encumbrance from property of estate which estate is not responsible for on theory that property may increase in value.

Approved in Estate of Blythe, 2 Cof. Prob. 160, 162, 163, sustaining demurrer to petition of administrator to spend money to preserve Mexican lands from forfeiture under conditions of grants.

12 Cal. 208-212, WAGENBLAST v. WASHBURN.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 789, 877, 915.

12 Cal. 216-226, 73 Am. Dec. 533, SMITH v. SMITH.

Husband can Dispose of Community Property without consent of wife.

Approved in Reade v. de Lea, 14 N. M. 450, 95 Pac. 133, following rule.

Husband cannot Voluntarily Dispose of community property for the purpose of defeating claims of wife.

Approved in Reade v. de Lea, 14 N. M. 457, 95 Pac. 135, reaffirming rule; De Godey v. Godey, 39 Cal. 164, sustaining injunction to prevent husband from disposing of community property.

Property Acquired During Continuance of Community is presumed to belong to the community.

Approved in Estate of Donahue, 1 Cof. Prob. 198, allegation in widow's petition to have her share of community property assigned to her by way of partial distribution, that property was acquired by deceased after his marriage to petitioner by purchase and not by gift, devise, bequest or descent, sufficiently shows community character.

Distinguished in Wilson v. Sarment, 153 Cal. 527, 126 Am. St. Rep. 91, 96 Pac. 316, holding amendment of 1889 to section 164, Civil Code, provided that when title was acquired during community in wife's name, presumption is that it is her separate property.

Burden of Proof as to Community Property. See note, 82 Am. St. Rep. 365.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 193.

12 Cal. 243-245, MARTIN v. TRAVERS.

Ground for Objection to Testimony must be Stated at the time it is offered. A general objection is not sufficient.

Approved in People v. Nichols, 62 Cal. 521, holding point of objection to irregular mode of entering verdict and poll of jury must be made at time.

12 Cal. 245-247, MORGENTHAM v. HARRIS.

Preference by Mortgage or Sale as assignment for creditors. See note, 37 L. R. A. 340.

12 Cal. 247-255, 73 Am. Dec. 538, MEYER v. KINZER.

Property Acquired by Either Spouse, except by gift, devise, bequest or descent, during existence of community, is presumed to be community property.

Approved in Strong v. Eakin, 11 N. M. 115, 118, 66 Pac. 540, 541, following rule; Mitchell v. Moses, 16 Cal. App. 598, 117 Pac. 687, where deed to wife does not expressly convey property to wife as her separate property, husband may by parol show property was community property; State v. Langan, 32 Nev. 181, 105 Pac. 570, issue as to whether property sought to be set aside to widow of homestead is separate or community property is raised by petition showing husband was in possession when he died; Reade v. de Lea, 14 N. M. 461, 95 Pac. 137, upholding sale of community property by husband.

Distinguished in Nilson v. Sarment, 153 Cal. 527, 126 Am. St. Rep. 91, 96 Pac. 316, holding by amendment of 1889 to section 164, Civil Code, property acquired in wife's name is presumed to be her separate property.

What is Community Property. See notes, 126 Am. St. Rep. 100, 103, 123; 4 Cof. Prob. 42, 45, 65.

Presumption That Property Purchased during marriage is community property can be overcome only by clear and conclusive proof.

Approved in Estate of Donahue, 1 Cof. Prob. 198, allegation in widow's petition to have share of community property assigned to her by way of partial distribution, that property was acquired by decedent by purchase after his marriage to her and not by gift, devise, bequest or descent, sufficiently shows community character.

Qualified in Estate of Pepper, 158 Cal. 622, 112 Pac. 64, only that degree of proof which produces conviction in unprejudiced mind is required to establish separate character of property acquired during marriage.

Distinguished in Estate of Leahy, 3 Cof. Prob. 370, where part of price of realty was obtained by decedent by pledge of his separate property and there is not enough money on hand to redeem it, realty is separate property.

Husband has Right of Control and disposition of community property.

Approved in Brenneke v. Smallman, 2 Cal. App. 310, 83 Pac. 304, holding husband has right to sue for and recover community property although mortgaged under name of wife.

12 Cal. 265–273, **MOORE v. PATCH.**

Act of Legislature in Nature of Special Act is not unconstitutional on ground of not being uniform in its operation.

Approved in People v. Judge Twelfth District, 17 Cal. 562, holding constitutional special act of legislature to change venue of a single indictment.

A Tax is a Debt Due from Property Holder to state.

Approved in William Ede Co. v. Heywood, 153 Cal. 620, 96 Pac. 83, 22 L. R. A. (n. s.) 562, holding purchaser of real property who pays taxes assessed on interest of mortgagee under mortgage by his grantor to remove lien therefor cannot recover from such mortgagee, there being no privity between them.

12 Cal. 275–277, **MARKLEY v. RAND.**

Injunctions Against Judgments for Errors and irregularities. See note, 30 L. R. A. 706.

Who may Proceed to Set Aside Judgments against other persons. See note, 54 L. R. A. 767.

12 Cal. 277–279, **SEARS v. HATHAWAY.**

In Absence of Proof of Express Malice, actual damages only can be recovered in suit for malicious prosecution.

Approved in Adkin v. Pillen, 136 Mich. 688, 100 N. W. 179, holding evidence to negative malice admissible in mitigation of damages.

12 Cal. 283–286, **SWAIN v. CHASE.**

Law Presumes Nothing in Favor of jurisdiction of justices' courts.

Approved in Harlan v. Gladding, McBean & Co., 7 Cal. App. 53, 93 Pac. 401, holding void attachment issued by justice orally called in to act during illness of resident justice.

Affidavit as to Inability to Find Defendant in county, offered on motion for order for publication of summons in justice court considered, and held insufficient.

Approved in Slocum v. McLaren, 106 Minn. 391, 119 N. W. 408, upholding return of service of notice to redeem from tax sale containing statement that party could not be found.

12 Cal. 291–295, **PEOPLE v. MILLER.**

Where Indictment for Murder is Used as substitute for indictment for manslaughter, it must, where time is material, contain averment as to time which would be essential in indictment for manslaughter.

Approved in Letcher v. State, 159 Ala. 64, 48 So. 806, holding conviction, on prosecution under felony indictment, for lesser offense, could not be sustained if such offense was barred though felony was not barred.

When Limitations Apply to Offense, indictment therefor must allege it was committed on a day within such period.

Approved in State v. Myrberg, 56 Wash. 386, 105 Pac. 624, holding information for rape sufficiently charged time when it alleged act was committed "within three years next preceding filing."

Charge of Time and Place in indictment for homicide. See note, 3 L. R. A. (n. s.) 1023.

12 Cal. 298–299, **RITTER v. PATCH.**

Injunction Does not Lie to Restrain Collection of illegal taxes unless irreparable injury will result from their collection.

Approved in Hallett v. Board of County Commissioners, 40 Colo. 316, 90 Pac. 681, refusing injunction to restrain collection of illegal taxes.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 702, 704, 705, 708.

12 Cal. 306–308, **STEVENS v. IRWIN; S. C., 15 Cal. 503, 76 Am. Dec. 500.**

Witness Called to Impeach Another may answer that he would not believe such other on oath.

Approved in People v. Corey, 8 Cal. App. 726, 97 Pac. 910, following rule.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 28.

Necessity of Calling Subscribing Witnesses to prove attested instruments. See note, 35 L. R. A. 321, 322.

12 Cal. 308–311, **BEEBE v. BROOKS.**

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 804.

12 Cal. 311–315, **BARRINGER v. WARDEN.**

Plea of Statute of Limitations may be Taken by demurrer when complaint shows on its face that claim is barred.

Approved in Palmtag v. Roadhouse (Cal.), 34 Pac. 112, holding complaint must show that cause is barred by limitation, not that it may be barred, to allow objection to be taken by demurrer.

12 Cal. 317–325, **GRIFFITH v. GROGAN.**

Taking Note for Debt Due does not extinguish the debt unless so agreed.

Approved in Stone v. Hammel (Cal.), 22 Pac. 205, reaffirming rule; Savings etc. Society v. Burnett (Cal.), 37 Pac. 185, refusing to disturb finding that taking note canceled debt for which given.

Accord and Satisfaction by part payment. See note, 20 L. R. A. 791.

12 Cal. 327–330, **LIES v. DE DIABLAR.**

Adultery and Abandonment on Part of Wife will not devest homestead of its character.

Approved in Harlan v. Schulze, 7 Cal. App. 293, 94 Pac. 381, holding incidental use of homestead for prostitution by wife did not destroy homestead character; Murphy v. Renner, 99 Minn. 351, 116 Am. St. Rep. 418, 109 N. W. 594, 8 L. R. A. (n. s.) 565, holding void attempted conveyance of homestead by husband without joinder of wife, although she had deserted him and was leading adulterous life.

Right of Minor Children to benefit of probate homestead. See note, 1 Cof. Prob. 556.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 914.

12 Cal. 345–348, PEOPLE v. AH FONG.

In Criminal Case Oral Instructions cannot be given except by consent of parties.

Approved in dissenting opinion in Boggs v. United States, 11 Okl. 144, 65 Pac. 929, majority opinion holding conversation between court and jury after jury had declared itself unable to reach verdict did not amount to giving oral instructions.

12 Cal. 352–362, WHIPLEY v. McKUNE.

Irregularities in Election must be Proven, the returns being prima facie evidence of fact they impart.

Approved in Chatham v. Mansfield, 1 Cal. App. 306, 82 Pac. 346, holding returns of election not controlled by recount of ballots that have been insecurely kept; Harris v. Palmer, 25 Okl. 773, 108 Pac. 386, holding party contesting election must affirmatively show illegality of particular votes he asks to be excluded; State v. Barnes, 22 Okl. 207, 97 Pac. 1003, holding failure of election judges, inspectors and clerks to take oath prescribed by law did not invalidate election in absence of showing of collusion or willful neglect; Krickbaum's Contested Election, 221 Pa. 528, 70 Atl. 855, refusing to throw out vote of district because one person acted improperly in place of regularly elected judge in belief he had right to do so.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 51.

12 Cal. 363–377, 73 Am. Dec. 543, HUNTER v. WATSON.

Deed to One and His Heirs where named grantee is dead is void.

Approved in Baker v. Lane, 82 Kan. 718, 109 Pac. 183, holding rule applies to tax deed.

Conveyances to Persons not in being. See notes, 84 Am. St. Rep. 237; 28 L. R. A. (n. s.) 405.

Effect of Possession of Real Property as notice. See notes, 104 Am. St. Rep. 345; 13 L. R. A. (n. s.) 56, 57, 61, 84, 112, 114.

Title Acquired by One Purchasing at his own execution sale. See note, 79 Am. St. Rep. 948.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 36.

Priority of Liens of Judgment or of prior unrecorded conveyance. See note, 16 L. R. A. 668, 672.

12 Cal. 378–394, PEOPLE v. BURBANK.

Tenure of Office Fixed by Constitution cannot be altered by legislature.

Approved in The King v. Testa, 7 Haw. 206, holding judge appointed to supreme court under constitution could not be recovered by act of legislature; Commonwealth v. Sheatz, 228 Pa. 306, 77 Atl. 549, holding term of state treasurer could not be extended by legislature.

Term of District Judge Elected upon occurrence of vacancy is for full term of six years.

Approved in State v. Schnitger, 17 Wyo. 89, 96 Pac. 244, following rule.

12 Cal. 394–402, PEOPLE v. TEMPLETON.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 68.

12 Cal. 403–409, BURKE v. TABLE MOUNTAIN WATER CO.

Reasons Given by Judge in Findings are no part of judgment. The point decided is the thing fixed by the judgment.

Approved in Terre Haute & Ind. etc. R. R. Co. v. State, 159 Ind. 472, 65 N. E. 413, holding court's reasoning in sustaining demurrer wholly immaterial if right result was reached; Stough v. Reeves, 42 Colo. 436, 95 Pac. 959, holding oral remarks of judge at time of decision will not be considered.

12 Cal. 409–411, PEOPLE v. MARTIN.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 62.

Necessity of Notice or proclamation of election. See note, 120 Am. St. Rep. 795.

Miscellaneous.—Cited in People v. Rosborough, 14 Cal. 187, 188.

12 Cal. 414–424, 73 Am. Dec. 550, PICO v. COLUMBET.

Tenant in Common cannot Recover from cotenant any share of profits of such cotenant's labor on common property, unless he is ousted from possession.

Approved in Hawaiian Commercial etc. Co. v. Waikaper Sugar Co., 9 Haw. 83, following rule; McCord v. Oakland etc. Min. Co., 64 Cal. 146, 49 Am. Rep. 686, 27 Pac. 865, holding tenant in common of mine, working it without excluding cotenants, is not accountable to them for damages and waste; Brown v. Thurstin, 83 Kan. 127, 109 Pac. 785, holding tenant in common had no action for rent against cotenant in possession when exclusion was not shown.

Distinguished in Paepcke-Leicht Lumber Co. v. Collins, 85 Ark. 421, 108 S. W. 514, holding tenant in common who cut and sold valuable standing timber on common property liable to other for proportionate share; Ayotte v. Nadeau, 32 Mont. 511, 81 Pac. 148, holding common-law rule that tenant in common has no right to collect rent from cotenant in possession does not hold in Montana.

Liability of Cotenants for Improvements and repairs. See note, 29 L. R. A. 450.

Liability of Cotenants to Account for use and occupation and rents and profits. See note, 28 L. R. A. 829, 851.

12 Cal. 426–432, McGARRITY v. BYINGTON.

Failure to Comply With Any One of Mining Rules of camp is not forfeiture of title, but such noncompliance must be with such rules as make noncompliance therewith forfeiture.

Approved in Sturtevant v. Vogel, 167 Fed. 451, 93 C. C. A. 84, holding filing notice of location of mining claim not essential to validity of location in absence of well-established custom in vicinage; dissenting opinion in Sturtevant v. Vogel, 167 Fed. 456, 93 C. C. A. 84, majority holding valid mining location without filing notice of location.

Abandonment and Forfeiture of mining claims. See notes, 87 Am. St. Rep. 407.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769, 880.

Work Done Outside Mining Claim with intent to work claim, to be considered by intendment as work done on claims, must have direct relation and be in reasonable proximity to it.

Approved in Godfrey v. Faust, 20 S. D. 208, 105 N. W. 462, holding construction of tunnel outside mining claim made solely with reference to development of claim is work on claim available as annual development work thereon.

Necessity of Calling Subscribing Witnesses to prove attested instruments. See note, 35 L. R. A. 326. 328.

12 Cal. 437–438, STODDART v. VAN DYKE.

Effect of Judgment in Action against part of obligors on joint or joint and several contract upon liability of others. See note, 43 L. R. A. 162.

12 Cal. 440–449, BORLAND v. THORNTON.

Injunction will not be Granted to Restrain enforcement of judgment when complaint shows no reason for failing to apply to district court to open judgment and allow answer to be filed.

Approved in Weed v. Hunt, 81 Vt. 306, 70 Atl. 565, following rule.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 328.

Negligence as Cause for, and as Bar to, injunctions against judgments. See note, 31 L. R. A. 36.

Miscellaneous.—Cited in Kendall v. Earl (Cal.), 44 Pac. 793.

12 Cal. 450–456, FARRELL v. ENRIGHT.

Alien's Right to Inherit. See note, 31 L. R. A. 86, 177.

12 Cal. 457–466, BUTLER v. COLLINS.

Title is not Transferred When Contract transferring goods is based on fraud.

Approved in Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 414, 95 Pac. 1030, holding rule applies as to original parties but not as to innocent purchaser from vendee.

Fraud may be Proved by circumstances.

Approved in Maxson v. Llewelyn (Cal.), 54 Pac. 734, following rule.

In Action for Damages for Trespass and conversion of goods plaintiff cannot recover value of goods and also profits which might have been made by their sale.

Approved in dissenting opinion in Lesch v. Great Northern Ry. Co., 97 Minn. 508, 106 N. W. 957, 7 L. R. A. (n. s.) 93, majority upholding damages allowed plaintiff for injury by reason of fright caused by wrongful acts of defendant's employees.

Damages for Tort as Affected by loss of profits. See note, 52 L. R. A. 53.

12 Cal. 467–469, McMILLAN v. RICHARDS.

Entry of Judgment of Supreme Court by clerk of court below is mere ministerial act.

Approved in State v. District Court, 42 Mont. 173, 111 Pac. 731, mandamus does not lie against judge in trial court to compel entry of judgment of supreme court certified down after appeal.

12 Cal. 469–476, WELLINGTON v. SEDGWICK.

Where Goods are Levied on by Sheriff on execution, it is duty of party whose goods are taken to specifically point out to sheriff goods not subject to levy before he can sue for their taking.

Approved in McCausey v. Hoek, 159 Mich. 576, 124 N. W. 572, and Johnson v. Emery, 31 Utah, 138, 86 Pac. 872, both holding writ of attachment properly executed on whole of mixed property where garnishee refused to point out his own goods and demanded return of whole.

Distinguished in Susskind v. Hall (Cal.), 44 Pac. 329, refusing to apply rule where chattels of third party taken were easily distinguishable.

12 Cal. 476–478, HART v. GAVEN.

Assessments for Improvements by front-foot rule. See note, 28 L. R. A. (n. s.) 1159.

12 Cal. 479–482, ZIEL v. DUKES.

Demand is not Necessary Before Suit on note payable on demand.

Approved in Ex parte Howitz, 2 Cal. App. 754, 84 Pac. 230, and Heweth v. Dean (Cal.), 25 Pac. 755, both following rule.

12 Cal. 483–499, PAIGE v. O'NEAL.

Where Possession of Property is Wrongfully Obtained, no demand is necessary before suit is brought.

Approved in Daggett v. Gray (Cal.), 40 Pac. 960, holding allegation of demand necessary in complaint having no allegation of wrongful acquisition; Havird v. Lung, 19 Idaho, 794, 115 Pac. 931, applying rule in claim and delivery for horse.

Participation in Fraud of Vendor which will invalidate transfer for good consideration as against creditors. See note, 32 L. R. A. 69.

12 Cal. 500–533, McCAULEY v. WELLER.

Partisan Feeling of Judge does not disqualify him from sitting nor authorize change of venue.

Approved in Ex parte Guerrero, 69 Cal. 102, 10 Pac. 270, holding alleged prejudice of judge did not disqualify him from trying case under liquor ordinance; Day v. Day, 12 Idaho, 563, 564, 565, 86 Pac. 533, 534, ordering change of venue upon showing of bias in judge; Hutchinson v. Manchester St. Ry., 73 N. H. 275, 60 Atl. 1013, holding criticism of defendant's trial methods by court did not disqualify judge.

In Forcible Entry and Detainer, forcible entry upon actual possession being proven, plaintiff is entitled to restitution of premises, though fee simple title and present right of possession is shown by defendant.

Approved in Lasserot v. Gamble (Cal.), 46 Pac. 919, holding inadmissible evidence of title in defendant in forcible entry and detainer suit.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 390, 396.

Forcible Entry and Detainer Against One forcibly dispossessing peaceable possessor in asserting lawful right to possession. See note, 8 L. R. A. (n. s.) 428.

12 Cal. 534–535, DUTCH FLAT WATER CO. v. MOONEY.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769.

12 Cal. 535–539, 73 Am. Dec. 561, WATERS v. MOSS.

In Action Against Railroad for running over and killing horse, plaintiff had right to prove custom of country to permit domestic **animals to run at large** on uninclosed lands.

Approved in Hamilton v. Chicago, Burlington etc. Ry. Co., 145 Iowa, 437, 124 N. W. 365, holding admissible, in action for damages for injury to servant in course of employment, evidence of customary method of doing work.

Domestic Animals. See note, 140 Am. St. Rep. 137.

Liability of Owner for Trespass of cattle. See note, 22 L. R. A. 56.

12 Cal. 542–555, ELLISON v. JACKSON WATER CO.

A Promise by One to Fulfill His Contract with another is no consideration for a promise by a third person to pay him for such contract.

Approved in Marinovich v. Kilburn, 153 Cal. 642, 96 Pac. 304, holding where plaintiff purchased stock, paying in part, and contract by defendant was to repurchase stock to induce payment of remainder, neither existence of duty to repurchase nor performance of it by plaintiff would constitute consideration for contract.

Performance of Existing Contract obligation as consideration for new promise. See note, 34 L. R. A. 43.

Validity of Oral Promise to Pay another's pre-existing debt, made to secure benefit to promisor, without releasing original debtor. See note, 22 L. R. A. (n. s.) 1085.

Party for Whom Contract is Assumed to be made may ratify it, but there must be some relations, actual or assumed, of principal and agent, to authorize ratification.

Distinguished in Capps v. Hensley, 23 Okl. 316, 100 Pac. 517, holding lease made by natural guardian for infant, and rents from which as sole heir he collected after infant's death, to be neither ratified nor confirmed by him by such act, but adopted.

Equity Raises No Lien in respect to real estate in behalf of mechanics or materialmen.

Approved in Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 520, 97 Pac. 417, holding lien given only by statute and distinct from debt created by furnishing labor and materials.

12 Cal. 555–559, 73 Am. Dec. 562, FRALER v. SEARS UNION WATER CO.

Liability for Damming back stream. See note, 59 L. R. A. 820, 904.

12 Cal. 561–563, MORLEY v. DICKINSON.

Surety on Contract is Discharged when levy of execution on judgment obtained thereon is released and principal's note taken.

Distinguished in Read v. Am. Surety Co. of N. Y., 117 Iowa, 13, 90 N. W. 591, holding failure to file laborer's lien according to statute did not release surety on bond of contractor for municipal street improvement given for performance of work and payment of labor claims.

12 Cal. 564–580, INGOLDSBY v. JUAN.

Deed by Wife of Her Separate Property with assent of husband underwritten passes title though husband is not joined as grantor.

Approved in Sterling v. Park, 129 Ga. 313, 121 Am. St. Rep. 224, 58 S. E. 830, 13 L. R. A. (n. s.) 298, deed signed by grantor is operative though his name is omitted from body of instrument; Holt v. Kaaukai, 11 Haw. 503, under Civil Code, section 1287, consent of husband to conveyance of her lands by wife must be in writing; Peter v. Byrne, 175 Mo. 248, 97 Am. St. Rep. 576, 75 S. W. 438, deed of husband and wife to wife's land considered and held to be joint deed and valid, although husband's name did not appear in introductory clause.

Explained in Cordano v. Wright, 159 Cal. 618, 619, 115 Pac. 230, 231, where husband and wife each owned individed interest in land, wife's interest could not be transferred by her by her mere signature to deed purporting to convey property of husband alone.

Sufficiency of Husband's Joinder in wife's conveyance of land. See note, 97 Am. St. Rep. 591.

Sixth Section of Act of April 17, 1850, making husband manager of wife's property, relates only to property acquired after passage of act.

Approved in **Reade v. de Lea,** 14 N. M. 464, 195 Pac. 138, holding act of March 20, 1901, providing neither husband nor wife shall dispose of real estate acquired during coverture by onerous title except by joint deed, does not affect property acquired prior to passage of act.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 13 CALIFORNIA.

13 Cal. 9–11, BARKER v. KONEMAN.

Law Favors Provision by Husband, when solvent, for wife and family against possible future misfortune.

Approved in Hoeck v. Greif, 142 Cal. 122, 75 Pac. 671, upholding husband's gift to wife of community property.

Effect of Conveyance by husband to wife. See note, 69 L. R. A. 362.

13 Cal. 11–13, WAUGH v. CHAUNCEY.

It is Doubtful Whether Appeal Lies from judgment of board of supervisors as to location of bridge, but if it does, it must be direct to some superior tribunal.

Approved in Murray v. Board of Supervisors, 23 Cal. 495, district court has power to grant writ of certiorari to review action of board of supervisors in granting ferry license.

Rule Against Collateral Attack on judicial decisions applies to special tribunal which acts judicially.

Distinguished in State v. Howard, 83 Vt. 16, 74 Atl. 396, auditor's allowance of claim of railroad commissioner, where there had been a fraudulent concealment, was not binding on the state.

13 Cal. 13–15, HAFFLEY v. MAIER.

A Foreclosure is Effectual only against those persons who are made parties.

Approved in Horr v. Herrington, 22 Okl. 594, 132 Am. St. Rep. 648, 98 Pac. 444, 20 L. R. A. (n. s.) 47, applying rule in controversy over surplus arising from foreclosure sale, where holder of second mortgage was not made a party to the suit but became purchaser at foreclosure sale.

Right to Strict Foreclosure. See note, 20 L. R. A. 372.

13 Cal. 24–28, 73 Am. Dec. 565, HOUSTON v. WILLIAMS.

A Decision of Court is Its Judgment; an opinion is a statement of the reason for its conclusion.

Approved in Craig v. Bennett, 158 Ind. 13, 62 N. E. 274, construing the word "opinion" in Burns' Revised Statutes of 1901, section 1337j, on application to have appeal transferred from appellate to supreme court; Coffey v. Gamble, 117 Iowa, 548, 91 N. W. 814, in suit to restrain town from doing street work an opinion and decision announcing in unmistakable terms that injunction should be dissolved constituted dissolution before entry of decree; Russell v. Schade Brewing Co., 49 Wash. 365, 95 Pac. 328, where court gave oral opinion in favor of defendant, and later made written findings on which judgment was entered for plaintiff, it did not review and reverse its decision.

Legislature has No Power to Control supreme court in the discharge of its judicial duty.

Approved in Alabama Western R. R. Co. v. Talley-Bates Const. Co., 162 Ala. 410, 50 So. 345, where, under statute requiring opinion to be delivered by justice who heard oral argument, counsel acquiesced in assignment of matter to judge who had not heard argument, right to invoke application of statute was waived; Ex parte Brown, 166 Ind. 602, 78 N. E. 556, upholding rule on application of clerk of supreme court for construction of law as to his right to furnish carbon copies of opinions at less than statutory rate; Parkison v. Thompson, 164 Ind. 627, 73 N. E. 115, under statute providing appellate court shall carefully consider and weigh the evidence given before trial court as presented in bill of exceptions, it is not required to weigh conflicting oral testimony; State v. District Court, 40 Mont. 209, 105 Pac. 722, provision of code requiring supreme court to state the reasons for its decisions is not binding upon the court; dissenting opinion in Barnett v. State, 42 Tex. Cr. 321, 62 S. W. 776, and dissenting opinion in Johnson v. State, 42 Tex. Cr. 995, 58 S. W. 67, 51 L. R. A. 272, in both majority upholding Code of Criminal Procedure, article 723, prohibiting review on appeal of a charge not excepted to in court below.

Legislative Power to Regulate Rules of Court. See notes, 113 Am. St. Rep. 93; 91 Am. St. Rep. 402.

Legislature cannot Control Records of courts in so far as necessary to proper administration of justice by judges.

Distinguished in Estate of Miehle, 3 Cof. Prob. 101, 102, where will has been filed for probate but evidence adduced is insufficient to prove its execution, court cannot direct commission to take testimony of subscribing witnesses in foreign country, will to accompany commission.

13 Cal. 29–31, DUNPHY v. GUINDON.

Appeals Should be Allowed in all civil cases, provided amount in dispute exceeds statutory limit.

Approved in History Co. v. Dougherty, 3 Ariz. 394, 29 Pac. 650, reconciling Revised Statutes of 1887, sections 592 and 593, with each other as well as with section 846, relating to appeals from district court.

13 Cal. 31–33, BRADY v. REYNOLDS.

Transfer of Title to Note by indorsement in form of guaranty. See note, 36 L. R. A. 232.

Effect of Judgment in Action against part of obligors on joint or joint and several contract upon liability of others. See note, 43 L. R. A. 166.

13 Cal. 33-40, ORTMAN v. DIXON.

Prior Appropriator of Water for certain purpose is entitled to it to extent necessary for that purpose to exclusion of subsequent appropriator.

Approved in dissenting opinion in Lux v. Haggin (Cal.), 4 Pac. 933, majority holding state could not authorize appropriation of water running through private land.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 674.

Periodical Appropriation of Water. See note, 46 L. R. A. 175.

Transfer of Right to Use Water for irrigation. See note, 65 L. R. A. 413.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

Change of Use or Channel of water appropriated. See note, 30 L. R. A. 387.

As a General Rule, the Distinction between sealed and unsealed instruments has no force.

Approved in Olston v. Oregon Water Power & Ry. Co., 52 Or. 353, 96 Pac. 1098, 20 L. R. A. (n. s.) 915, effect of seal being only prima facie evidence of consideration, release of claim for negligent death may be attacked at law for fraud in the consideration as well as for fraud in the execution.

Liability of Grantee on Covenants and conditions in deeds. See note, 126 Am. St. Rep. 369.

13 Cal. 40-43, CRAVENS v. DEWEY.

Granting of Nonsuit on Facts Presents Question of law and may be reviewed on appeal without motion for new trial.

Approved in Non-Refillable Bottle v. Robertson, 8 Cal. App. 105, 96 Pac. 325, and Archibald Estate v. Matteson, 5 Cal. App. 445, 90 Pac. 725, both holding upon evidence granting of nonsuit was error; Smith v. Superior Court, 2 Cal. App. 531, 84 Pac. 55, applying rule to appeal from judgment of justice's court granting nonsuit, though taken on questions both of law and fact.

Nonsuit is Improperly Granted where there is any evidence tending to prove allegations of complaint.

Approved in Later v. Haywood, 12 Idaho, 83, 85 Pac. 496, in action to declare deed absolute in form a mortgage, nonsuit was improperly granted.

13 Cal. 45-50, HASKELL v. CORNISH.

Where Note Signed Solely With Agent's Name discloses in its body an intention to bind principal alone, agent is not liable.

Approved in Perkins v. Cooper (Cal.), 24 Pac. 377, holding letters written by an executor relating to sale of property of estate not sufficient writing to charge him individually with commissions for sale; Nunnemacher v. Poss, 116 Wis. 449, 92 N. W. 377, note naming corporation independently of and conjunctively with "we, the undersigned," contained a promise to pay by the corporation and each of the others who signed it.

Liability of Principal on Negotiable Paper executed by agent. See note, 21 L. R. A. (n. s.) 1048, 1049, 1051, 1060.

Personal Liability of Officers on note made for corporation. See note, 19 L. R. A. 677.

13 Cal. 53–54, RICE v. GASHIRIE.

Terms upon Which Court will grant new trial are peculiarly a matter within its discretion.

Approved in Carver v. San Joaquin Cigar Co., 16 Cal. App. 766, 118 Pac. 94, reaffirming rule; Godfrey v. Godfrey, 127 Wis. 64, 106 N. W. 820, upholding order of court setting aside verdict and granting new trial unconditionally in action on note.

13 Cal. 58–61, VISHER v. WEBSTER.

Costs of Former Trials may be Included in final bill of costs.

Approved in Hughes v. Chicago St. P. M. & O. R. Co., 126 Wis. 537, 106 N. W. 530, plaintiff, who obtained judgment in action for personal injuries in the superior court, again in the circuit court and after reversal on appeal obtained judgment on third trial, was entitled to costs of the three trials.

Disposition of Appeal Where Without Fault of appellant record is lost or incomplete. See note, 25 L. R. A. (n. s.) 864.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 450.

13 Cal. 62–72, 73 Am. Dec. 569, HORN v. VOLCANO WATER CO.

To Authorize Intervention the Interest in the matter in litigation must be of such immediate character that intervener will either gain or lose by direct legal effect of judgment.

Approved in Estate of Ghio, 157 Cal. 561, 137 Am. St. Rep. 145, 108 Pac. 525, construing word "intervene" as used in treaty with foreign country giving right to consul-general to intervene in settlement of estates; Guaranty Realty Co. v. Recreation Gun Club, 12 Cal. App. 389, 107 Pac. 628, where covenant imposed on grantee of lots by grantor for benefit of his remaining hunting lands, a subsequent grantee of one of the lots is not entitled to intervene in suit between original grantor and subsequent grantee of another lot to restrain breach of the covenant; Reay v. Butler (Cal.), 7 Pac. 673, person asserting title paramount to both parties to ejectment suit cannot intervene in the action; Howe v. Meriwether, 172 Fed. 869, 97 C. C. A. 288, under statute person seeking to intervene must plead facts showing direct and immediate interest in property; Potlatch Lumber Co. v. Runkel, 16 Idaho, 196, 197, 101 Pac. 397, 23 L. R. A. (n. s.) 536, owner or claimant of property attached in action for debt may intervene and assert right to property; Pittock v. Buck, 15 Idaho, 54, 96 Pac. 214, wife suing for divorce had right to intervene in action brought collusively by third party against her husband for debt to defeat her property rights; Neustadter Bros. v. Doust, 13 Idaho, 623, 92 Pac. 979, general creditor who has no lien on the property by contract or judgment is not an "interested party" entitled to enjoin sale of personal property secured by chattel mortgage; Wightman v. Yaryan Co., 217 Ill. 379, 108 Am. St. Rep. 258, 75 N. E. 504, in proceeding to foreclose trust deed to secure corporate bonds persons holding unexpired contracts with the corporation cannot intervene though fraud or collusion as to foreclosure is charged; Donohoo v.

Howard, 4 Ind. Ter. 440, 69 S. W. 930, in action in ejectment where plaintiff claimed title under sale by Cherokee Nation to his grantor, plea of intervention by Cherokee Nation alleging valid sale and nonpayment of installments was properly dismissed; Vanmeter v. Fidelity Trust etc. Co., 107 Ky. 113, 53 S. W. 12, under statute one seeking to set aside deed to land cannot intervene in action by grantee to enforce chattel mortgage executed to secure rent under lease of the land; Hindman v. Colvin, 47 Wash. 384, 92 Pac. 140, simple contract creditors of insolvent corporation were not entitled to intervene in proceeding to foreclose mortgage on property of corporation; Westland Publishing Co. v. Royal, 36 Wash. 419, 78 Pac. 1103, taxpayer of school district had no such interest in contract between state board of education and publisher of school books as entitled him to intervene in action by publisher against directors of taxpayer's district.

Intervention. See note, 123 Am. St. Rep. 307.

As Against Subsequent Creditors a conveyance, though voluntary, is not void unless made with fraudulent intent.

Approved in Schultz v. McLean (Cal.), 25 Pac. 430, holding inadequacy of consideration did not show fraud in conveyance of land.

Evidence of Intent to Defraud Existing Creditors is prima facie evidence of fraud against subsequent creditors.

Approved in Hemenway v. Thaxter, 150 Cal. 741, 90 Pac. 117, following rule; House v. Johnson, 19 Colo. App. 528, 76 Pac. 744, applying rule where, in attachment by assignee of note, third party intervenes, claiming to hold under conveyance from defendant prior to assignment.

Court Takes Judicial Notice of Status of case as shown by its own records.

Approved in Pilant v. Hirsch & Co., 14 N. M. 14, 88 Pac. 1130, when defendant's answer was stricken out and he elected not to amend, cause was ripe for judgment without acting on motion for security for costs filed with answer.

13 Cal. 73, SPEER v. SEE YUP CO.

Chinese are Incompetent as Witnesses in suits to which white persons are parties.

Distinguished in Pumphrey v. State, 84 Neb. 639, 122 N. W. 20, 23 L. R. A. (n. s.) 1023, adult citizen of Empire of Japan was competent to testify in criminal proceeding.

13 Cal. 75–76, McHENDRY v. REILLY.

Lien for Purchase Money of homesteads. See note, 86 Am. St. Rep. 174.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 931.

13 Cal. 76–79, SCALES v. SCOTT.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 40.

13 Cal. 81–85, GOODE v. SMITH.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 571.

13 Cal. 87–106, BAKER v. BAKER.

In Action for Divorce, Confessions of Defendant are admissible but must be corroborated.

Approved in Kenniston v. Kenniston, 6 Cal. App. 660, 92 Pac. 1038, holding evidence insufficient to prove desertion as ground for divorce; Bell v. Bell, 15 Idaho, 21, 22, 24, 96 Pac. 202, 203, letters and admissions of defendant will not alone sufficiently corroborate testimony of plaintiff as to fact of desertion.

Antenuptial Pregnancy by Stranger concealed from husband vitiates the contract of marriage ab initio and authorizes divorce.

Approved in Wallace v. Wallace, 137 Iowa, 39, 126 Am. St. Rep. 253, 114 N. W. 528, 14 L. R. A. (n. s.) 544, applying rule though husband also had intercourse with wife before marriage; Smith v. Smith, 171 Mass. 406, 68 Am. St. Rep. 440, 50 N. E. 934, annulling marriage where prior to its consummation husband was found to be affected with syphilis which was incurable; Reynolds v. Reynolds, 85 Mass. (3 Allen) 611, annulling marriage where woman was pregnant.

Distinguished in Franke v. Franke (Cal.), 31 Pac. 573, holding such pregnancy at time of marriage not ground for annulment where husband had previously had sexual intercourse with wife and knew of her pregnancy.

Antenuptial Pregnancy or Unchastity as ground of divorce or annulment of marriage. See note, 18 L. R. A. 375, 377.

A Woman to be Marriageable must at the time be able to bear children to her husband, and representation to that effect is implied in nature of contract.

Distinguished in Franke v. Franke (Cal.), 31 Pac. 573, holding pregnancy of woman at time of marriage not ground for annulment under Civil Code, sections 58, 82, for physical incapacity.

Impotency as Ground for divorce. See note, 116 Am. St. Rep. 244.

13 Cal. 107–116, SMITH v. BRANNAN.

Party in Possession Under Deed which creates an equitable estate or right of possession may sue to quiet title.

Approved in Hayford v. Wallace (Cal.), 46 Pac. 295, conveyance by one of two trustees and beneficiary of trust after he became of age sufficient to enable grantee to quiet title against all except trustee; Pollack M. & M. Co. v. Davenport, 31 Mont. 453, 78 Pac. 768, upholding complaint in action to quiet title, objected to because it nowhere pleads plaintiff is the owner of the property; Blakemore v. Roberts, 12 N. D. 401, 96 N. W. 1031, upholding right of executor to bring action to quiet title to property on which his testator had lien by virtue of having purchased same at tax sale.

13 Cal. 116–133, PIERCE v. ROBINSON.

Agreement of Mortgagor That Mortgagee in possession may pay claims of third persons from surplus funds is equitable assignment of such surplus.

Approved in Brady v. Ranch Mining Co., 7 Cal. App. 184, 94 Pac. 86, order for payment of money being whole amount due from drawee to drawer operates as equitable assignment of claim; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 568, 86 Pac. 822, order on third person for commissions and profits to arise from operation of chartered vessels operates as assignment.

Terms of Written Instrument may be Varied by parol evidence where an equity is sought to be shown superior to the writing.

Approved in Jolivet v. Chaves, 125 La. 936, 52 So. 103, where recorded act purporting to be "sale with right of redemption" was in reality an act of mortgage, purchaser on faith of record will be protected in his purchase; O'Brien v. Paterson Brewing & Malting Co., 69 N. J. Eq. 130, 61 Atl. 442, applying rule in action to restrain collection of note and mortgage given on transfer of saloon business to complainant, where there was oral agreement it would not be enforced; Wagg v. Herbert, 19 Okl. 562, 92 Pac. 264, deed absolute on its face was only a mortgage in transaction where mortgagee obtained deed of mortgaged premises from mortgagor; Shields v. Simonton, 65 W. Va. 183, 63 S. E. 974, recital in deed purporting to cancel or release antecedent indebtedness did not preclude establishment of facts showing it to be mortgage.

Distinguished in Keifer v. Myers, 14 Cal. App. 340, 111 Pac. 1038, written agreement of pledge cannot be shown by parol to be a sale, any more than it could be shown that a mortgage was intended as a grant.

Fraud in the Use of Instruments is as much a ground for the interposition of equity as fraud in their creation.

Approved in Gibbons v. Gibbons Consolidated Mining etc. Co., 37 Colo. 104, 86 Pac. 96, extrinsic evidence was competent to show bill of sale was mortgage where complaint contained no allegation of fraud in the making of bill.

Proceeds of Trust Property cannot Pass to administrator as assets for benefit of creditors of deceased.

Approved in Probate Court v. Williams, 30 R. I. 161, 73 Atl. 388, as property held by a decedent in trust is no part of his estate, sureties on administration bond are not liable for action of executor in relation thereto.

Maxim "Once a Mortgage always a mortgage." See note, 131 Am. St. Rep. 919.

Sale of Expectancy by prospective heir. See note, 33 L. R. A. 269.

13 Cal. 133–145, WELLS, FARGO & CO v. ROBINSON.

Doctrine of Election Applies Only when party is cognizant of all the facts and then makes a free and deliberate choice.

Approved in Garrett v. Farwell Co., 199 Ill. 441, 65 N. E. 363, commencing of suit to set aside conveyance of land made in exchange for stock of goods due to misunderstanding of facts does not prevent later action to recover the goods; Linn v. Ziegler, 68 Kan. 533, 75 Pac. 490, action commenced by one holding mortgage claim against deceased person to collect debt, without knowledge of all the facts, was no bar to another action for same debt after knowledge of facts; Noyes v. Edgerly, 71 N. H. 504, 53 Atl. 313, in action against sheriff for false imprisonment, "brief statement" alleging plaintiff had elected to treat his imprisonment as legal, without stating he was cognizant of his legal rights, was defective.

13 Cal. 145–156, SAUNDERS v. HAYNES.

Act Giving Jurisdiction Over Subject of contested elections to judge of county court is constitutional and embraces district judges.

Approved in Bush v. Head, 154 Cal. 280, 97 Pac. 514, holding office of superior judge subject to contest under Code of Civil Procedure, section 1111, providing for contest of right of any person declared elected to office.

The Fact That the Candidate Receiving highest number of votes at election is ineligible does not give office to next highest on list.

Approved in Campbell v. Free, 7 Cal. App. 154, 93 Pac. 1061, reaffirming rule; State v. Frear, 144 Wis. 88, 90, 128 N. W. 1072, votes knowingly cast for candidate on primary ticket who died a few days before election were thrown away.

Effect of Election where successful candidate is ineligible. See notes, 124 Am. St. Rep. 211, 212; 13 L. R. A. (n. s.) 1013.

Employment of Inspector of Customs is not a lucrative office under federal government within provision of state constitution disqualifying such from office.

Approved in Reed v. Schon, 2 Cal. App. 57, 83 Pac. 79, retired army officer does not hold a lucrative "office" within the meaning of section 20, article IV of the state Constitution.

13 Cal. 156–158, BURNETT v. WHITESIDES.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 700, 704.

13 Cal. 159–166, STATE v. ROGERS.

Effect of State Constitutions and Statutes upon inheritance by or from alien. See note, 31 L. R. A. 86, 87.

13 Cal. 171–172, DE WITT v. PORTER.

Common-law Count for Money had and received, without alleging facts creating indebtedness, states cause of action.

Distinguished in Truro v. Passmore, 38 Mont. 550, 100 Pac. 968, under code provision, common-law count insufficient to state cause of action for fraud.

13 Cal. 173–175, CLARY v. HOAGLAND.

Writ of Certiorari will not Lie where there is an adequate remedy by appeal.

Approved in Olcese v. Justice's Court, 156 Cal. 85, 103 Pac. 317, refusing certiorari from supreme court to review judgment of justice's court; Chapman v. Justice Court, 29 Nev. 161, 86 Pac. 554, holding certiorari does not lie from supreme court to review conviction in justice's court on ground that justice was without jurisdiction.

13 Cal. 175–189, PATTISON v. SUPERVISORS.

Article VIII of Constitution, Prohibiting State from creating debts over a certain amount, does not apply to debts authorized to be created by municipal corporations.

Approved in Van Cleeve v. Passaic Valley Sewerage Commrs., 71 N. J. L. 228, 58 Atl. 588, reaffirming rule; Kennebec Water Dist. v. Waterville, 96 Me. 255, 52 Atl. 783, applying rule in action to condemn property, brought by water district which included within its limits a city which had already exceeded its debt limit; Blais v. Franklin, 31 R. I. 126, 77 Atl. 185, no state debt was created by act providing for appointment of commission for erection of bridge be-

tween the cities of Pawtucket and Central Falls; State v. Candland, 36 Utah, 429, 104 Pac. 294, Utah Laws of 1909, page 335, chapter 124, section 1, authorizing regents of University of Utah to expend two hundred and fifty thousand dollars for central building, was unconstitutional, as such indebtedness was state indebtedness.

13 Cal. 190, BRANCH TURNPIKE CO. v. YUBA COUNTY.

Bill for Injunction must State Facts showing irreparable injury, mere allegation in general terms not being sufficient.

Approved in Bishop v. Owens, 5 Cal. App. 87, 89 Pac. 846, holding in suit to enjoin defendant from entering upon and letting down ladders and ropes upon the roof of plaintiff's building from an adjoining building, allegations of irreparable injury not sufficient; Empire Transportation Co. v. Johnson, 76 Conn. 82, 55 Atl. 589, holding in suit for injunction to restrain replevying of certain coal barges, allegations to show irreparable injury not sufficient; Holke v. Herman, 87 Mo. App. 139, holding complaint to enjoin construction of pond on property adjacent to plaintiff's dwelling insufficient to show nuisance.

13 Cal. 191–203, HOLMES v. ROGERS.

Authority of Attorney Who Appears will be Presumed, and his action will bind the party unless in cases of fraud or insolvency of the attorney.

Approved in Gregory v. Ford, 14 Cal. 143, 73 Am. Dec. 639, holding a defendant showing no defense to action cannot go into equity to enjoin judgment by default on ground sheriff's return of service upon him is false.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 166.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 848.

13 Cal. 203–214, HASTINGS v. HALLECK.

Liability of Attorney to Client for mistake. See note, 52 L. R. A. 883, 886.

13 Cal. 220–239, McDONALD v. BEAR RIVER ETC. MIN. CO.

Water Rights Acquired by Appropriation pass by deed of the land as appurtenant thereto.

Approved in Watts v. Spencer, 51 Or. 270, 94 Pac. 42, parol sale of land and appurtenant water rights accompanied by surrender of possession to purchaser created equitable estate in water rights; dissenting opinion in Lux v. Haggin (Cal.), 4 Pac. 933, majority holding state could not authorize appropriation of water running through private land.

Right of Prior Appropriator of water. See note, 30 L. R. A. 676.

One Taking Up Millsite on public agricultural land and erecting mill and dwellings thereon and appropriating waters of stream for use of mill may use water for mill erected at same place years afterward.

Approved in Lower Tule River Ditch Co. v. Angiola Water Co., 149 Cal. 499, 86 Pac. 1082, one may by prior actual and complete appropriation and use, without proceeding under code, acquire right to water used, superior to later appropriator in code manner.

How Far Grant of Mill includes water rights. See note, 58 L. R. A. 488.

Equitable Title as Sustaining Action for injury to realty. See note, 30 L. R. A. (n. s.) 233.

13 Cal. 242–290, FORBES v. SCANNEL.

By "Common Law" is Intended that law which is found in decisions as distinguished from that found in statutes.

Approved in Williams v. Miles, 68 Neb. 470, 110 Am. St. Rep. 431, 94 N. W. 708, 62 L. R. A. 383, discussing meaning of term "common law of England" in statute making common law of England rule of decision in all cases not governed by statute.

Transfer of Property Out of State by bankruptcy or other kindred proceedings. See note, 23 L. R. A. 39.

Necessity of Acceptance of Assignment or deed of trust for creditors. See note, 24 L. R. A. 370, 371.

Jurisdiction and Powers of consuls. See note, 45 L. R. A. 499.

13 Cal. 290–295, CURTIS v. SACRAMENTO COUNTY.

Recorder of City of Sacramento when acting as justice of the peace was entitled to collect fees therefor from county, but was bound to pay them into city treasury.

Approved in Carlisle v. Tulare County (Cal.), 49 Pac. 4, holding under statute where recorder is acting as justice of peace, marshal's fees for service of process issuing out of recorder's court are chargeable to county.

13 Cal. 295–306, RIDDLE v. BAKER.

Admissibility and Effect against surety of judgment against principal. See note, 132 Am. St. Rep. 763.

13 Cal. 306–320, 73 Am. Dec. 575, BENSLEY v. MOUNTAIN LAKE WATER CO.

In Condemnation of Private Property just compensation must be paid or secured to the owner as condition precedent to acquiring title or right of possession.

Approved in Johnson v. Alameda County, 14 Cal. 107, holding where compensation did not accompany taking of land by county for public use, whole taking was void and constituted trespass by the parties; California Southern R. Co. v. Colton Land & Water Co. (Cal.), 2 Pac. 40, holding the compensation required is the value of the land at time of trial.

When Title Passes in Condemnation Proceedings. See note, 16 L. R. A. (n. s.) 538.

Failure to Act Under Order condemning land to public use will constitute abandonment of right.

Distinguished in Woolard v. Nashville, 108 Tenn. 364, 67 S. W. 804, where, after award, city took possession and proceeded to construct extensive improvement, it did not abandon proceedings by failing to prepay damages awarded.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 741.

13 Cal. 321–325, WATTS v. WHITE.

Party Seeking to Rescind Contract must restore other party to condition in which he was before the contract.

Approved in Wills v. Porter (Cal.), 61 Pac. 1111, holding where corporation paid a debt to its principal stockholder in consideration of his guaranteeing its note to bank, suit by other stockholders to compel repayment cannot be maintained without relieving him of guaranty.

13 Cal. 325–330, PATTEN v. GREEN.

Board of Equalization has No Power to raise valuation of land without notice to the owner.

Disapproved in Carroll v. Alsup, 107 Tenn. 277, 280, 64 S. W. 198, 199, where a public statute specifies time board of equalization shall meet, no other notice of meeting or action of board is required.

13 Cal. 335–342, 73 Am. Dec. 584, WHITNEY v. BUTTERFIELD.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 98.

13 Cal. 343–359, PEOPLE v. BURR.

Legislature may Authorize Municipal Corporation to pay claims invalid in law, but equitable and just in themselves.

Approved in Earle v. Commonwealth, 180 Mass. 583, 91 Am. St. Rep. 326, 63 N. E. 10, 57 L. R. A. 292, metropolitan water supply act (Stats. 1895, c. 488, sec. 14) not unconstitutional because allowing compensation for injury to such business as the professional practice of a physician; Merchants' Nat. Bank v. City of East Grand Forks, 94 Minn. 251, 102 N. W. 705, upholding right of legislature to pass curative act requiring city to pay disputed obligations; State v. Aberdeen, 34 Wash. 69, 74 Pac. 1024, applying rule in action by state against city to recover balance due from municipality on account of moneys received by it for issuance of licenses to sell intoxicating liquor.

Distinguished in Lewis v. Colgan (Cal.), 44 Pac. 1083, holding under article IV, section 32, of state Constitution of 1879, an appropriation for salary of expert to board of examiners is invalid, there being no express antecedent authority in the board to appoint such expert.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 468, 471, 473.

Laws may be Absolute or may be subject to such condition as legislature may impose.

Approved in Wheeler v. Herbert, 152 Cal. 234, 92 Pac. 357, applying rule upholding act of 1907, changing boundaries of Fresno and Kings counties; Arnett v. State, 168 Ind. 185, 80 N. E. 154, 8 L. R. A. (n. s.) 1192, Burns' Annotated Statutes of 1901, section 3717 et seq., providing for metropolitan police force in certain cities, is not invalid as an improper delegation of legislative power; Attorney General v. Arnott, 145 Mich. 421, 108 N. W. 648, upholding public acts of 1883, page 34, No. 39, sec. 14, as amended by public acts of 1899, page 262, No. 231, imposing ad valorem tax on corporations organized under act, subject to right to pay specific tax instead; State v. Rogers,

97 Minn. 324, 106 N. W. 346, upholding right of legislature to pass law operative in future upon happening of some contingency; State v. District Court, 30 Nev. 232, 94 Pac. 73, holding an act for incorporation of cities not unconstitutional as delegating legislative power to judicial department because it authorizes district court to determine whether petitioners for incorporation complies with requirements.

Legislature has Power to Dispose of the public funds of political subdivisions of the state.

Approved in McSurley v. McGrew, 140 Iowa, 169, 176, 132 Am. St. Rep. 248, 118 N. W. 418, 421, applying rule in action on official bond of county treasurer to recover money lost through failure of bank in which funds were deposited without order of board of supervisors; Horton v. City of Newport, 27 R. I. 288, 61 Atl. 761, 1 L. R. A. (n. s.) 512, upholding right of legislature to require payment of expenses of police department by city of Newport.

13 Cal. 363–369, STEINBACH v. LEESE.

Miscellaneous.—Cited in Steinback v. Lose, 27 Cal. 299, on subsequent appeal.

13 Cal. 369–372, ORD v. STEAMER UNCLE SAM.

A Contract for Transportation of Passenger from San Francisco to New York is an entirety, though entire voyage not made by one vessel, and original vessel liable under Practice Act, section 317, wherever breach occurs.

Approved in Pfister v. Dascey, 65 Cal. 405, 4 Pac. 395, holding purchaser at execution sale could join suit to set aside conveyances by judgment debtor in fraud of creditors and to recover possession of property, all the matters complained of being parts of one transaction and design to defraud.

13 Cal. 373–422, WATERMAN v. SMITH.

Mexican Grant of Specified Quantity of Land within exterior boundaries conferred only a vested interest in the specific quantity designated, to be afterward surveyed and laid off by the government, which right of segregation passed to the United States.

Approved in Ohm v. San Francisco (Cal.), 25 Pac. 156, holding Mexican grant so vague and uncertain in description as to pass no definite tract by force of the grant alone is not aided by possession taken under it by grantee; Sullivan v. State, 41 Tex. Civ. App. 94, 95 S. W. 648, right to land claimed under act of 1852 confirming grant and providing for survey was not dependent upon the survey.

Patent Issued upon a Confirmed Mexican Grant is only evidence of the pre-existing title made perfect by confirmation and survey.

Approved in De Guyer v. Banning (Cal.), 25 Pac. 255, holding decree of court confirming Mexican grant and defining boundaries gives title upon which ejectment may be maintained.

13 Cal. 422–427, 73 Am. Dec. 589, PARKS v. ALTA CALIFORNIA TEL. CO.

Telegraph Companies are Common Carriers, subject to rules governing same.

Approved in Cowan v. Western Union Telegraph Co., 122 Iowa, 384, 101 Am. St. Rep. 268, 98 N. W. 283, 64 L. R. A. 545, negligent trans-

mission of message is a tort, damages for which are not limited to such as were contemplated by the parties to the contract; Strahorn-Hutton-Evans Com. Co. v. Western Union Tel. Co., 101 Mo. App. 506, 74 S. W. 878, error in transmitting telegram was not proximate cause of loss.

Inquiries for Purpose of Ascertaining whether damages sustained were real or nominal are pertinent.

Approved in Texas etc. Tel. Co. v. Mackenzie, 36 Tex. Civ. 181, 81 S. W. 584, applying rule in action against telegraph company for delay in delivering telegram consisting of bid for erection of building; Barker v. Western Union Tel. Co., 134 Wis. 155, 126 Am. St. Rep. 1017, 114 N. W. 441, 14 L. R. A. (n. s.) 533, upholding rule in action for damages for failure to deliver telegram to physician asking whether he would see another professionally.

Elements of Damages Recoverable for failure to transmit and deliver telegrams. See note, 117 Am. St. Rep. 287, 290, 293, 297.

Contingencies in Possible Action of Sendee or third person, as affecting liability for failure properly to transmit and deliver telegram. See note, 12 L. R. A. (n. s.) 749.

13 Cal. 427–430, TERRY v. SICKLES.

Failure to Object Within Reasonable Time to an account rendered makes it an account stated.

Approved in Tuggle v. Minor, 76 Cal. 100, 18 Pac. 132, holding when items of an account are admitted as correct except certain items left to future adjustment, the account becomes stated as to former.

Distinguished in Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal. App. 561, 97 Pac. 323, holding rule not applicable where there was no previously existing liability of defendant to plaintiff.

Accounts Stated. See note, 136 Am. St. Rep. 44.

Effect of Retaining Statement of Account to render it an account stated. See note, 29 L. R. A. (n. s.) 335.

Fraud or Mistake in an Account Stated must be put in issue by the pleadings.

Approved in Naylor v. Lewiston etc. Ry. Co., 14 Idaho, 804, 96 Pac. 578, upholding rule in action to foreclose lien filed in support of an account stated for services upon railway right of way.

13 Cal. 431–434, HERRICK v. HODGES.

Agent Who Undertakes to Act Gratuitously is bound to the exercise of ordinary diligence.

Approved in Kevane v. Miller, 4 Cal. App. 602, 88 Pac. 645, holding agent liable to principal for profits made out of agency; Schroeder v. Mauzy, 16 Cal. App. 449, 118 Pac. 462, applying rule where defendant agreed to store piano.

13 Cal. 434–444, PATRICK v. MONTADER.

Attachment Issued Before Maturity of Debt is prima facie void as to creditors injured, but if debt was contracted fraudulently, it is equitably due, and attachment will stand.

Approved in Hillman v. Griffin (Cal.), 59 Pac. 195, holding evidence to impeach an affidavit of attachment not admissible in a collateral proceeding by stranger to recover possession of the property; May v. Gesellschaft, 211 Ill. 316, 71 N. E. 1003, holding where plaintiff in

attachment filed first declaration in tort and later by amended declaration changed form of action to assumpsit, such irregularity is not open to attack by interpleader whose rights were acquired pendente lite.

13 Cal. 444–458, HYMAN v. READ.

Where Transaction Partakes of nature of judicial sale, it should be construed strictly.

Approved in United States v. Cameron, 3 Ariz. 106, 21 Pac. 178, donee of land claimed under Mexican grant is entitled to quantity specified, and no more.

Municipal Ownership of Tide Lands. See note, 64 L. R. A. 336.

13 Cal. 458–477, SCOTT v. WARD.

What is Community Property. See notes, 126 Am. St. Rep. 103, 110; 4 Cof. Prob. 45, 53.

Applicability of State Community Property Laws to realty acquired from federal government. See note, 26 L. R. A. (n. s.) 1119.

Real Property Granted by Government to citizen as separate or community property. See note, 96 Am. St. Rep. 916.

13 Cal. 478–489, MOORE v. WILKINSON.

Survey and Patent are Conclusive in action of ejectment.

Approved in Valentine v. Sloss (Cal.), 37 Pac. 329, reaffirming rule; Bay v. Pope, 18 Cal. 696, holding in ejectment defendant who had put improvements on land believing it to be public land of United States could not set them off against mesne profits.

Distinguished in United Land Assn. v. Knight (Cal.), 23 Pac. 270, holding in ejectment plaintiff can attack the patent of United States under which defendant claims on ground that it embraces land not described in decree of confirmation.

13 Cal. 490–494, TRYON v. SUTTON.

Mortgagor cannot Complain of Indefiniteness of description in mortgage in suit to foreclose.

Approved in Brenneke v. Smallman, 2 Cal. App. 309, 83 Pac. 304, holding mortgagor could not be heard to complain of the indefinite description of property in chattel mortgaged.

13 Cal. 494–502, 73 Am. Dec. 593, MORRISON v. WILSON.

Wife Could not Convey Her Separate Estate acquired before act of 1850, whether legal or equitable, except by joint deed of husband and wife.

Approved in Dentzel v. Waldie, 30 Cal. 142, holding married woman could not, prior to act of April 3, 1863, convey her separate estate by an attorney in fact but must do it in propria persona.

Distinguished in Grice v. Woodworth, 10 Idaho, 466, 467, 109 Am. St. Rep. 214, 80 Pac. 914, 69 L. R. A. 584, where husband and wife entered into oral contract for sale of homestead, laws for protection of homestead rights of wives could not operate to relieve them against fraud on their part.

What is Community Property. See notes, 126 Am. St. Rep. 124; 4 Cof. Prob. 66.

Effect of Possession of real property, as notice. See notes, 104 Am. St. Rep. 344; 13 L. R. A. (n. s.) 123.

13 Cal. 510–512, SMITH v. DALL.

Omission in Record of Deed to make copy of seal or some mark to indicate it does not vitiate the record.

Approved in Sibly v. England, 90 Ark. 424, 119 S. W. 821, fact that seal did not appear of record did not affect certified copy of record as evidence; Emmal v. Webb, 36 Cal. 203, arguendo.

Effect of Defective Recording of legal instruments on rights of third persons. See note, 96 Am. St. Rep. 400.

Possession of Land as notice of title. See note, 13 L. R. A. (n. s.) 100.

13 Cal. 514–518, 73 Am. Dec. 600, HARRIS v. REYNOLDS.

Bill in Equity to Account will Lie where account is long and complicated.

Approved in Kaston v. Paxton, 46 Or. 310, 80 Pac. 209, in suit for accounting complaint stated no facts justifying recourse to court of equity.

Purchaser at Sheriff's Sale of "water ditch" is entitled to rents and profits thereof from date of sale to expiration of period of redemption.

Approved in Estate of Johnson, 4 Cof. Prob. 508, purchaser at executor's sale is entitled to rents of property between time of confirmation and delivery of deed.

Miscellaneous.—Cited in Raun v. Reynolds, 18 Cal. 289.

13 Cal. 521–526, WHITE v. FRATT.

A Bill Quia Timet and to Specifically Enforce an agreement will not lie where there is adequate remedy at law.

Distinguished in Sherwood v. Wallin, 1 Cal. App. 534, 82 Pac. 567, holding, in suit for specific performance of contract for transfer of mining stock, complaint sufficiently shows no adequate remedy at law.

13 Cal. 526–531, 73 Am. Dec. 603, SWIFT v. KRAEMER.

Where One Mortgagee is Substituted for Another, equity will keep the first mortgage alive when justice requires it.

Approved in Farmers' Loan etc. Co. v. Meridian Waterworks Co., 139 Fed. 671, where water company, after suit against it by city to annul franchise had begun, made a second issue of bonds secured by trust deed to same trustee who held prior deed, it providing also for renewal and extension of liens of prior mortgage, the prior bondholders and trustees were not affected by lis pendens.

13 Cal. 531–534, SMITH v. SACRAMENTO.

City Authorities may Under Charter Employ Counsel in addition to city attorney to protect city's interests.

Approved in County of Santa Cruz v. Barnes, 9 Ariz. 48, 76 Pac. 622, 623, reaffirming rule; Freeman v. City of Perry, 11 Okl. 71, 65 Pac. 925, upholding action of common council of city of first class in employing attorney to assist city attorney.

13 Cal. 536–539, WHITNEY v. BUCKMAN.

In Suit to Foreclose Mortgagor cannot complain of indefiniteness of description in mortgage.

Approved in Brenneke v. Smallman, 2 Cal. App. 309, 83 Pac. 304, applying rule to chattel mortgage.

13 Cal. 540–553, CITY OF OAKLAND v. CARPENTIER.

Board of Trustees of City Could not Delegate to an individual exclusive right to establish, build and maintain wharves in city.

Approved in Galindo v. Walter, 8 Cal. App. 236, 96 Pac. 505, holding under charter of city of San Jose common council could not delegate to electors power to determine where sale of intoxicating liquor would be prohibited.

Delegation of Municipal Power as to license, franchise, and buildings. See note, 20 L. R. A. 726.

Municipal Authorities have No Power to contract away rights of the public which rest in legislative discretion.

Approved in Vandalia R. R. Co. v. State, 166 Ind. 233, 117 Am. St. Rep. 370, 76 N. E. 985, contract between city and railway company for erection of viaduct over railroad track by company and erection of approaches by city was invalid and unauthorized; State v. Bd. of Park Commrs., 100 Minn. 154, 110 N. W. 1123, 9 L. R. A. (n. s.) 1045, contract requiring board of park commissioners to perpetually maintain avenue as a parkway, free of cost to abutting owners, is invalid.

Where Body is Vested With Authority to discharge public functions, absence of one does not affect power of remainder.

Approved in Swedback v. Olson, 107 Minn. 423, 120 N. W. 754, upholding action of board of county commissioners composed of five members, each representing a district, where one representative failed to qualify.

Concealed Fraud Postpones Running of Statute of limitations until discovery of facts constituting the fraud.

Distinguished in Pietsch v. Milbrath, 123 Wis. 666, 107 Am. St. Rep. 1017, 102 N. W. 344, 68 L. R. A. 945, except as provided by Revised Statutes of 1898, section 4222, fact of fraud, although concealed, does not suspend running of statute of limitations.

Right to Wharfage. See note, 70 L. R. A. 198.

13 Cal. 553–558, PALMER v. VANCE.

A Bond Given Sheriff to Release attached property is valid at common law though its recital incorrectly describes the action.

Approved in Bailey v. Aetna Indemnity Co., 5 Cal. App. 744, 91 Pac. 417, holding bond given to prevent continuance of levy of attachment valid at common law though not literally complying with statute; Woodward v. Bingham, 25 Okl. 402, 106 Pac. 844, failure to insert description of property attached in blank space provided for that purpose did not vitiate attachment bond.

Distinguished in Kanouse v. Brand, 11 Cal. App. 671, 106 Pac. 121, holding in suit on bond given sheriff to prevent attachment as provided in section 540, Code of Civil Procedure, a return of execution unsatisfied is essential to fix liability on bond.

Bonds Given Voluntarily which are not offensive to law will be enforced by common-law remedies.

Approved in Dackich v. Barich, 37 Mont. 501, 97 Pac. 935, sureties on bond to release attachment were bound to pay judgment secured against their principal on his failure to pay; Chambers v. Cline, 60 W. Va. 598, 55 S. E. 1003, upholding bond and amended bond given for special election to be held for purpose of voting on relocation of county seat.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 829.

13 Cal. 558–562, CHESTER v. MILLER.

Equity may Vacate Judgment fraudulently altered so as to include person not served with process and not originally included in judgment.

Approved in Hanley v. Hanley, 4 Cof. Prob. 479, upholding equity jurisdiction to set aside order setting apart homestead procured by fraud.

Collateral Attack upon Forged or altered judgment entries. See note, 80 Am. St. Rep. 482.

Alteration of a Judgment, Without Notice, if not void, is voidable.

Approved in Keventsky v. Sirovy, 142 Iowa, 392, 121 N. W. 30, divorce decree altered by the court after being passed could be attacked in action to quiet title.

13 Cal. 579–580, GEIGER v. CLARK.

Necessity of Notice of Default to bind guarantor. See note, 20 L. R. A. 261.

13 Cal. 581–585, PEOPLE v. KEENAN.

Courts have Discretion in Limiting Argument before jury, but in capital cases it should be done only in extraordinary instances.

Approved in People v. Fernandez, 4 Cal. App. 321, 322, 326, 87 Pac. 1114, 1116, granting new trial where order of court limiting argument in criminal case deprived defendant of fair and full argument to jury; State v. Rogoway, 45 Or. 613, 81 Pac. 235, action of court in limiting time for argument to one hour on a side, against defendant's objection, was reversible error; State v. Mayo, 42 Wash. 549, 85 Pac. 254, in this case limitation of time for argument to one and one-half hours was a violation of defendant's constitutional right.

Right to Limit Time of Argument of counsel for accused. See note, 25 L. R. A. (n. s.) 1029, 1035.

13 Cal. 585–588, PRADER v. GRIM.

Counsel Fees for Dissolving Restraining Order are recoverable in action on bond.

Distinguished in Elder v. Kutner, 97 Cal. 494, 32 Pac. 564, holding impairment of credit of attachment debtor whose real property has been attached and depreciation in value of the property are not proximate consequences of attachment.

Recovery on Injunction Bond of attorneys' fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 55.

Bond is of No Effect After Hearing upon and determination of order to show cause.

Approved in City of Chamberlain v. Quarnberg, 23 S. D. 65, 119 N. W. 1030, referee erred in admitting evidence covering damages claimed for a period after order refusing injunction pendente lite.

13 Cal. 588–591, PRADER v. PURKETT.

Court has Jurisdiction to Require Undertaking on issuance of temporary restraining order.

Approved in Ex parte Grimes, 20 Okl. 451, 1 Okl. Cr. 106, 94 Pac. 670, temporary restraining order is not changed to temporary injunction by giving of bond at time of its issuance.

13 Cal. 596–598, SMITH v. SPARROW.

Equity will not Interfere where adequate remedy exists at law.

Approved in Miller v. Kettenbach, 18 Idaho, 258, 138 Am. St. Rep. 192, 109 Pac. 507, upholding rule in action to cancel and release an estate from liability upon a contract of guaranty.

13 Cal. 598–599, LIENING v. GOULD.

Performance of Existing Contract Obligation as consideration for new promise. See note, 34 L. R. A. 33.

13 Cal. 599–605, FAIRCHILD v. CALIFORNIA STAGE CO.

Proprietors of Stage-coaches are Held to extraordinary diligence and care, and are liable for slightest negligence.

Approved in Kline v. Santa Barbara etc. Ry. Co., 150 Cal. 745, 90 Pac. 127, upholding instruction that carrier of passengers has burden of proving that injury was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent; Maxwell v. Fresno City Ry. Co., 4 Cal. App. 747, 89 Pac. 367, holding street railway negligent in not affording passenger reasonably safe place in which to alight; Carroll v. Boston Elevated Ry. Co., 200 Mass. 535, 86 N. E. 797, in action for injuries to passenger by derailment of car, where carrier gave evidence of due care in construction, burden of proof remained on plaintiff to establish negligence.

Presumption of Negligence from Happening of accident causing personal injuries. See note, 113 Am. St. Rep. 1031.

13 Cal. 609–619, KELSEY v. ABBOTT.

Defendant in Foreclosure Suit Who Sets Up tax title consents to jurisdiction.

Distinguished in Tinsley v. Atlantic Mines Co., 20 Colo. App. 72, 77 Pac. 16, one made defendant in foreclosure who claimed under a paramount title by tax lien could not be compelled to litigate its title in such action.

An Assessment for Taxes must be made against the owner when known.

Approved in Houser & Haines Mfg. Co. v. Hargrove (Cal.), 59 Pac. 949, holding assessment of personal property against person not owner void.

If the Owner of Land Does not Pay Taxes Thereon, a party in possession under a judicial sale must pay them.

Approved in King v. Bender, 116 Fed. 817, 54 C. C. A. 317, holding under Code of Civil Procedure of Montana, section 1235, where purchaser at execution sale later purchases the premises at a tax sale, he does not thereby become a creditor of the judgment debtor, and the amount thereof need not be paid in redeeming from execution sale.

13 Cal. 620–621, KNOWLES v. JOOST.

Under Mechanic's Lien Law of 1856, owner of building is liable to materialmen up to amount due contractor at date of notice by materialmen.

Denied in Allen v. Redward, 10 Haw. 156, lien provided by statute in favor of a subcontractor or materialman is not limited to amount payable under original contract to principal contractor.

13 Cal. 623–625, KLINK v. COHEN.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 208, 209.

13 Cal. 626–634, 73 Am. Dec. 605, CONROY v. WOODS.

Where One Partner Buys Out His Copartner, agreeing to pay the firm debts, the partnership property remains bound for firm debts as before the sale.

Approved in In re Perens, 175 Fed. 500, holding a dissolution and transfer by one partner to the other, though without actual fraudulent intent, is fraudulent in law as against firm creditors.

Assumption of Debts on Dissolution of partnership. See note, 9 L. R. A. (n. s.) 103.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 494.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 40.

13 Cal. 634–635, WOODBURY v. BOWMAN.

Appeal Suspends the Judgment Below for all purposes, and it is not evidence upon the questions at issue, even between the parties.

Approved in People v. Gibbs (Cal.), 33 Pac. 631, holding in prosecution for obtaining money under false pretenses a previous judgment against defendant in action by him to quiet title to property not admissible to show latter's belief that his title was not good, when an appeal from the judgment was pending.

Distinguished in Contra Costa Water Co. v. City of Oakland, 165 Fed. 529, holding on application for preliminary injunction by water company to restrain enforcement of resolution of city council fixing water rates, a judgment between the parties in a state court, though appealed from, may properly be considered as to pertinent matters therein determined.

13 Cal. 637, HANCOCK DITCH CO. v. BRADFORD.

Plaintiff is not Bound to Tender Defendant his costs before taking nonsuit.

Approved in Chicago etc. Ry. Co. v. Trueman, 18 Idaho, 693, 694, 112 Pac. 212, plaintiff had right to dismiss action in condemnation after filing of report by commissioners appointed to award damages; Miller v. Northern Pac. Ry. Co., 30 Mont. 294, 76 Pac. 693, when action is dismissed by plaintiff, court has no jurisdiction save to enter judgment for costs if applied for.

13 Cal. 641–643, BRIDGES v. PAIGE.

Proof That Plaintiff has No Right of recovery may be shown under general denial.

Approved in Hogen v. Klabo, 13 N. D. 324, 100 N. W. 849, evidence tending to show entirely different contract from that declared on and refuting allegation as to unpaid balance was not of new matter.

13 Cal. 643–649, PFEIFFER v. RIEHN.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 941.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 14 CALIFORNIA.

14 Cal. 12–18, PEOPLE v. SQUIRES.

The Office, Duties and Fees of public officers are controlled by the legislature.

Approved in New Mexico v. Albright, 12 N. M. 319, 78 Pac. 212, reaffirming rule; State v. Huegle, 135 Iowa, 102, 112 N. W. 235, upholding rule in proceeding to test right to hold office of county superintendent of schools; dissenting opinion in Ex parte Corliss, 16 N. D. 521, 114 N. W. 985, majority holding act vesting in enforcement commissioner power to displace regularly elected state's attorney and sheriff, and appoint others in their places, is unconstitutional.

14 Cal. 18–25, JACKSON v. FEATHER RIVER ETC. WATER CO.

Every Error in Court Below is Prima Facie an injury, and it rests with the other party to show that no hurt could have been, or was, done thereby.

Approved in Taggart v. Bosch (Cal.), 48 Pac. 1094, and Harrold v. Territory of Oklahoma, 169 Fed. 52, 94 C. C. A. 415, both holding exclusion of proper cross-examination prejudicial error; dissenting opinion in Madsen v. Utah Light & Ry. Co., 36 Utah, 568, 105 Pac. 813, majority holding in action for injuries to street-car passenger error in admission of evidence will not be regarded, unless from record a possibility of injury appears.

General Denial Puts Plaintiff upon Proof of all the material allegations of the petition.

Approved in Leavenworth Light etc. Co. v. Waller, 65 Kan. 517, 70 Pac. 366, in personal injury case where answer denies generally and then pleads contributory negligence, plaintiff is not relieved from proving negligence of defendant.

Cross-examination cannot Go Beyond the subject matter of the evidence in chief, but should be allowed a very free range within it.

Approved in People v. Ebanks, 117 Cal. 665, 49 Pac. 1053, 40 L. R. A. 269, and Taggart v. Bosch (Cal.), 48 Pac. 1094, both following rule.

On Cross-examination Defendant may Disprove by plaintiff's witness the very case witness has made without opening his case.

Approved in Hogen v. Klabo, 13 N. D. 323, 100 N. W. 849, such cross-examination was not objectionable as tending to establish new matter.

14 Cal. 25–29, GALE v. TUOLUMNE WATER CO.

By Amendment of Complaint After Demurrer sustained, plaintiff waives error, if any, in ruling of court.

Approved in Cleland v. Hostetter, 13 N. M. 46, 79 Pac. 801, and Bremen Min. Co. v. Bremen, 13 N. M. 118, 79 Pac. 808, both reaffirming rule; Cleland v. Hostetter (N. M.), 79 Pac. 801, filing by plaintiff of amended reply to defendants' answer waives right to allege error in ruling on demurrer to original reply.

By Going to Trial Without Answer to amended complaint being filed, plaintiff waived right after verdict against him to raise objection of want of answer.

Approved in Sauer v. Eagle Brewing Co., 3 Cal. App. 131, 84 Pac. 427, where no answer had been filed to amended complaint, a party could not after trial and for first time on appeal raise point that there were no issues to be tried; Hall v. Southern Pacific Co., 6 Ariz. 383, 57 Pac. 619, defect in answer in replevin which failed to deny right of possession was cured by judgment where plaintiff took no advantage of defect.

14 Cal. 29–31, PEOPLE v. SAVIERS.

Indictment Charging Offense in the Words of the statute is sufficient.

Approved in State v. Rathbone, 8 Idaho, 166, 67 Pac. 187, information charging larceny in the felonious taking of two mares is sufficient; State v. Swan, 31 Utah, 342, 88 Pac. 14, applying rule where offense consisted in presenting false claim for county to county clerk for allowance.

14 Cal. 35–38, GARFIELD v. KNIGHTS FERRY ETC. WATER CO.

To Bind Principal, Declarations of Agent must be made at time of the transaction.

Approved in Hogan v. Kelly, 29 Mont. 489, 75 Pac. 82, letters and certificate written by agent several months after bill of sale, and contradicting it, were erroneously received in evidence.

Declarations and Acts of agents. See note, 131 Am. St. Rep. 308.

14 Cal. 39–42, THOMPSON v. LYON.

Pleas in Abatement are not Favored and must be strictly proved.

Approved in Riverdale Mining Co. v. Wicks, 14 Cal. App. 532, 112 Pac. 898, where corporation commenced action without filing its articles of incorporation as required by statute, defendant stipulated away the force of his special plea by agreeing to allow proof of compliance with the statute pending trial.

14 Cal. 43–47, PALMER v. WOODBURY.

In Quo Warranto Allegation That Defendant is in possession of office without lawful authority is sufficient averment of intrusion and usurpation against general demurrer.

Approved in State v. Grimm, 220 Mo. 491, 119 S. W. 627, reaffirming rule; People v. Davidson, 2 Cal. App. 103, 83 Pac. 162, holding

in quo warranto to oust two constables improperly elected to same office an averment that one received the highest number of votes not subject to general demurrer for failure to aver he received highest number of legal votes.

The Position of Pilot of Port is an office.

Approved in Peterson v. Pilot Commissioners 24 Tex. Civ. App. 42, 57 S. W. 1007, upholding constitutionality of Revised Statutes, article 3791, providing for appointment of branch pilots.

One Action may be Brought Against All Persons claiming an office, to try their respective rights.

Approved in People v. Stoddard, 34 Colo. 203, 86 Pac. 252, relators claiming to hold offices of county commissioners were entitled to bring joint action against persons elected thereto.

14 Cal. 47-53, 73 Am. Dec. 610, TAFFTS v. MANLOVE.

In Order to Levy Attachment upon Personal Property, the law requires a seizure.

Approved in Cupples v. Level, 54 Wash. 302, 103 Pac. 431, 23 L. R. A. (n. s.) 519, proceedings of sheriff in levying execution on growing crops, did not constitute constructive seizure.

Right to Attach Property in hands of assignee for creditors. See note, 26 L. R. A. 596.

14 Cal. 54-59, HASKELL v. MANLOVE.

Creditor Seeking Statutory Redemption must comply strictly with statute, and must present specified evidence as well as have a judgment.

Approved in White v. Costigan (Cal.), 63 Pac. 1077, holding an attempted redemption by one not authorized to redeem was in effect an equitable assignment.

14 Cal. 59-73, MERRITT v. JUDD.

A Fixture is Anything Annexed to the Freehold and may exist on public land.

Approved in Miller v. Waddingham (Cal.), 25 Pac. 689, holding houses built on mudsills resting upon the soil which is not disturbed are affixed to land within Civil Code, section 660.

Tenant's Right to Remove Fixtures ceases with the termination of his right to consider himself a tenant.

Approved in Hereford v. Pusch, 8 Ariz. 83, 68 Pac. 550, holding log fence built by mistake on government land is, as between the builder and one later acquiring title to the land, a part of the realty and cannot be removed by builder; Bush v. Havird, 12 Idaho, 356, 86 Pac. 530, applying rule where tenant, having committed breach of lease, was evicted by legal process and failed to take his trade fixtures.

Effect of Renewing Tenancy without reserving right to remove fixtures. See note, 1 L. R. A. (n. s.) 1195.

Fixtures Subsequently Attached to mortgaged land pass to purchaser at foreclosure sale though not mentioned in mortgage.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 724, 93 Pac. 862, 15 L. R. A. (n. s.) 359, applying rule to water right fully acquired prior to execution of mortgage.

Steam Engine and Boiler Fastened to Frame of timber, bedded in ground of quartz ledge sufficient to make it level, with shed to protect machinery, and used to work ledge, are fixtures.

Approved in Arnold v. Goldfield Third Chance Min. Co., 32 Nev. 455, 457, 458, 109 Pac. 720, 721, holding engines, boilers, hoisting works, mills and the like annexed to soil for mining purposes are fixtures.

Mining Claims are Legal Estates of freehold.

Approved in Buchner v. Malloy, 155 Cal. 255, 100 Pac. 688, holding one having equitable interest in mining claims could not, upon the facts, quiet title under section 738, Code of Civil Procedure, but should have sued to enforce trust against holder of legal title to claims; White Star Mining Co. v. Hultberg, 220 Ill. 598, 77 N. E. 334, holding person legally in possession of mining claim, though not having taken out patent, has freehold estate within meaning of statute governing appeals in cases involving freeholds; McConnell v. Pierce, 210 Ill. 635, 71 N. E. 625, holding mining claims, being estates of freehold, are subject to partition.

Discovery of Mineral in Mining Claims and right of locators prior thereto. See note, 139 Am. St. Rep. 158.

14 Cal. 73–76, HANNA v. FLINT.

Broker Buying Goods for A With A's Funds under agreement that he shall sell them and divide profits does not make broker partner.

Approved in Title Insurance and Trust Co. v. Grider, 152 Cal. 752, 94 Pac. 603, holding agreement whereby one party appoints other his exclusive agent to sell and manage land for specified percentage does not create partnership, though agent agreed to pay certain expenses of sale and was to be paid portion of net profits of sale.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 1033, 1036.

14 Cal. 76–81, 73 Am. Dec. 615, MORRIS v. MORRIS.

Any Conduct Which Furnishes reasonable apprehension of bodily harm is extreme cruelty.

Approved in Ring v. Ring, 118 Ga. 192, 44 S. E. 865, 62 L. R. A. 878, habitual and intemperate use of morphine, unaccompanied by cruel conduct, is not ground for divorce; Kapp v. District Court, 31 Nev. 451, 452, 453, 103 Pac. 238, 239, allegations of complaint sufficiently alleged actual violence to give the court jurisdiction; dissenting opinion in Dunn v. Dunn, 150 Mich. 479, 114 N. W. 386, majority holding where husband had compelled wife to submit to two abortions and insisted upon another, she was not required to condone offenses upon his promise to waive objection to her bearing children.

Necessity for Personal Violence to constitute cruelty. See note, 139 Am. St. Rep. 565.

14 Cal. 85–90, HACKETT v. MANLOVE.

Collusive Judgment Creditor can be Enjoined in equity at suit of one injured by the fraud.

Approved in Balch v. Beach, 119 Wis. 90, 95 N. W. 136, upholding rule in taxpayer's action against school district where officers of school district permitted default judgment to be taken on invalid claim.

14 Cal. 91-93, BUSENIUS v. COFFEE.

In Ejectment Defendants' Denial that they "wrongfully and unlawfully entered and dispossessed" plaintiffs admits entry and ouster.

Approved in Dondero v. O'Hara, 3 Cal. App. 639, 86 Pac. 987, holding in ejectment defendants' denial only of plaintiffs' title and right of possession was an admission of ouster of plaintiffs by them.

14 Cal. 94-100, ROBINSON v. SMITH.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 472, 473.

14 Cal. 101-102, 73 Am. Dec. 631, PEOPLE v. BALL.

Indictment for Larceny must Set Forth the particular denomination of coin and pieces.

Approved in Whitson v. State, 160 Ind. 513, 67 N. E. 266, indictment describing property stolen as "five dollars of the personal goods and chattels of," etc., was insufficient; In re Waterman, 29 Nev. 300, 89 Pac. 295, 11 L. R. A. (n. s.) 424, holding indictment for obtaining money under false pretenses defective in not alleging the character of money so obtained.

14 Cal. 103-106, ABILA v. PADILLA; S. C., 19 Cal. 388.

Citation of Heirs to Show Cause against probate of will is waived by their appearance and answer.

Approved in Estate of Ricks, 160 Cal. 472, 117 Pac. 541, reaffirming rule; Estate of Kearney, 13 Cal. App. 95, 109 Pac. 38, holding recital in decree of partial distribution that the executor appeared at the hearing by his attorney sufficient to show due notice to executor.

14 Cal. 106-107, JOHNSON v. ALAMEDA COUNTY.

Right of One Whose Property Taken for public use without consent or condemnation to maintain action for compensation or permanent damages. See note, 28 L. R. A. (n. s.) 973.

14 Cal. 117-120, 73 Am. Dec. 632, CURTIS v. HERRICK.

Ejectment by Executor or administrator. See note, 136 Am. St. Rep. 182.

14 Cal. 120-125, PACHECO v. HUNSACKER.

Sale or Mortgage of future crops. See note, 23 L. R. A. 450.

14 Cal. 134-138, RYER v. STOCKWELL.

Where Offer of Reward is Made by public advertisement, performance according to its terms creates a valid contract.

Approved in Cunningham v. Fiske, 13 N. M. 337, 83 Pac. 790, but holding such a contract is not a "contract in writing" within the meaning of the statute of limitations.

14 Cal. 138-144, 73 Am. Dec. 639, GREGORY v. FORD.

Equity will not Enjoin Default Judgment on ground that return of service was false and defendant was not served, where he showed no defense to the suit.

Approved in Meyer v. Wilson, 166 Ind. 657, 76 N. E. 750, reaffirming rule; California Casket Co. v. McGinn, 10 Cal. App. 10, 100 Pac. 1079,

error to set aside a default judgment where affidavit of service of summons erred one day as to date of service and default in consequence entered prematurely; Brandt v. Little, 47 Wash. 195, 91 Pac. 766, 14 L. R. A. (n. s.) 213, where independent action in equity was brought to vacate judgment as obtained without jurisdiction, showing of merits was necessary; Smoot v. Judd, 184 Mo. 577, 83 S. W. 504, and dissenting opinion in Smoot v. Judd, 184 Mo. 611, 83 S. W. 518, majority holding, in suit to set aside default judgment on ground return of sheriff was false, that return is conclusive except when attacked for fraud in which plaintiff participated or in a suit against the sheriff.

Injunctions Against Judgments for want of jurisdictions or invalidity. See notes, 32 L. R. A. 327; 31 L. R. A. 202, 212.

Showing Defense to Cause of Action as condition of equity suit to set aside judgment as obtained without jurisdiction. See note, 14 L. R. A. (n. s.) 214.

Court of Equity will Seek to award full and complete relief.

Approved in Swope v. Missouri etc. Trust Co., 26 Tex. Civ. App. 138, 62 S. W. 950, applying rule where court, in rendering judgment for balance due on note given in part payment of land and secured by deed of trust also decreed foreclosure of lien though not prayed for.

Equity will not Interfere to Enjoin Enforcement of a judgment, if judgment debtor has plain, speedy, and adequate remedy at law.

Approved in Donovan v. McDevitt, 36 Mont. 64, 92 Pac. 50, applying rule where judgment creditor attempted to sell debtor's property upon execution after judgment had been otherwise satisfied.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 137.

14 Cal. 145–146, PEOPLE v. ELYEA.

Memorandum Made by Witness at the Time of conversation with defendant not admissible to prove statements of defendant.

Approved in Republic of Hawaii v. Toyotaro, 11 Haw. 197, holding memorandum previously made by witness of statement of another could be used by him to refresh his memory but could not be read in evidence itself.

14 Cal. 148–156, HART v. PLUM.

Provision in Statute of 1854 That Assessment must be made on or before first Monday in May is directory.

Approved in Miller v. County of Kern, 150 Cal. 800, 90 Pac. 121, defect in assessment because of omission of clerk of supervisors and of auditor to affix to corrected assessment-book their affidavits within statutory time is cured by affixing such affidavits before taxes are paid under protest; Haskell v. Reigel, 26 Okl. 90, 108 Pac. 368, section 5, article 1, chapter 26, Session Laws of 1907–08, providing if sixty per cent majority vote to transfer territory from one county to an existing county, governor shall, within ten days after declaring result, issue proclamation calling an election, is directory.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 293.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 76.

14 Cal. 156–157, ROWLAND v. LEIBY.

Decree in Foreclosure may Follow the old chancery system, or it may be a formal judgment for the amount due in the first instance.

Approved in Englund v. Lewis, 25 Cal. 357, reaffirming rule.

14 Cal. 159–160, PEOPLE v. MURRAY.

To Make an Act Indictable, an attempt must be manifested by acts which would end in consummation of the offense but for the intervention of circumstances independent of will of the party.

Approved in Ex parte Floyd, 7 Cal. App. 591, 95 Pac. 176, holding evidence of preparation not sufficient to show attempt to commit forgery of printed cigar orders; Ex parte Turner, 3 Okl. Cr. 173, 104 Pac. 1074, under circumstances of case "attempt" to commit crime was merely preparatory and there was no direct movement toward commission of crime; State v. Wood, 19 S. D. 262, 103 N. W. 26, applying rule where one threatened to kill another and went to get a razor but was induced to abandon design before procuring same; State v. Hurley, 79 Vt. 31, 118 Am. St. Rep. 934, 64 Atl. 78, 6 L. R. A. (n. s.) 804, procuring tools adapted to jail-breaking did not constitute attempt to break jail.

14 Cal. 160–164, THOMPSON v. WILLIAMS.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 804, 805.

14 Cal. 164–165, HOCKER v. KELLEY.

Application for Intervention Just as Plaintiff is taking judgment should be denied.

Approved in Reay v. Butler (Cal.), 7 Pac. 671, holding, where plaintiff in ejectment desired jury trial, filing of intervention praying equitable relief after jury impaneled and sworn did not affect such right.

14 Cal. 165–167, WHITE v. LESZYNSKY.

What Intent to Defraud will sustain attachment. See note, 30 L. R. A. 483.

14 Cal. 167–171, ALGIER v. STEAMER MARIA.

Where No Exceptions to Phraseology of special verdict are reserved, such exceptions cannot be considered on appeal.

Approved in Napa Val. Pkg. Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 470, 118 Pac. 472, reaffirming rule.

Competency of Jurors Who have Served in same or similar case. See note, 68 L. R. A. 875.

14 Cal. 173–178, IMLAY v. CARPENTIER.

Equity will not Enjoin Enforcement of judgment if judgment debtor has ample remedy at law.

Approved in Donovan v. McDevitt, 36 Mont. 64, 92 Pac. 50, upholding rule where judgment creditor attempted to sell debtor's property upon execution after judgment had been otherwise satisfied.

Equity will not Grant Relief from Judgment against bankrupt, which has been discharged, there being adequate remedy at law.

Distinguished in Sherwood v. Wallin, 1 Cal. App. 534, 82 Pac. 567, holding complaint for specific performance of agreement for transfer of shares of corporate stock sufficiently showed no adequate remedy at law to warrant equitable relief.

14 Cal. 178–180, MACOLETA v. PACKARD.

Judgment in Suit for Money Due on invoice of goods, which allowed ten per cent interest, not supported by verdict which did not find the interest.

Approved in Diggs v. Porteus (Cal.), 33 Pac. 449, holding verdict in unlawful detainer too indefinite to support judgment.

Statement of Claims Against Estates of decedents. See notes, 130 Am. St. Rep. 322; 5 Cof. Prob. 308.

14 Cal. 180–188, PEOPLE v. ROSBOROUGH.

Governor's Proclamation is Necessary to Validity of special election to fill a vacancy.

Approved in Marsden v. Harlocker, 48 Or. 93, 120 Am. St. Rep. 786, 85 Pac. 329, where county court did not order local option election as required by law, such election was invalid.

Necessity of Notice or proclamation of election. See note, 120 Am. St. Rep. 795.

Where Appointee of Governor to Fill Vacancy in judicial office held office for several years because of no valid election of successor, his acts are as binding as those of legally elected officer.

Approved in dissenting opinion in People v. Toal (Cal.), 23 Pac. 206, majority holding under Constitution, article VI, section 13, provisions in city charter for establishment of inferior courts in city not having been enacted by legislature and passed on by governor in regular way were void and there were no de facto officers thereunder.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 68, 69.

14 Cal. 194–201, VAN PELT v. LITTLER.

Sureties on Official Bond of Sheriff or Constable are liable in first instance for breach of its condition though the cause of action is based on trespass.

Approved in Homan v. Wayer, 9 Cal. App. 129, 98 Pac. 83, holding notary liable on official bond for damages to plaintiff from false acknowledgment given an impersonator of owner whom he did not know.

14 Cal. 201–202, SMITH v. YREKA WATER CO.

Judgment for Defendant on Sustaining Demurrer will be affirmed where plaintiff does not offer to amend.

Approved in Marks v. Evans (Cal.), 62 Pac. 79, holding it was not error to sustain demurrer to complaint without leave to amend where it could not be amended to obviate the objection and no application to amend was made.

14 Cal. 202–207, 73 Am. Dec. 747, PICO v. WEBSTER.

Judgment Against Principal is Conclusive on surety who undertakes that his principal shall pay any judgment.

Approved in State v. Abbott, 63 W. Va. 193, 61 S. E. 371, where special receiver, on settlement of his accounts, was found chargeable with a certain amount, decree requiring him to pay it was conclusive on his sureties as to liability and amount.

Admissibility and Effect Against Surety of judgment against principal. See notes, 132 Am. St. Rep. 768; 52 L. R. A. 168.

Unsatisfied Judgment Against Officer is no bar to action against sureties on his official bond.

Approved in Gray v. Noonan, 6 Ariz. 40, 53 Pac. 8, judgment against sheriff individually for wrongful taking of property under writ did not extinguish liability of sureties.

14 Cal. 208–210, BRUSH v. MAYDWELL.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 461.

14 Cal. 210–212, ABBE v. MARR.

Where Plaintiff Alleges Facts showing his own moral turpitude, he states himself out of court.

Approved in Schmitt v. Gibson, 12 Cal. App. 411, 416, 107 Pac. 573, 574, applying rule where plaintiff was similarly induced to part with money as wager on fake pugilistic encounter; Levy v. Kansas City, 168 Fed. 526, 22 L. R. A. (n. s.) 862, 93 C. C. A. 523, holding one who paid money to city and obtained license for poolselling under city ordinance, but in violation of state law, could not recover the money from city on license being revoked; dissenting opinion in Stewart v. Wright, 147 Fed. 337, 340, 77 C. C. A. 499, majority holding that plaintiff who had been induced by swindlers to bet on foot-races upon false pretense that they were fixed so he would win was not prevented thereby from recovering his money.

Relief to Party Defrauded who went into scheme with intention of defrauding others. See note, 5 L. R. A. (n. s.) 906.

Complaint Which Shows No Legal Cause of action will not support judgment by default.

Approved in Dame v. Cochiti Reduction & Imp. Co., 13 N. M. 15, 79 Pac. 298, allegations of complaint in this cause would not sustain judgment by default for principal of bonds sued on or for attorney's fees.

14 Cal. 212–219, TYLER v. YREKA WATER CO.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 743.

14 Cal. 223–230, COLLINS v. BUTLER.

Injunctions Against Judgments for errors and irregularities. See notes, 32 L. R. A. 327; 30 L. R. A. 703.

Injunctions Against Judgments for defenses existing prior to rendition. See note, 31 L. R. A. 764.

14 Cal. 230–232, PURCELL v. McKUNE.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 110.

14 Cal. 247–250, SOULE v. DAWES; S. C., SOULE v. RITTER, 20 Cal. 523.

Where a Case upon All the Proofs is fully before the lower court and the appellate court, judgment of latter is conclusive and on reversal of decree below only such further proceedings can be taken as are authorized by the appellate court.

Approved in Robinson v. Muir, 151 Cal. 125, 90 Pac. 524, on appeal from order denying new trial in action to quiet title to several pieces of property to which issues are separate, and as to which new trial properly denied as to some only, order reversed and new trial granted only so far as necessary to correct error; People's Lumber Co. v. Gillard, 5 Cal. App. 438, 90 Pac. 357, holding law of the case not confined to that portion of the opinion of appellate court which was strictly essential to disposition of case; American Hydraulic etc. Co. v. Rich, 8 Idaho, 573, 69 Pac. 281, where lower court, through misconstruction of opinion of appellate court, refused to enter judgment dismissing action, writ of mandate must issue; State v. District Court, 32 Mont. 24, 79 Pac. 411, upholding rule where trial court, after affirmance of judgment on appeal, made an order allowing certain costs not previously allowed; Butler v. Thompson, 52 W. Va. 314, 43 S. E. 175, applying rule where lower court after adjudication on appeal allowed matter to be reopened by additional pleadings and evidence, and entered decree in conformity with first decree, which had been reversed.

14 Cal. 250–253, BECKMAN v. McKAY.

Mere Demand and Refusal to Surrender are not sufficient to charge conversion of thing demanded.

Approved in Phelps, Dodge & Palmer Co. v. Halsell & Frazier, 11 Okl. 9, 65 Pac. 342, in order to make defendant liable in action for conversion of personal property, demand must be made for same while he is in possession, unless same have been fraudulently disposed of before demand could be made.

14 Cal. 256–264, 73 Am. Dec. 651, KOCH v. BRIGGS.

Deed of Trust Given to Secure Note and authorizing trustee to sell is not a mortgage requiring judicial foreclosure.

Distinguished in Curtin v. Krohn, 4 Cal. App. 134, 87 Pac. 244, holding rule not applicable to instrument in question though denominated a trust deed; Herbert Craft Co. v. Bryan (Cal.), 68 Pac. 1021, holding deed of trust to secure debt is in effect only a mortgage with power of sale and is within provisions of Code of Civil Procedure, section 726.

There is No Equity of Redemption from Sale under deed of trust, as there is no forfeiture. Performance of trust carries out contract of parties.

Approved in Roberts v. True, 7 Cal. App. 381, 94 Pac. 393, holding marginal note of satisfaction made on margin of record of deed of trust in pursuance of agreement for satisfaction of no effect, and title still remained in trustor with power of sale; Brown v. Comonow, 17 N. D. 88, 114 N. W. 729, attempted foreclosure by plaintiff of instrument, whether deed of trust or mortgage, which authorized no one except trustee named therein to sell, was a nullity; Langmaack v. Keith, 19 S. D. 356, 103 N. W. 211, construing instrument con-

veying land as security for debt and authorizing sale in case of default in manner prescribed for foreclosure of mortgages was intended as a mortgage.

Right to Strict Foreclosure. See note, 20 L. R. A. 372.

A Mortgage is a Conveyance in Form but the contract is one only of security, and equity gives effect to the intention of the parties.

Approved in Bank of Oroville v. Lawrence (Cal.), 37 Pac. 938, holding instrument in form of deed but showing on face that it was intended in legal effect as mortgage, was a mortgage and not trust deed, though designated a "trust deed so being and operating as a mortgage."

14 Cal. 265-268, MOKELUMNE HILL CANAL & MIN. CO. v. WOODBURY.

Corporate Stockholders are Principal Debtors, and stand in the same position in relation to creditors of corporation as if they were a common partnership.

Approved in Harrill v. Davis, 168 Fed. 198, 22 L. R. A. (n. s.) 1153, 94 C. C. A. 47, holding under statute incorporators who had failed to file articles in both places required by statute were liable individually as partners for debts.

14 Cal. 279-380, BOGGS v. MERCED MIN. CO.

Elements of Estoppel in Pais with respect to the title of property stated.

Approved in Hicks v. Post, 154 Cal. 28, 96 Pac. 880, holding act of one party in entering orally into contract required to be in writing did not amount to such misrepresentation as to estop him from denying the agreement; Wilson v. Sarment, 153 Cal. 531, 126 Am. St. Rep. 91, 96 Pac. 318, holding taking of property purchased in wife's name and later signing with her a deed of trust with provision that in case of sale surplus should be paid to her, did not estop him from claiming it as community property as against grantee of wife; Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 682, 93 Pac. 1033, holding evidence insufficient to support finding that plaintiff estopped from questioning right of defendant to water appropriated by him in wells sunk on own land; Morris v. Blan, 146 Fed. 435, holding subsequent appropriator of water of stream cannot invoke estoppel against prior appropriator because latter stood by and let him build improvements on strength of diversion of water; Kela v. Pahuilima, 5 Haw. 527, holding upon facts, owner of land not estopped to assert title to land against one who had been in possession and made improvements on the faith that his own title was good; dissenting opinion in Sherman v. Sherman, 23 S. D. 507, 122 N. W. 448, and dissenting opinion in El Paso Livestock etc. Co. v. Colorado Livestock etc. Co., 171 Fed. 29, 96 C. C. A. 262, majority holding facts constituted estoppel.

He Who Acts in Ignorance of His Title shall not be estopped.

Approved in Walker v. Ehresman, 79 Neb. 780, 113 N. W. 220, facts relied on lacked essential elements of estoppel; Rihner v. Jacobs, 79 Neb. 749, 113 N. W. 223, where owner parted with property through fraud, creditor of fraudulent grantee who failed to establish reliance on apparent ownership cannot claim owner should be estopped from asserting title; Kenny v. McKenzie, 25 S. D. 498, 127 N. W. 602, action to recover possession of land sold under mortgage foreclosure

which was invalid because assignment of mortgage was not acknowledged, was barred by estoppel, where there was no ignorance of the facts; Kenny v. McKenzie, 23 S. D. 119, 120 N. W. 784, mortgagors who acquiesced in foreclosure sale, believing same was valid, and delivered up possession of the property, were not estopped from asserting their legal rights upon ascertaining defect in assignment of mortgage.

Consent of Parties will not Enable the court to pass upon questions not raised by the written allegations of the pleadings.

Distinguished in Gulling v. Washoe County Bank, 29 Nev. 272, 89 Pac. 31, holding where pleadings on their face and judgment-roll do not show issues tried and determined between parties, it may be shown by extrinsic evidence.

Decision of Land Department is Conclusive on the courts when patent issued in pursuance thereof is collaterally attacked.

Approved in Powers v. Webster, 47 Wash. 102, 91 Pac. 570, in action to set aside sale of school lands, private citizen claiming he was prevented by fraud from bidding at the sale, but who suffered no special injury, cannot maintain suit to cancel deed; Welsh v. Callvert, 34 Wash. 256, 75 Pac. 873, where subsequent applicant to purchase lands as oyster lands, theretofore sold and conveyed by the state as tide lands, claimed that deed did not include the lands applied for, this was a collateral attack.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 778.

14 Cal. 380–383, BURGE v. SMITH.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769, 771.

14 Cal. 384–387, CHAFFIN v. DOUB.

What Constitutes Delivery Depends on the character of the article sold and the circumstances of the case.

Approved in Sequeira v. Collins, 153 Cal. 431, 95 Pac. 878, holding retention of two kilns of brick without doing anything to indicate intention to pass control to transferee inconsistent with actual possession in transferee as against attaching creditor.

14 Cal. 387–390, 73 Am. Dec. 656, HULL v. SACRAMENTO VALLEY R. R. CO.

Fact That Fire was Communicated to property by sparks from locomotive raises inference of negligence.

Approved in Dyer v. Maine Central R. R. Co., 99 Me. 202, 58 Atl. 996, 67 L. R. A. 416, reaffirming rule in action for benefit of insurance company against railroad company to recover insurance money paid owner of property destroyed by sparks from engine; Continental Ins. Co. v. Chicago & Northwestern Ry. Co., 97 Minn. 474, 107 N. W. 551, 5 L. R. A. (n. s.) 99, burden was on defendant to rebut presumption.

Presumption of Negligence from occurrence of accidents. See note, 15 L. R. A. 40.

14 Cal. 390–395, CARSLEY v. LINDSAY.

That Arbitrator Did not Act upon All Items in adjusting affairs of a partnership is no ground for vacating his award.

Approved in Wood v. Hingley, 5 Haw. 158, holding award would not be set aside on ground that one item in issue was omitted where

it is not shown that the matter was brought to notice of arbitrators; Jensen v. Deep Creek Farm & L. S. Co., 27 Utah, 79, 74 Pac. 430, all matters submitted in controversy arising out of lease of a number of sheep were adjudicated upon by arbitrators.

14 Cal. 396–401, TAYLOR v. ROBINSON.

Intervening Rights of Third Persons cannot be injuriously affected by subsequent ratification of unauthorized acts of agent.

Approved in Johnson v. North British etc. Ins. Co., 66 Ohio St. 18, 63 N. E. 613, discussing rule where the one who did the act neither had nor claimed to have authority to represent another.

Authority of Agent to Accept Chattel in payment of debt. See note, 19 L. R. A. (n. s.) 325.

14 Cal. 403–408, POPE v. HUTH.

An Order Payable Out of a Particular Fund is an equitable assignment of the fund pro tanto.

Approved in Brady v. Ranch Mining Co., 7 Cal. App. 184, 94 Pac. 86, holding an order relating to whole amount of funds in hands of drawee belonging to drawer operates as equitable assignment of claim.

14 Cal. 410–413, GRIFFITH v. BOCARDUS.

Replevin may be Maintained for the recovery of money when the same can be segregated or identified.

Approved in Eddings v. Boner, 1 Ind. Ter. 178, 38 S. W. 1111, applying rule in action to recover belt containing purse and money where belt was sufficiently described.

14 Cal. 413–415, HAWKINS v. BORLAND.

All Facts Tending to Disprove Allegations of complaint may be offered under general denial.

Approved in Hogen v. Klabo, 13 N. D. 324, 100 N. W. 850, upholding rulings of court permitting defendant, in action to recover balance due for threshing, to testify concerning terms of contract, and identify notes paid for threshing, where answer was general denial.

14 Cal. 421–424, SACRAMENTO v. DUNLAP.

Bond Purporting to be Joint Bond of principal and sureties but signed by latter only is not binding on them.

Approved in Novak v. Pitlick, 120 Iowa, 291, 98 Am. St. Rep. 360, 94 N. W. 918, applying rule to bond reciting, "We, F. as principal and ———, as sureties . . . . are held and firmly bound," signed by an alleged surety alone.

Distinguished in Stimson Mill Co. v. Riley (Cal.), 42 Pac. 1074, holding a contractor's bond, in form joint and several, valid against sureties though contractor had not signed it; Deer Lodge Co. v. United States Fidelity etc. Co., 42 Mont. 322, 112 Pac. 1061, surety is not released by failure of principal to sign official bond which is joint and several.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 194.

Effect of Delivery of Bond unsigned by principal obligor. See note, 12 L. R. A. (n. s.) 1106, 1107, 1111.

Conditional Execution of Contract under parol agreement that it shall not take effect until others signed. See note, 45 L. R. A. 325, 326, 335.

14 Cal. 424–427, 73 Am. Dec. 658, MOKELUMNE HILL & MIN. CO. v. WOODBURY.

Existence of Corporation must be Shown by at least a substantial compliance with statute in its formation.

Approved in Alaska Gold Mining Co. v. Ebner, 2 Alaska, 613, holding under organic act of 1884 the general laws of Oregon for incorporation of domestic corporations was applicable to Alaska and must be substantially complied with there in formation of corporation.

14 Cal. 428–436, PEOPLE v. IRWIN; S. C., 18 Cal. 117.

Statutory Lien of a Judgment Attaches only upon property in which judgment debtor has a vested legal interest.

Approved in Zenda Mining & Milling Co. v. Tiffin, 11 Cal. App. 65, 104 Pac. 12, holding judgment lien did not attach to property where deeds thereof to judgment debtor were held in escrow subject to payment of purchase money by grantee of judgment debtor.

Estates and Interests to which judgment liens attach. See note, 117 Am. St. Rep. 780.

14 Cal. 437–438, PEOPLE v. WOPPNER.

In Criminal Cases Statute Requiring Statement, or bill of exceptions, to be made within ten days after trial is directory.

Distinguished in People v. Blis, 3 Cal. App. 165, 166, 84 Pac. 676, 677, holding provisions of section 1171, Penal Code, as amended in 1905, with section 1174, as so amended, relating to notice by defendant of intended presentation of bill of exceptions, are mandatory.

The Giving of Oral Instructions to Jury without consent of defendant is fatal error.

Approved in dissenting opinion in Boggs v. United States, 11 Okl. 144, 65 Pac. 929, majority holding only when statement of court amounts to a positive direction as to law of case is it required to be in writing.

14 Cal. 438–440, PEOPLE v. CARABIN.

Under Statute Authorizing Court of Sessions to hold special terms, the court, when specially called, has same powers as at regular term.

Approved in Republic of Hawaii v. Kapea, 11 Haw. 299, holding defendant could be tried at special term though he had been committed to be tried at following regular term.

When Charge of Court Assumes That Any Facts have been proven, it invades province of jury.

Approved in Arizona v. Kay, 3 Ariz. 94, 21 Pac. 153, reaffirming rule.

Organization of Grand Jury. See note, 27 L. R. A. 787.

14 Cal. 440–444, HITCHCOCK v. PAGE.

Privilege Given Lessee of purchasing the land at expiration of term was limited to whole land, and lessee could not claim right to buy a portion of it.

Approved in Slaughter v. Mallet Land etc. Co., 141 Fed. 291, 72 C. C. A. 430, holding preference right given lessee to purchase at any bona fide offer made and accepted not void for uncertainty.

14 Cal. 444–446, McDANIEL v. YUBA COUNTY.

Objection to Sufficiency of Allegation as to qualification to practice medicine must be taken by special demurrer.

Approved in Sailor v. Caldwell, 65 Kan. 89, 68 Pac. 1085, applying rule to objection to introduction of certificate to practice medicine on general ground that bill of particulars failed to state a cause of action.

14 Cal. 446–450, HAYNES v. WAITE.

Application of Payments. See note, 96 Am. St. Rep. 73, 79.

14 Cal. 450–457, NAGLEE v. LYMAN.

Creditor Who Takes Bill Before Maturity as security for antecedent debt becomes holder for value, if there is any change in legal rights of parties in relation to the debt.

Approved in Robinson v. Smith, 14 Cal. 98, following rule; Iowa Nat. Bank v. Sherman, 17 S. D. 406, 106 Am. St. Rep. 778, 97 N. W. 15, transferee of negotiable note before maturity who gave transferrer credit on existing debt for proceeds of note is entitled to protection against defenses of which he had no notice.

14 Cal. 457–459, JEROME v. STEBBINS.

In Action Against Indorser of Note payable on demand, complaint must allege facts to excuse delay of thirteen months in making demand for payment.

Approved in Seebach v. Kuhn, 9 Cal. App. 490, 99 Pac. 725, holding acts of prevention of performance of contract or waiver of full performance must be specially pleaded; Aronson v. Frankfort etc. Ins. Co., 9 Cal. App. 479, 99 Pac. 540, holding waiver of notice to insurance company of accident must be specially pleaded.

Every Fact Which, if Controverted, plaintiff must prove to maintain his case, must be stated in complaint.

Distinguished in McPherson v. San Joaquin County (Cal.), 56 Pac. 804, holding allegation in complaint on contract with county stating contract made by county "by and through James Brown, the duly authorized agent of said county for said purpose," sufficiently alleges authority.

14 Cal. 459–460, JOHNSON v. JOHNSON.

Divorce will not be Granted on Ground of extreme cruelty where cruelty is provoked by party who applies.

Approved in Spofford v. Spofford, 18 Idaho, 121, 108 Pac. 1056, applying rule where husband, who had been indiscreet in his conduct with other women, alleged cruelty on account of his wife's jealousy.

What Constitutes Connivance sufficient to bar divorce. See note, 120 Am. St. Rep. 527.

14 Cal. 460–465, HENSHAW v. CLARK.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 778.

14 Cal. 465–469, YOUNT v. HOWELL.

Judgment in Ejectment Relates only to time of commencement of suit.

Approved in Henry v. Davis, 149 Ala. 363, 43 So. 123, in action for trespass for cutting trees, where no evidence of possession was offered except judgment in ejectment, no evidence of trespass previous to commencement of ejectment suit was admissible.

14 Cal. 472–478, GEE v. MOORE.

Where Deed Conveys "the Right, Title and Interest" of grantor, instead of the land itself, the covenant of warranty does not estop him from setting up after-acquired title.

Approved in O'Sullivan v. Griffith, 153 Cal. 505, 95 Pac. 875, holding a deed of all the grantor's "right, title and interest in and to" a street railway franchise operated as quitclaim and failure of title was no defense to action for purchase price.

Effect of Covenants to Carry Title to a future or subsequently acquired interest where grantor's deed passed a present interest. See note, 13 L. R. A. (n. s.) 1006.

Conveyance of Homestead by Husband Alone vests the estate in the vendee, subject to use and occupation by husband and wife until character of premises as homestead has gone.

Approved in Jerdee v. Furbush, 115 Wis. 280, 91 N. W. 662, reaffirming rule; Teske v. Dittberner, 65 Neb. 169, 101 Am. St. Rep. 614, 91 N. W. 181, applying rule in action to enforce oral agreement between son and parents that upon death of both he shall become vested with title to homestead upon certain conditions.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See notes, 95 Am. St. Rep. 930.

Continuance of Family as Condition of continuance of homestead where a condition of inception. See note, 16 L. R. A. (n. s.) 111.

Distinguished in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 354, 107 Pac. 337, holding, under Civil Code, section 1265, homestead right in nature of joint tenancy, and could be alienated only by act of both; Mundy v. Shellaberger, 161 Fed. 507, 88 C. C. A. 445, holding under Missouri statute contract by husband alone for conveyance of homestead property absolutely void; Garr Scott & Co. v. Collin, 15 N. D. 629, 110 N. W. 83, statute in force when mortgage of homestead was given required wife's signature; Nielson v. Peterson, 30 Utah, 396, 85 Pac. 431, where no declaration of homestead had been made, and husband held legal title, foreclosure and sale under mortgage of husband transferred title to mortgagee, subject to right of redemption and to wife's one-third interest should she survive husband.

Surviving Wife Takes Homestead as property set apart from her husband's estate.

Approved in Campbell v. Moran, 71 Neb. 620, 99 N. W. 500, wife living with her husband on land occupied by them jointly as family homestead is not a freeholder.

Right of Minor Children to Benefit of probate homestead. See note, 1 Cof. Prob. 556.

14 Cal. 479–505, PEOPLE v. BOARD OF DELEGATES SAN FRANCISCO FIRE DEPARTMENT.

Certiorari Never Extends to the Merits and tries nothing but jurisdiction, but it covers every question of law and fact involving jurisdiction.

Approved in Golden Gate Tile Co. v. Superior Court, 159 Cal. 481, 114 Pac. 981, mandamus lies to review the erroneous dismissal of an appeal from an inferior court; Matter of Hughes, 159 Cal. 364, 113 Pac. 686, applying rule in proceeding to review order discharging convict from state prison, where superior court made mistake of law in holding petition stated facts sufficient to justify release of prisoner;

Thomas, Jr., v. Hawkins, 12 Cal. App. 334, 107 Pac. 581, holding on writ of review, where jurisdiction of inferior tribunal is brought in question, court would not interfere with conclusion of inferior tribunal upon such question properly before it; Cripple Creek v. Hanley, 19 Colo. App. 393, 75 Pac. 601, on certiorari to review action of city council in an election contest, the court cannot consider whether the evidence before the council justified its action.

Distinguished in Cook v. Civil Service Commission, 160 Cal. 593, 117 Pac. 664, denying certiorari to set aside examination held by San Francisco civil service commission though it had not complied with charter provision relative to making of rules.

Exceptions to Rule That Certiorari will not lie where there is an appeal. See note, 50 L. R. A. 799.

14 Cal. 506–508, 76 Am. Dec. 440, GUIOD v. GUIOD.

Husband may Abandon Homestead without consent of wife.

Approved in Helgebye v. Dammen, 13 N. D. 174, 100 N. W. 247, wife who abandoned homestead with her husband could not afterward claim same though ownership was awarded her by a decree of divorce; Beranek v. Beranek, 113 Wis. 277, 89 N. W. 147, where husband abandoned homestead, fact that wife refused to follow him did not preserve status of homestead.

Abandonment of Homestead. See note, 102 Am. St. Rep. 394, 400.

Miscellaneous.—Cited in Broadus v. Nelson, 16 Cal. 81.

14 Cal. 508–509, HENSLEY v. TARTAR.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 177.

14 Cal. 510–512, PEOPLE v. LEE.

In Criminal Cases Statute Requiring Statement or bill of exceptions to be made within ten days after trial is directory.

Distinguished in People v. Blis, 3 Cal. App. 165, 166, 84 Pac. 676, 677, holding provisions of section 1171, Penal Code, as amended in 1905, with section 1174, as so amended, relating to notice by defendant of intended presentation of bill of exceptions are mandatory.

There is No Difference Between a Statement and bill of exceptions under the statute fixing the time for settlement and signing.

Approved in Sauer v. Eagle Brewing Co., 3 Cal. App. 130, 84 Pac. 427, holding fact that motion to court was for leave to serve statement, though notice of intention to move for new trial stated that it would be made on bill of exceptions, not ground for disregarding the bill of exceptions or statement; Steve v. Bonners Ferry etc. Co., 13 Idaho, 396, 92 Pac. 366, all errors properly saved and assigned in statement of the case may be reviewed on appeal from the judgment although not used in motion for new trial.

When Judge cannot be Found, proposed statement in criminal case may be delivered to clerk of court for him.

Approved in Hawley v. Le Clair, 18 Wyo. 9, 102 Pac. 852, refusing to reverse overruling of motion to strike from file bill of exceptions filed with clerk in absence of judge within proper time but which was not actually allowed until expiration of time.

14 Cal. 519–531, 76 Am. Dec. 444, PERRE v. CASTRO.

Effect of Unaccepted Tender on lien of mortgage or pledge. See note, 33 L. R. A. 232.

14 Cal. 531–539, GORMAN v. RUSSELL.

Voluntary Associations for Mutual Relief are partnerships.

Approved in Kauffman v. Foster, 3 Cal. App. 746, 748, 86 Pac. 1111, holding, upon facts, mutual benefit lodge was in effect ordinary partnership; Ehrlich v. Willenski, 138 Fed. 426, holding complaint against labor union naming four members "for themselves and others, officers and members of the unincorporated association," insufficient; State Council of Catholic Knights v. Board of Review, 198 Ill. 444, 64 N. E. 1105, holding a fraternal beneficial society having lodge system and paying benefits in case of death or disability of members is not an institution of purely public charity within section 2 of revenue act exempting such institutions from taxation; Methodist etc. South Church v. Clifton, 34 Tex. Civ. App. 253, 78 S. W. 735, moneys expended for benefit of a church by trustees of a college could not be recovered.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 408.

Associations for Mutual Relief cannot be treated as charitable institutions.

Approved in Supreme Lodge Modern Am. Fraternal Order v. Board of Review of Effingham Co., 223 Ill. 57, 79 N. E. 24, act providing money of fraternal benefit organizations shall be exempt from taxation is unconstitutional.

When Impracticable, It is not Necessary to make all of the persons interested in a proceeding parties to the suit.

Approved in Standard Light etc. Co. v. Muncey, 33 Tex. Civ. App. 419, 76 S. W. 933, bondholders of an electric company should be sued for injuries to a servant, in the names of its members.

14 Cal. 540–542, PEOPLE v. MIDDLETON.

Commissioners of the Funded Debt of City of San Francisco have power, on sale of realty under twelfth section of act of May 1, 1851, to receive the "three per cent scrip" of the city instead of cash.

Approved in Mansfield v. District Agricultural Assn. No. 6, 154 Cal. 148, 149, 97 Pac. 151, holding deed of property to an agricultural association in trust to be sold for purpose of improving grounds and meeting other expenses authorized conveyance of portion in consideration of legal services.

14 Cal. 544–552, NATOMA WATER CO. v. CLARKIN.

Privilege of Moving for Dissolution of Injunction upon filing of answer is limited to cases where injunction is granted without notice.

Approved in Ots v. Superior Court, 10 Cal. App. 170, 101 Pac. 432, following rule.

Complaint in Ejectment may also Pray injunction against waste.

Approved in Waskey v. McNaught, 163 Fed. 933, 934, 90 C. C. A. 289, holding under Code of Civil Procedure of Alaska, section 386, plaintiff in ejectment to recover certain mining ground entitled to injunction ancillary to such action restraining defendant's mining operations on ground pendente lite; Colorado Eastern R. Co. v. Chicago etc. Ry. Co., 141 Fed. 901, 73 C. C. A. 132, holding injunction properly granted to enjoin construction of railroad track by defendant on complainant's right of way, a suit in ejectment having been begun by complainant.

Injunction Granted on Rule to Show Cause cannot be dissolved until final hearing.

Approved in Humphrey v. Buena Vista Water Co., 2 Cal. App. 542, 543, 544, 84 Pac. 297, 298, holding preliminary injunction granted on notice could not be dissolved until trial of cause is determined on merits.

Distinguished in Fowler v. Heinrath (Cal.), 2 Pac. 248, holding where nothing in record to show upon what court acted in dissolving such injunction, it will be presumed that it was dissolved upon good cause.

Cutting and Removing Growing Timber is ground for an injunction.

Approved in Hatton v. Gregg, 4 Cal. App. 545, 88 Pac. 595, reaffirming rule; dissenting opinion in Mountain Copper Co. v. United States, 142 Fed. 648, 73 C. C. A. 621, majority holding court of equity would not grant injunction restraining defendant from operating smelter as nuisance but would leave complainant to its remedy at law.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 749.

Decree of Confirmation of Mexican Grant confining the claim to a particularly described tract is conclusive evidence of validity of grant.

Approved in De Guyer v. Banning (Cal.), 25 Pac. 255, holding decree of confirmation conclusive as to title of all land contained within exterior boundaries therein described, it containing no exceptions therefrom, though a clause in the certificate of survey thereunder excepted a certain island.

As Between the Parties, Deed to a Corporation authorized to hold real estate is not void.

Approved in Tonart v. Jett Bros., 169 Ala. 643, 53 So. 752, bill by corporation to quiet title is not insufficient for failure to aver corporation's power to own realty; Watkins v. Iowa Central Ry. Co., 123 Iowa, 400, 98 N. W. 914, where owner of strip of land conveyed it to railway company without showing purposes for which it was to be used, state alone had right to inquire into matter.

Right of Private Persons to Contest Power of corporation to take or to hold property. See note, 32 L. R. A. 296.

14 Cal. 553–558, DORSEY v. MANLOVE.

In Action for Taking and Detaining Personal Property, in absence of circumstances of aggravation, measure of damages is value of property, with interest, and not consequential damages resulting to owner.

Approved in Cassin v. Cole, 153 Cal. 679, 96 Pac. 278, but holding evidence sufficient to support verdict of damages for trespass on land.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 37.

Where Trespass is Committed Maliciously, jury may award punitive damages.

Approved in Shandy v. McDonald, 38 Mont. 400, 100 Pac. 206, in action for conversion of property, void proceedings in justice's court were nevertheless admissible to rebut inference of malice.

14 Cal. 566–573, PEOPLE v. BEATTY.

Organization of Grand Jury. See note, 27 L. R. A. 776, 777.

14 Cal. 573–576, LANDIS v. TURNER.

Admissibility in Evidence of Books of account. See notes, 138 Am. St. Rep. 447, 454, 456; 52 L. R. A. 548, 576, 577, 580.

Service of Process Sufficient to constitute due process of law. See note, 50 L. R. A. 591.

14 Cal. 576–612, NOE v. CARD.

Expenditures by Community upon Separate Property are a charge in favor of community but do not make the property or improvements common.

Approved in Carlson v. Carlson, 10 Cal. App. 303, 101 Pac. 925, holding expenditure of money by husband in improvements upon wife's property did not affect title of the property or change it to community.

What is Community Property. See notes, 126 Am. St. Rep. 110; 4 Cof. Prob. 53.

Applicability of State Community Property Laws to realty acquired from federal government. See note, 26 L. R. A. (n. s.) 1119.

14 Cal. 612–634, 76 Am. Dec. 449, CLARK v. BAKER.

Mortgage Binds Subsequently Acquired Title of mortgagor.

Approved in Younger v. Moore, 155 Cal. 773, 103 Pac. 224, holding deed of trust conveyed after-acquired interest in property; Jones v. Chalfant (Cal.), 31 Pac. 258, holding mortgage and foreclosure proceedings carried rights under patent afterward received; Tilton v. Flormann, 22 S. D. 339, 117 N. W. 383, where grantor at time of executing conveyance had no title, his after-acquired title obtained from United States by patent passed to grantee; Bernardy v. Colonial etc. Mortgage Co., 17 S. D. 641, 106 Am. St. Rep. 791, 98 N. W. 167, where entryman on public land conveyed same before patent issued, on subsequent issuance of patent to him fee passed to his grantee; dissenting opinion in Boykin v. Springs, 66 S. C. 374, 44 S. E. 938, majority holding where one went in possession under agreement with life tenant to exchange land, fee did not pass until court, by its commissioners, conveyed same.

One Purchasing Property has Constructive Notice of prior recorded conveyance.

Approved in Tilton v. Flormann, 22 S. D. 338, 117 N. W. 382, applying rule where grantor at time of executing prior conveyance had no title.

Effect of Quitclaim Deeds on subsequently acquired title. See note, 105 Am. St. Rep. 857.

Conveyance Recorded Before Grantor obtained title, as notice. See note, 23 L. R. A. 563, 564.

14 Cal. 640–642, COWELL v. BUCKELEW.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 844, 862.

14 Cal. 643–651, HARDING v. JASPER.

In Dedication of Land for Public Highway, intention of owner to so dedicate is vital question, no particular formality being necessary.

Approved in Cordano v. Wright, 159 Cal. 620, 115 Pac. 231, questioning whether there can be dedication of land selected as a homestead by

a married person, other than by instrument executed by both spouses; City of Los Angeles v. McCollum, 156 Cal. 151, 103 Pac. 916, 23 L. R. A. (n. s.) 378, holding recording of subdivision map in city sufficient evidence to authorize finding of intention to dedicate portion thereof as street; Hibberd v. Mellville (Cal.), 33 Pac. 202, holding facts did not constitute dedication of land for public highway.

14 Cal. 651-653, PEOPLE ex rel. TERRY v. BARTLETT.

Homicide in Commission of unlawful act. See note, 63 L. R. A. 377, 378.

14 Cal. 654-658, HARDENBERGH v. HARDENBERGH.

Refusal of Wife to Accompany Husband on change of residence is evidence of desertion.

Approved in Roby v. Roby, 10 Idaho, 146, 77 Pac. 215, husband is not required by the law to provide for wife who refused to follow him to new home.

Desertion as Ground for Divorce. See notes, 119 Am. St. Rep. 636; 138 Am. St. Rep. 160.

Refusal of Wife to Follow Husband, on change of domicile, as desertion. See note, 4 L. R. A. (n. s.) 146, 148.

14 Cal. 661-667, MITCHELL v. HACKETT.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 110.

Fraud in Obtaining Execution of Note as defense against bona fide holder. See note, 36 L. R. A. 434.

14 Cal. 667-682, 76 Am. Dec. 459, REYNOLDS v. HARRIS.

Rules as to Conclusiveness of Judgment on parties, and right to collateral attack, stated.

Approved in Philbrook v. Newman, 148 Cal. 175, 82 Pac. 773, reaffirming rule.

Party Obtaining Benefit Through Judgment before being reversed must, after reversal, restore what he got.

Approved in Schoonover v. Osborne, 117 Iowa, 435, 90 N. W. 847, applying rule where plaintiff, pending appeal by defendant, obtained money through sale and redemption of defendant's land.

Reversal of a Decree Does not Affect Purchasers for value without notice.

Approved in Dunfee v. Childs, 59 W. Va. 243, 53 S. E. 216, where party interested in suit was purchaser and conveyed to bona fide purchaser before appeal, such purchaser's title was not affected by reversal of decree of sale on appeal.

Reversal of Judgments. See note, 96 Am. St. Rep. 136, 139, 141, 142.

Purchaser at Execution Sale is not clothed with legal title until he receives sheriff's deed.

Approved in North Dakota etc. Cattle Co. v. Serumgard, 17 N. D. 491, 138 Am. St. Rep. 717, 117 N. W. 463, any person interested may redeem property from lien at any time after claim is due and before right of redemption expires.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 53, 54.

Title Acquired by One Purchasing at his own execution sale. See note, 79 Am. St. Rep. 953.

NOTES

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CALIFORNIA REPORTS.

CASES IN 15 CALIFORNIA.

15 Cal. 12–20, TRAVERS v. CRANE.

Revocation of Power of Attorney. See note, 110 Am. St. Rep. 858.

Effect on Contract of death of party. See note, 23 L. R. A. 710.

15 Cal. 21–23, BREWSTER v. LATHROP.

Right to Dividends on transfer of stock. See note, 45 L. R. A. 395.

15 Cal. 23–26, SMITH v. BILLETT.

Necessity for Jury to Compute Damages on default judgment. See note, 20 L. R. A. (n. s.) 7.

15 Cal. 35–37, BURNETT v. WHITESIDES.

Where One Brings Water by Means of Ditch from foreign source into stream, he may divert water thus emptied in but cannot diminish quantity of water in stream to which prior appropriator is entitled.

Approved in Miller v. Wheeler, 54 Wash. 434, 438, 103 Pac. 643, 644, 23 L. R. A. (n. s.) 1065, stream, waters of which have been appropriated, may be used to conduct waters belonging to others not naturally tributary to stream.

Rights as Against Other Appropriators of one who adds to natural flow of stream. See note, 23 L. R. A. (n. s.) 1066.

Use of Natural Stream to convey appropriated water. See note, 51 L. R. A. 931.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

15 Cal. 38. PEOPLE v. MARQUIS.

Verdict must Specify Degree of offense.

Approved in People v. Bannister (Cal.), 34 Pac. 710, verdict of guilty of burglary must specify degree, though jury instructed that they could find no higher offense than burglary in second degree.

Correction of Verdict in criminal cases. See note, 23 L. R. A. 723.

15 Cal. 44–46, HAWLEY v. BADER.

A Receipt may be Explained or contradicted by parol.

Approved in San Pedro Lumber Co. v. Schroeter, 156 Cal. 161, 103 Pac. 889, reaffirming rule; California Packers Co. v. Merritt Fruit Co.,

6 Cal. App. 512, 92 Pac. 511, admission of due execution of receipt does not bar evidence to explain it; dissenting opinion in Jersey Island Dredging Co. v. Whitney (Cal.), 86 Pac. 512, majority holding indorsement on receipt given on settlement of claim on which creditor wrote, "Paid $650 in full satisfaction of all claims and guaranteed against liens," was not mere receipt but contract not variable by parol.

15 Cal. 48–50, PEOPLE ex rel. ORMAN v. RILEY.

Acquiring Residence as Voter while attending school at public institution. See note, 23 L. R. A. 215.

15 Cal. 50–52, COHN v. MULFORD.

Statements Made by Vendor of Personalty subsequent to sale are not admissible to defeat his vendee's title.

Cited in Wegerer v. Jordan, 10 Cal. App. 365, 101 Pac. 1067, arguendo.

15 Cal. 53–58, EDE v. JOHNSON.

An Affidavit Need not be Signed by the party making it.

Approved in Hotaling v. Brogan, 12 Cal. App. 502, 107 Pac. 712, and Fairbanks etc. Co. v. Getchell, 13 Cal. App. 461, 110 Pac. 332, reaffirming rule; Petaluma v. White, 152 Cal. 195, 92 Pac. 180, applying rule to affidavits of publication in condemnation proceedings; In re Petition of Shannahan etc. Hardware Co., 5 Penne. (Del.) 140, 58 Atl. 1023, applying rule to affidavit required by statute on chattel mortgage.

Courts Take Judicial Knowledge of the official character of justices of the peace in their own states.

Approved in Bell v. Stevens, 116 Iowa, 455, 90 N. W. 88, taking judicial knowledge of official character of treasurer of certain county.

Effect of Failure to Execute and record chattel mortgage. See note, 137 Am. St. Rep. 480.

15 Cal. 70–75, PEOPLE v. WYMAN.

Affidavit of Juror cannot be Used to impeach verdict on ground that it was not fair expression of jury's opinion.

Approved in State v. Forrester, 14 N. D. 339, 103 N. W. 626, affidavits of jurors are inadmissible to show that they misunderstood instructions of court.

Jury may Believe Part of Confession and disbelieve the remainder.

Approved in dissenting opinion in Owens v. State, 120 Ga. 301, 48 S. E. 24, statement which admits act, but also gives legal excuse, is not confession.

15 Cal. 75–85, DAVIDSON v. DALLAS.

In Case of Reversal the Directions of the opinion become a portion of the judgment.

Approved in People's Lumber Co. v. Gillard, 5 Cal. App. 438, 90 Pac. 557, opinion of appellate court is binding on all points raised; Oklahoma City Elec., Gas & Power Co., v. Baumhoff, 21 Okl. 508, 96 Pac. 760, question decided upon former appeal will not ordinarily be reviewed upon second appeal, where facts are substantially the same.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 323, 325.

15 Cal. 85–88, CLARK v. DUVAL.

Semble, That Supreme Court has no power to grant injunction pending appeal.

Distinguished in City of Pasadena v. Superior Court, 157 Cal. 793, 109 Pac. 625, superior court may continue injunction pending appeal.

The Right to Mine Carries with it whatever is necessary to its beneficial enjoyment.

Approved in McGraw v. Lakin, 67 W. Va. 387, 68 S. E. 28, upholding tax sale of "mineral right" in tract of land.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 770.

Right of Prior Appropriation of Water. See note, 30 L. R. A. 670.

15 Cal. 93–96, GARRISON v. SAMPSON.

Possession of Part as possession of whole. See note, 125 Am. St. Rep. 303.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1246.

15 Cal. 96–100, BLEN v. BEAR RIVER ETC. MIN. CO.

Miscellaneous.—Cited in Blen v. Bear River etc. Min. Co., 20 Cal. 603, 81 Am. Dec. 132, on subsequent appeal.

15 Cal. 100–107, SMITH v. DOE.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769, 812.

15 Cal. 107–117, HICKS v. MICHAEL.

The Supreme Court has No Power to grant an injunction pending an appeal.

Distinguished in City of Pasadena v. Superior Court, 157 Cal. 793, 109 Pac. 625, superior court may continue injunction pending appeal.

Disapproved in Manning v. Poling, 114 Iowa, 27, 83 N. W. 897, supreme court may issue restraining order to prevent one party to appeal from disturbing possession of adverse party to property in litigation pending appeal.

There are Many Cases in Which the powers of a court of equity to prevent waste have been invoked in the first instance.

Approved in Dunker v. Field and Tule Club, 6 Cal. App. 531, 92 Pac. 505, granting injunction to plaintiff ousted from possession.

Injunction to Restrain Waste should not be issued before hearing on merits except in cases of urgent necessity or of irreparable injury.

Approved in Williams v. Los Angeles Ry. Co., 150 Cal. 596, 89 Pac. 332, upholding denial of injunction pendente lite restraining use and maintenance of switch-tower on sidewalk in front of plaintiff's store.

An Injunction will Lie to restrain cutting and removing timber from land without seeking to gain possession.

Approved in Hatton v. Gregg, 4 Cal. App. 545, 88 Pac. 595, enjoining removal of timber; Waskey v. McNaught, 163 Fed. 934, 90 C. C. A. 289, in ejectment granting ancillary injunction against mining operations.

Injunction Against Trespass to cut timber. See note, 22 L. R. A. 236.

The Court Below may Revive an Injunction once dissolved or grant an injunction previously denied.

Distinguished in Humphrey v. Buena Vista Water Co., 2 Cal. App. 543, 84 Pac. 297, holding preliminary injunction granted upon notice cannot be arbitrarily dissolved.

Restraining Order Issued upon Order to show cause expires upon day set for hearing.

Approved in Ex parte Grimes, 20 Okl. 454, 455, 1 Okl. Cr. 109, 110, 94 Pac. 671, matter is not affected by belief of parties that order is still in force; City of Chamberlain v. Quarnberg, 23 S. D. 65, 119 N. W. 1030, bond given for restraining order expires upon hearing of order to show cause.

An Appeal Does not Revive an injunction once dissolved.

Approved in Wilkinson v. Dunkley-Williams Co., 141 Mich. 412, 104 N. W. 773, appeal from decree granting permanent injunction does not dissolve injunction.

15 Cal. 117-123, SEARCY v. GROW.

Effect of Election Where Successful candidate is ineligible. See note, 124 Am. St. Rep. 218.

Time as of Which Eligibility of officer to be determined. See note, 23 L. R. A. (n. s.) 1229.

15 Cal. 124-127, SMITH v. FRIEND.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 23.

15 Cal. 127-135, PIXLEY v. HUGGINS.

A Conveyance not Falling in the chain of title does not constitute a cloud.

Approved in Devine v. Los Angeles, 202 U. S. 335, 26 Sup. Ct. 652, 50 L. Ed. 1046, bill alleging invalidity, under federal constitution, of statutes and ordinance alleged to constitute cloud on title does not present federal question; Ashburn v. Graves, 149 Fed. 972, 79 C. C. A. 478, deed executed by stranger to title is not cloud; Beardsley v. Hill, 85 Ark. 8, 106 S. W. 1170, tax deed created no cloud where it described no land.

A Deed Casts a Cloud upon Title only where it would be necessary in ejectment based thereon for the defendant to introduce evidence.

Approved in Haggart v. Chapman etc. Land Co., 77 Ark. 529, 92 S. W. 792, decree affecting land in suit between strangers to the true title is not cloud; Payne v. Daviess Co. Sav. Assn., 126 Mo. App. 598, 105 S. W. 17, sale under execution against stranger to the record title, not in possession, does not constitute cloud; Cummings v. Dolan, 53 Wash. 500, 132 Am. St. Rep. 986, 100 Pac. 990. vendee cannot reject title as unmarketable because of recorded conveyance by stranger to the chain of title.

A Cloud is Cast upon Vendee's Title by an execution sale against his vendor.

Approved in Austin v. Union Paving etc. Co., 4 Cal. App. 612, 613, 88 Pac. 732, reaffirming rule; Barr v. Simpson, 54 Tex. Civ.

108, 117 S. W. 1042, injunction lies at suit of wife's grantee to enjoin execution sale based on judgment against husband of land conveyed to wife, who purchased with separate funds under deed not settting forth fact that land was to be her separate property.

Disapproved in Chamberlain v. Baker, 28 Tex. Civ. App. 500, 67 S. W. 533, refusing to enjoin judgment creditor of grantor from selling, under execution, realty conveyed to plaintiff before levy of writ.

What is Community Property. See notes, 126 Am. St. Rep. 121; 4 Cof. Prob. 63.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 107, 132.

Priority of Liens of Judgment or of prior unrecorded conveyance. See note, 16 L. R. A. 668.

15 Cal. 137–143, ESMOND v. CHEW.

Pollution of Stream by Mining. See note, 24 L. R. A. 65.

15 Cal. 144, BOLES v. WEIFENBACK.

Complaint in Ejectment alleging actual possession by plaintiffs, ouster by defendants and that defendants are still in possession, is sufficient.

Approved in Payne v. Treadwell, 16 Cal. 247, averment that possession was withheld from plaintiff unnecessary.

15 Cal. 149–150, EARLY v. MANNIX.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 892.

15 Cal. 150–152, BOLES v. COHEN.

Effect of Conveyance or encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 912.

15 Cal. 152–161, 76 Am. Dec. 468, BROWN v. '49 & '56 QUARTZ MINING CO.

Discovery of Mineral in mining claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 173.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 768, 822.

15 Cal. 161–182, 76 Am. Dec. 472, KIDD v. LAIRD.

A Person Entitled to a Given Quantity of water from a stream may change the point of diversion at pleasure.

Approved in Anderson v. Bassman, 140 Fed. 23, whether water is taken from stream in California by riparian owner or in Nevada by appropriator, use of water for irrigation must be reasonable; dissenting opinion in Lonoaea v. Wailuku Sugar Co., 9 Haw. 672, majority holding water may be transferred from land to which it is appurtenant to other land, provided no one is injured.

Change of Use or Channel of water appropriated. See note, 30 L. R. A. 386.

Running Water, so Long as It Continues to flow in its natural course, cannot be made the subject of private ownership.

Approved in Boise Irr. etc. Co. v. Stewart, 10 Idaho, 49, 77 Pac. 27, state may prescribe rules under which the rights of persons to water may be determined.

Right of Prior Appropriation of water. See note, 30 L. R. A. 672.

A Verdict is Conclusive Between same parties or their privies in respect of fact or title distinctly put in issue.

Approved in Harris v. Mason, 120 Tenn. 679, 115 S. W. 1149, 25 L. R. A. (n. s.) 1011, where plaintiff failed to prove title, defendant's title not put in issue.

Miscellaneous.—Cited in Butte T. M. Co. v. Morgan, 19 Cal. 612, in opinion of lower court.

15 Cal. 183–186, COLLIER v. CORBETT.

It is Impossible to Prove With Exactness the contents of instruments lost by fire.

Approved in Kries v. Holladay etc. Land & Lumber Co., 121 Mo. App. 200, 98 S. W. 1091, admitting abstract of burnt deed.

One Tenant in Common may Recover possession of the entire premises as against a stranger to the title.

Approved in Griswold v. Minneapolis etc. R. R. Co., 12 N. D. 439, 102 Am. St. Rep. 572, 97 N. W. 539, reaffirming rule.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 712.

15 Cal. 186–198, SPARKS v. HESS.

Everything Essential to the Beneficial Use and enjoyment of property is considered as passing to the grantee.

Approved in Bank of Lemoore v. Fulgham, 151 Cal. 239, 90 Pac. 938, delinquent tax deed describing land as it was assessed and described in certificate of sale with added words "with the appurtenances, etc.," is not invalidated by such addition; Crozer v. White, 9 Cal. App. 620, 100 Pac. 133, deed of "home place" held to include not only residence but farm.

Corporeal Appurtenances to Realty. See notes, 81 Am. St. Rep. 766; 15 L. R. A. 652.

Vendor Retaining Title as Security may sue for specific performance and take alternative decree that if vendee will not take conveyance and pay price, premises be sold and vendee pay deficiency.

Approved in White v. Sage, 149 Cal. 614, 87 Pac. 193, following rule.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 187, 188.

Vendor's Lien is Mere Equitable Right to resort to property upon failure of payment.

Approved in Womble v. Womble, 14 Cal. App. 744, 113 Pac. 355, that vendor's lien may exist, there must be a fixed consideration.

Nature of Interest of Vendor or Vendee in land contract as real or personal property. See note, 57 L. R. A. 643.

15 Cal. 199–200, LISMAN v. EARLY.

Payment is Matter of defense.

Approved in Barrett-Hicks Co. v. Glas, 14 Cal. App. 300, 111 Pac. 765, reaffirming rule.

15 Cal. 204–206, MORE v. ORD.

Injunctions Against Execution Sales or other proceedings under final process. See note, 111 Am. St. Rep. 100, 101.

15 Cal. 213–219, COGHILL v. BORING.

Vendor of Goods, in Rescinding Sale, may offer to return notes given therefor at, or at any time before, trial.

Approved in Cowen v. Bloomberg, 66 N. J. L. 386, 49 Atl. 452, reaffirming rule.

Necessity of Returning Consideration before bringing replevin for property obtained by fraudulent purchase. See note, 21 L. R. A. 208.

15 Cal. 220–221, ESTATE OF SCOTT.

Proceedings for Settlement of an Estate are not civil actions within meaning of Practice Act.

Approved in Estate of Harris, 3 Cof. Prob. 3, 5, discussing power of probate court to appoint guardian ad litem for minors; State v. District Court, 34 Mont. 230, 85 Pac. 1023, no authority for minor to appear by guardian ad litem in opposition to probate of will.

15 Cal. 221–223, PEOPLE ex rel. JACOBS v. MURRAY.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 76.

15 Cal. 223–226, FOX v. BRISSAC.

Effect of Re-entry Clauses in leases. See note, 127 Am. St. Rep. 86, 97.

Miscellaneous.—Cited in dissenting opinion in Illinois Steel Co. v. Budzisz, 139 Wis. 312, 119 N. W. 943, to point that landlord cannot bring ejectment until end of term.

15 Cal. 226–259, NORRIS v. HARRIS.

An Entire Contract is indivisible.

Approved in Perry v. Ayers, 159 Cal. 418, 114 Pac. 48, holding contract to pay certain sum for part interest in mine and certain shares in another company to be entire contract; buyer receiving shares could not compel repayment of money because interest in mine was worthless; Meek v. Daugherty, 21 Okl. 862, 97 Pac. 558, denying recovery on contract for building wall where wall not completed.

Contract Made at the Same Time, for different articles, at different prices, not entire contract.

Approved in Los Angeles Gas etc. Co. v. Amalgamated Oil Co., 156 Cal. 779, 106 Pac. 57, contract to buy all oil required in business at fixed price payable monthly is not severable; Sterling v. Gregory, 149 Cal. 120, 121, 85 Pac. 306, construing contract to buy oranges in grove where defendant claimed agreement was to buy oranges in three groves and that plaintiff breached it by selling two of them; Rockwell v. Light, 6 Cal. App. 566, 92 Pac. 650, contract for painting different houses at specified prices for each is severable.

The Laws of Other Countries must be alleged and proved like any other facts.

Approved in Peck v. Noll, 154 Cal. 353, 97 Pac. 866, stockholders of Nevada corporation must prove that its laws exempt them from liability; Watford v. Alabama and Florida Lumber Co., 152 Ala. 183, 44 So. 568, Alabama courts will not presume that common law prevails in Florida; Maloney v. Winston Bros. Co., 18 Idaho, 763, 111 Pac.

1088, presuming Montana law as to liability for injuries to servant to be same as that of Idaho; Wilhite v. Skelton, 5 Ind. Ter. 630, 82 S. W. 935, assuming that statute of frauds of Oklahoma is same as that of Indian Territory; De Sonora v. Casualty Co., 124 Iowa, 587, 104 Am. St. Rep. 367, 100 N. W. 536, refusing to assume that either the common law or the entire body of the civil law prevails in Mexico; Mathieson v. St. Louis & S. F. R. R. Co., 219 Mo. 552, 118 S. W. 12, refusing to assume that common law exists in Kansas.

Proof of Foreign Laws and their effect. See note, 113 Am. St. Rep. 878.

How Case Determined When Proper foreign law not proved. See note, 67 L. R. A. 40.

The Common Law is Presumed to prevail in those states of the Union whose territory was not, at the time of its acquisition, occupied by organized and civilized communities.

Approved in Roberts v. Pratt, 152 N. C. 735, 68 S. E. 242, presuming that rule that court will not entertain proceeding to disturb final judgment after term in which it was rendered prevails in South Dakota.

Presumption as to Law of other states. See note, 21 L. R. A. 473.

A Will Made in Texas and operative upon property in that state must be interpreted according to the law of Texas.

Approved in Estate of Mackay, 3 Cof. Prob. 341, applying rule in determining validity of contract marriage contracted in Colorado between white and negro; Succession of Hasling, 114 La. 296, 38 So. 174, form of will made in Louisiana by citizen of Louisiana, disposing of real estate in Mississippi, is governed by law of Mississippi.

Conflict of Laws as to wills. See note, 2 L. R. A. (n. s.) 445.

Testator may Provide for Sale of his property without direction of probate court.

Approved in Wisker v. Rische, 167 Mo. 532, 67 S. W. 220, reaffirming rule.

Statute of Uses in United States. See note, 16 L. R. A. (n. s.) 1150.

15 Cal. 259–265, **CURTIS v. SUTTER.**

The Action to Quiet Title Extends the remedy of the old bill of peace.

Approved in McNeil v. Morgan, 157 Cal. 378, 108 Pac. 70, complaint need not aver in terms adverse nature of claim; Campbell v. Cronly, 150 N. C. 464, 64 S. E. 215, submission of controversy without action on agreed facts to determine interest of parties in land; Smith Oyster Co. v. Darbee & Immel Oyster etc. Co., 149 Fed. 559, complainant need not first establish title by action at law.

Though Suit is Brought in Equity, determination of purely legal questions is not necessarily withdrawn from cognizance of court of law.

Approved in Waskey v. McNaught, 163 Fed. 934, 90 C. C. A. 289, plaintiffs in ejectment entitled to ancillary injunction restraining defendant's mining operations.

Effect of Legal Remedy upon equitable jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 68, 73.

Where Injunction is Granted on Complaint, it is dissolved on filing answer setting up paramount title.

Approved in Humphrey v. Buena Vista Water Co., 2 Cal. App. 543, 544, 84 Pac. 297, 298, preliminary injunction granted upon notice, "until the further order of the court," cannot be arbitrarily dissolved.

Party in Possession of Real Property may bring bill to quiet title against party out of possession without waiting to be disturbed by legal proceedings.

Approved in Harding v. Harding, 46 Or. 181, 80 Pac. 98, allowing such action against child of fifteen years.

Administrator is Proper Party Plaintiff in suit to quiet title to estate.

Approved in Blakemore v. Roberts, 12 N. D. 401, 96 N. W. 1031, reaffirming rule.

15 Cal. 266–267, HASWELL v. PARSONS.

Miscellaneous.—Cited in Parketon v. Pugsley, 142 Mo. App. 547, 121 S. W. 792, no liability for directing seizure of exempt property where exemption waived.

15 Cal. 271–275, WEAVER v. EUREKA LAKE CO.

A Comparison of the Value of conflicting rights would be a novel mode of determining their legal superiority.

Approved in American Smelting etc. Co. v. Godfrey, 158 Fed. 232, 89 C. C. A. 139, enjoining operation of smelters at suit of farm owners.

To Render Valid a Claim to Water by appropriation, it must be for some useful or beneficial purpose and not for mere speculation.

Approved in Miocene Ditch Co. v. Campion Min. etc. Co., 3 Alaska, 586, reaffirming rule.

Right of Prior Appropriation of water. See note, 30 L. R. A. 676.

15 Cal. 275–284, MORTON v. FOLGER.

The Sixth Section of the Act of 1850, fixing limitation for action to recover real property, was repealed by the amendatory act of 1855.

Approved in dissenting opinion in People v. McNulty (Cal.), 28 Pac. 823, applying rule to law changing place for infliction of capital punishment.

Declarations on Question of Boundary of deceased person, who was in a situation to be acquainted with the matter and who was at the time free from any interest therein, are admissible.

Cited in Morcom v. Baiersky, 16 Cal. App. 483, 117 Pac. 561, arguendo.

Distinguished in Spencer v. Clarke, 15 Cal. App. 514, 115 Pac. 249, hearsay evidence inadmissible where monuments of government survey still exist and lines described in field-notes may be exactly determined.

Admissibility Against Third Persons of declarations of deceased person. See note, 94 Am. St. Rep. 677, 678, 681, 682.

Party in Ejectment Failing to Prove Title by documentary evidence may rely upon showing of prior possession.

Approved in Weeks v. Cranmer, 18 S. D. 443, 101 N. W. 33, documentary evidence, insufficient to prove title, admissible to show exact location of premises occupied under claim of ownership.

Establishment of Prima Facie Title in ejectment by conveyances not running back to sovereignty, or common source of title. See note, 10 L. R. A. (n. s.) 407.

15 Cal. 285–286, GIBBONS v. SCOTT.

Supreme Court will not Reverse Judgment to afford plaintiff opportunity to amend.

Approved in Harrison v. Magoon, 16 Haw. 488, reaffirming rule.

Showing Defense to Cause of Action as condition of equity suit to set aside judgment as obtained without jurisdiction. See note, 14 L. R. A. (n. s.) 213.

15 Cal. 287–294, 76 Am. Dec. 481, JOHNSON v. SHERMAN.

Deeds Absolute as Mortgages. See note, 82 Am. St. Rep. 229.

Right to Strict Foreclosure. See note, 20 L. R. A. 372.

Liability of Assignee of leasehold for rent. See note, 14 L. R. A. 151, 154.

15 Cal. 294–296, SACRAMENTO v. BIRD.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 279.

15 Cal. 296–302, LOWE v. ALEXANDER.

No Intendments can be Indulged in favor of jurisdiction of inferior courts, but their jurisdiction must affirmatively appear.

Approved in Ferguson v. Basin Consolidated Mine, 152 Cal. 715, 93 Pac. 869, where plaintiffs claimed title under execution sale out of justice's court and summons was served out of county, recital in justice's docket of return of service of such summons by sheriff of another county, without showing that county clerk's certificate was attached to summons, is insufficient.

Recital in Docket of Justice that summons was "returned duly served" cannot control return of officer.

Approved in Stubbs v. McGillis, 44 Colo. 143, 130 Am. St. Rep. 116, 96 Pac. 1007, 18 L. R. A. (n. s.) 405, reaffirming rule.

Rights of Partners Inter Se in partnership realty. See note, 28 L. R. A. 102.

Rights and Position of Creditors, purchasers, and other third parties in partnership realty. See note, 28 L. R. A. 173.

Miscellaneous.—Cited in Thomas, Jr., v. Hawkins, 12 Cal. App. 334, 107 Pac. 581, to point that evidence may be taken to determine jurisdictional fact.

15 Cal. 304–307, SEWARD v. MALOTTE.

Where Grant Refers in Description to Plat, plat becomes part of grant for purpose of identifying land.

Approved in Foss v. Johnstone, 158 Cal. 128, 110 Pac. 298, where patent refers to official plat and survey, plat and field-notes are part of description of land granted.

15 Cal. 308–313, VAN MAREN v. JOHNSON.

The Wife's Interest in the Common Property is a mere expectancy.

Approved in Estate of Moffitt, 153 Cal. 634, 95 Pac. 1026, 20 L. R. A. (n. s.) 207, subjecting wife's share of community property to inheritance tax; Hall v. Johns, 17 Idaho, 228, 105 Pac. 72, where husband abandons family, wife may make contracts which will bind community property.

The Husband is Liable for His Wife's Debts to the extent of the common property.

Approved in Reade v. de Lea, 14 N. M. 462, 95 Pac. 137, statute requiring both husband and wife to join in conveyance of community property does not apply to community property already acquired; dissenting opinion in Schuler v. Henry, 42 Colo. 388, 94 Pac. 366, 14 L. R. A. (n. s.) 1009, majority holding husband's liability for wife's torts impliedly abrogated by married woman's property act.

Distinguished in dissenting opinion in Reade v. de Lea, 14 N. M. 468, 474, 95 Pac. 140, 142, majority holding statute requiring both husband and wife to join in conveyance of community property does not apply to community property already acquired.

Liability of Community Property for debts. See note, 19 L. R. A. 235.

Where Complaint Amended by inserting name of defendant's husband, point cannot be raised for first time in supreme court that supplemental complaint should have been filed.

Approved in Ennor v. Raine, 27 Nev. 216, 74 Pac. 3, failure to object in trial court that facts alleged in answer did not make proper counterclaim operated as waiver.

Adoption of Common Law in United States. See note, 22 L. R. A. 504.

15 Cal. 313–315, MAHONEY v. CAPERTON.

Notice of Motion for New Trial given one day before judgment rendered and six days after filing report of referee is ineffectual.

Approved in Harris v. Careaga (Cal.), 2 Pac. 42, proceedings had before filing report of referee ineffectual as basis for new trial.

15 Cal. 315–318, PRESTON v. KEHOE.

Where Complaint Alleges Forcible Entry and detainer, forcible entry must be proved.

Distinguished in Kerr v. O'Keefe, 138 Cal. 422, 71 Pac. 450, complaint not demurrable because unlawful entry and forcible detainer alleged in one count.

15 Cal. 319–320, WOLF v. ST. LOUIS INDEPENDENT WATER CO.

That Plaintiffs Might have Avoided the injury complained of by committing a trespass is no defense.

Approved in Barstow Irr. Co. v. Black, 39 Tex. Civ. App. 84, 86 S. W. 1038, defendants not bound to cut plaintiff's embankment in order to drain their land.

15 Cal. 321, 76 Am. Dec. 489, WILLIAMS v. BOWERS.

An Ostensible Partner Retiring from the Firm must give notice of his retirement.

Approved in Easton v. George Wostenholm & Son, 137 Fed. 533, 70 C. C. A. 108, and Kelley v. McNamee, 164 Fed. 375, 22 L. R. A. (n. s.) 851, 90 C. C. A. 357, reaffirming rule.

15 Cal. 322–324, 76 Am. Dec. 490, GEORGE v. RANSOM.

What is Community Property. See notes, 126 Am. St. Rep. 112; 4 Cof. Prob. 54.

Constitutionality of Statutes affecting rights based on pre-existing marriage. See note, 84 Am. St. Rep. 413.

Rights of Creditors in Personal Services of debtor. See note, 21 L. R. A. 629.

15 Cal. 329–331, **PEOPLE v. MOICE.**

Insanity After Commission of criminal act. See note, 38 L. R. A. 585, 590.

15 Cal. 336–344, **STATE v. WELLS, FARGO & CO.**

Bonds Given for Stolen Warrants are good in the hands of bona fide holders.

Approved in Ehrlich v. Jennings, 78 S. C. 275, 125 Am. St. Rep. 795, 58 S. E. 924, where coupon bond, redeemed but not canceled, was stolen, it was good in hands of holder for value without notice before maturity.

Stolen Bonds, Coupons and other negotiable instruments. See note, 125 Am. St. Rep. 808.

15 Cal. 344–347, **KREUTZ v. LIVINGSTON.**

An Action for Money had and Received lies whenever the defendant has in his hands money which in equity and conscience he has no right to retain.

Approved in McCormick etc. Co. v. Nofziger Bros. Lumber Co., 10 Cal. App. 243, 101 Pac. 689, action will not lie to enforce express contract; Richardson v. Moffitt-West Drug Co., 92 Mo. App. 532, allowing action for money wrongfully collected on insurance policy.

15 Cal. 348–349, **HARRIS v. TAYLOR.**

If Debtor has Property Which may be Reached by ordinary legal remedies, equity will not interfere.

Distinguished in Ziska v. Ziska, 20 Okl. 644, 95 Pac. 258, 23 L. R. A. (n. s.) 1, one attaching property of nonresident standing in name of another may enforce his lien without alleging execution issued and returned nulla bona.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 46.

Effect on Legal Title of Conveyance of land in fraud of creditors. See note, 67 L. R. A. 890.

15 Cal. 359–361, **REYNOLDS v. LAWRENCE.**

Parties have No Unqualified Right to stipulate for the abrogation of rules.

Approved in Missouri etc. Ry. Co. v. Kidd, 146 Fed. 500, 77 C. C. A. 13, appeal dismissed where appellant did not file brief for nearly three years after time fixed by rules.

Statement on Appeal, Failing to specify grounds of appeal, forms no part of record.

Approved in Chase v. Alaska F. & L. Co., 2 Alaska, 84, motion for new trial must specify actual and particular grounds relied upon.

15 Cal. 361–372, **STARK v. BARRETT.**

Conveyance by One Tenant of Parcel of tract owned by several is inoperative to impair any of the rights of his cotenants.

Approved in Kenoye v. Brown, 82 Miss. 613, 100 Am. St. Rep. 645, 35 So. 164, such conveyance is voidable in so far as it operates to the prejudice of the cotenants, at their election.

Conveyance by One Cotenant of specific part of common property. See note, 100 Am. St. Rep. 652.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 553.

Rights of Creditors in Personal Services of debtor. See note, 22 L. R. A. 644.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 713.

15 Cal. 374–375, DOBBINS v. DOLLARHIDE.

Appeal will not be Dismissed where the undertaking was both to render the appeal effectual and to stay execution and the justification was sufficient for the former purpose.

Approved in Edminston v. Steele, 12 Idaho, 617, 87 Pac. 678, reaffirming rule; Pacific Window Glass Co. v. Smith, 8 Cal. App. 767, 97 Pac. 900, it will be presumed that money deposited in justice's court was intended to make appeal effectual.

15 Cal. 375–382, DUFF v. FISHER.

Decisions are not Binding as Precedents upon propositions which should have been, but were not, considered.

Approved in Moinet v. Burnham, Stoepel & Co., 143 Mich. 491, 106 N. W. 1127, reaffirming rule.

Objections to Findings of Jury in Equity Case must be raised on motion for new trial.

Approved in Campbell v. Jones, 41 Cal. 519, objections to form of verdict or that excessive damages were awarded can only be raised on motion for new trial.

Specific Performance will not be Decreed where plaintiff has an adequate remedy at law.

Distinguished in Sherwood v. Wallin, 1 Cal. App. 534, 82 Pac. 567, granting specific performance of contract to transfer mining stock.

The Granting of Specific Performance depends, not upon the character of the property, but upon whether the remedy at law is adequate.

Approved in Ridenbaugh v. Thayer, 10 Idaho, 672, 80 Pac. 233, specifically enforcing contract to deliver wood where defendant insolvent; Turley v. Thomas, 31 Nev. 195, 135 Am. St. Rep. 667, 101 Pac. 574, specifically enforcing contract for delivery of corporate stock which has no market value; Livesley v. Johnston, 45 Or. 49, 106 Am. St. Rep. 647, 76 Pac. 950, 65 L. R. A. 783, specifically enforcing contract for sale and delivery at certain price of hops to be grown in succeeding five years.

Miscellaneous.—Cited in Hobbs v. Duff, 43 Cal. 489, referring historically to cited case.

15 Cal. 384–387, SHAW v. RANDALL.

Where No Undertaking is Filed within time limited by statute, there is nothing to amend.

Distinguished in Wasem v. Bellach, 17 S. D. 509, 97 N. W. 719, where undertaking contains no condition to pay costs of appeal, appellant may be permitted to file new undertaking.

15 Cal. 387–406, VALENTINE v. STEWART.

An Agreement to Withdraw depositions from archives of land commission is void as against public policy.

Approved in Benicia Agricultural Works v. Estes (Cal.), 32 Pac. 940, agreement to withdraw opposition to discharge of insolvent, invalid.

Where Attorney Purchases Subject of suit, client may set purchase aside unless attorney clearly shows that no advantage was taken.

Approved in Levara v. McNeny, 73 Neb. 420, 102 N. W. 1044, setting aside sale by attorney of client's land to third party, for whom he is acting as attorney, at inadequate price.

Contracts Between Attorneys and clients. See note, 83 Am. St. Rep. 184.

Who may not Purchase at judicial execution and other compulsory sales. See note, 136 Am. St. Rep. 816.

If Any Part of Consideration is against public policy, whole contract falls.

Approved in Cole v. Brown-Hurley Co., 139 Iowa, 499, 117 N. W. 750, 18 L. R. A. (n. s.) 1161, reaffirming rule.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 496.

15 Cal. 408–411, PEOPLE v. SMITH.

Confessions of Defendant to Owner of stolen property upon inducement that latter would use his influence to get defendant acquitted are inadmissible.

Approved in People v. Silvers, 6 Cal. App. 72, 92 Pac. 507, excluding confession where inducement was extended by third person in presence of district attorney.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 849.

Distinguished in People v. Piner, 11 Cal. App. 553, 105 Pac. 784, confession to relative on promise that he would do all in his power to prevent crime becoming known to authorities is admissible.

15 Cal. 411–418, 76 Am. Dec. 492, GREEN v. PALMER.

Each Party must Allege Every Fact which he is required to prove.

Distinguished in McPherson v. San Joaquin County (Cal.), 56 Pac. 804, complaint which alleged that county entered into contract sufficient, where contract itself recited that it was made through duly authorized agent.

Facts Only must be Alleged in pleading.

Approved in Estate of Goodspeed, 2 Cof. Prob. 147, 148, and Estate of Harris, 3 Cof. Prob. 13, both applying rule in will contest.

Bag of Coin Held in Hand is subject to execution.

Approved in Richards v. Heger, 122 Mo. App. 517, 99 S. W. 804, constable who, having execution, grabs package of currency held in hand of debtor is not guilty of trespass.

Miscellaneous.—Cited in Barrett-Hicks Co. v. Glas, 14 Cal. App. 300, 111 Pac. 765, burden of proving nonpayment rests upon defendant.

15 Cal. 418–421, LOEHR v. LATHAM.

Under Act of 1858, Authorizing Suit to be brought in any county of state, where residence of defendant is unknown, plaintiff must show that he used due diligence to ascertain defendant's residence.

Approved in Mahler v. Drummer Boy Gold Min. Co., 7 Cal. App. 193, 93 Pac. 1065, reaffirming rule.

15 Cal. 429–459, STATE v. McCAULEY.

Act of 1856, Authorizing Transfer of convicts to private individuals, is valid.

Approved in In re O'Shea, 11 Cal. App. 576, 105 Pac. 779, imprisonment in county jail or state prison for poolselling not cruel or unusual punishment.

Right to Compel Prisoners to labor. See note, 27 L. R. A. 593.

Cruel and Unusual Punishments. See note, 35 L. R. A. 562, 566.

Lease of Convicts, Under Act of 1856, held to be assignable.

Approved in Hall v. O'Neil Turpentine Co., 56 Fla. 335, 47 So. 612, upholding contract for subhiring of convicts, where subhirer bound himself to observe terms of original contract.

Where the Contract has Been in Part performed and it becomes impossible to place the parties in statu quo, there can be no rescission.

Approved in Wills v. Porter (Cal.), 61 Pac. 1111, where corporation pays indebtedness to stockholder before it is due, in consideration of his guaranteeing its note, action to recover money cannot be maintained without releasing stockholder from guaranty.

One Party cannot Violate Contract himself and then seek to rescind it on ground that other party has followed his example.

Approved in Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 273, 110 Pac. 955, applying rule where defendant was in default in asphalt contract and attempted rescission because of plaintiff's failure to make full payment.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 44.

State Revenues may be Appropriated in anticipation of their receipt without creating debt.

Approved in Stein v. Morrison, 9 Idaho, 448, 75 Pac. 246, 253, reaffirming rule.

Distinguished in Hagan v. Commissioners' Court of Limestone Co., 160 Ala. 556, 49 So. 420, holding that contract to build courthouse, to be paid for by assignment of proceeds of special tax levy for certain years, created debt.

What Constitutes "Indebtedness" of municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 405, 406, 407.

15 Cal. 459–472, RAUN v. REYNOLDS.

Mortgagee in Possession must account for rents and profits.

Approved in Murdock v. Clarke (Cal.), 24 Pac. 274, reaffirming rule.

Miscellaneous.—Cited in Raun v. Reynolds, 18 Cal. 289, on subsequent appeal.

15 Cal. 476–482, PEOPLE v. ARNOLD.

Threat Made at Time of Procuring Weapon is admissible.

Approved in State v. Reace, 121 La. 1081, 47 So. 31, evidence of threats by deceased, though not communicated to accused, is admissible as tending to show that deceased was aggressor; State v. Jackman, 29 Nev. 409, 91 Pac. 144, evidence of uncommunicated threats made within hour before shooting is admissible.

Distinguished in State v. Quen, 48 Or. 349, 86 Pac. 792, evidence that third person, in presence of accused, had threatened to kill prosecuting witness, inadmissible in absence of proof of conspiracy.

Evidence of Threats of Accused, or of person injured or killed. See notes, 3 L. R. A. (n. s.) 489; 17 L. R. A. 657, 658.

If Evidence is Relevant, Its Want of conclusiveness is no bar to its introduction.

Approved in Moody v. Peirano, 4 Cal. App. 419, 88 Pac. 382, evidence of similar warranties is admissible on issue whether warranty in question was made.

Where the Testimony for the Prosecution leaves a doubt as to whether homicide was justifiable, prisoner is entitled to benefit of doubt.

Approved in State v. Matheson, 130 Iowa, 451, 114 Am. St. Rep. 427, 103 N. W. 141, instruction placing upon defendant burden of proving that shot was accidentally fired, erroneous.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 489.

Where Defendant is Held to Answer before finding of indictment, objection to mode of drawing names of grand jurors must be made on their being impaneled.

Approved in Fooshee v. State, 3 Okl. Cr. 674, 108 Pac. 557, under statutes, where grand juror was found by court to be qualified, issue of his competency could not be raised to invalidate indictment.

15 Cal. 499–501, 76 Am. Dec. 499, HAWKINS v. HILL.

Plaintiff Having Two Mortgages on same property may sue to foreclose both, though one not yet due.

Approved in Dixon v. Eikenberry, 161 Ind. 317, 67 N. E. 917, 68 L. R. A. 323, where mortgagee on foreclosure failed to set up tax claim held by him, he could thereafter assert it against any party to the decree.

Distinguished in Kyle v. Hamilton (Cal.), 68 Pac. 486, judgment foreclosing mortgage, superseded by deed which does not provide for attorney's fee, cannot allow such fee.

15 Cal. 503–507, 76 Am. Dec. 500, STEVENS v. IRWIN.

The Statute of Frauds Requires that the vendee take actual, open and unequivocal possession, with usual marks and indications of ownership.

Approved in Sequeira v. Collins, 153 Cal. 431, 95 Pac. 878, pledge of bricks made and to be made held to violate statute; Byxbee v. Dewey (Cal.), 47 Pac. 53, that purchaser of raisin trays wrote his name on many of them and had a man to look after them, insufficient; dissenting opinion in Hunt v. Hammel, 142 Cal. 462, 76 Pac. 379, majority upholding transfer by husband to wife, where both conducted store together.

Acceptance of Goods to satisfy statute of frauds. See note, 96 Am. St. Rep. 217.

Where Vendee of Personal Property holds it in his exclusive possession for a year or more, his placing vendor in possession as attorney in fact does not show sale to be fraudulent.

Approved in Roberts v. Burr (Cal.), 54 Pac. 851, sale not fraudulent where purchaser of jewelry from firm returned it to member thereof to be sold on commission; Reynolds v. Beck, 108 Mo. App. 198, 200, 83 S. W. 295, 296, rule applicable where plaintiff bought carriage from liveryman, kept it for two months, and then returned it with team to be cared for.

15 Cal. 512–513, PEOPLE v. GREEN.

In Indictment for Larceny it is not necessary to allege that coin stolen was "current" coin.

Approved in State v. Quackenbush, 98 Minn. 521, 108 N. W. 956, upholding indictment for wrongfully accepting deposit of "good and lawful money and current as such under the laws of the state of Minnesota."

15 Cal. 515–529, TUOLUMNE REDEMPTION CO. v. SEDGWICK.

Right to Redeem Land may be Repealed at any time before party avails himself of it.

Overruled in Johnson v. Taylor, 150 Cal. 205, 119 Am. St. Rep. 181, 88 Pac. 905, 10 L. R. A. (n. s.) 818, where law in force at time of tax sale required written notice to owner thirty days prior to redemption period, deed made without such notice under law passed prior to such deed dispensing with notice is void.

Effect of Statutes making pre-existing contracts illegal. See note, 120 Am. St. Rep. 479.

15 Cal. 530–630, HART v. BURNETT.

The Pueblo of San Francisco continued to exist after the cession of California by Mexico.

Approved in Vilas v. City of Manila, 220 U. S. 360, 31 Sup. Ct. 420, 55 L. Ed. 497, public property of city of Manila did not pass to United States under treaty of cession.

The Municipal Lands of San Francisco are subject to the control of the state.

Approved in Mahoney v. Board of Education, 12 Cal. App. 296, 107 Pac. 585, state authorized city to lease school lands by approving municipal charter.

Municipal Lands of San Francisco were not subject to sale under execution.

Approved in Tulare Irrigation Dist. v. Collins, 154 Cal. 442, 97 Pac. 1125, unused lands of irrigation district not subject to execution; People v. San Joaquin etc. Agr. Assn., 151 Cal. 806, 91 Pac. 744, denying liability of property of district agricultural association to levy on execution.

Municipal Ownership of Tide Land. See note, 64 L. R. A. 334.

Statutes Legalizing Invalid municipal contracts. See note, 27 L. R. A. 702.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 487.

The Doctrine of Stare Decisis should not be too strongly pressed.

Approved in Frick Co. v. Oats, 20 Okl. 489, 94 Pac. 688, court may overrule decision of supreme court of territory of Oklahoma; dissenting opinion in Walling v. Brown, 9 Idaho, 749, 76 Pac. 321, majority refusing to reconsider constitutionality of "Two Mile Limit Law" as to pasturing of sheep.

Miscellaneous.—Cited in Ohm v. City and County of San Francisco (Cal.), 25 Pac. 157, claimant under Mexican grant may maintain legal action for possession.

15 Cal. 630–638, **HOLLADAY v. FRISBIE.**

Interest of San Francisco in Beach and water lots is a legal estate for ninety-nine years and is subject to levy on execution.

Approved in Potrero Nuevo Land Co. v. All Persons, 158 Cal. 734, 112 Pac. 306, owner of fee in San Francisco water lot sold by state under act of 1853, subject to ninety-nine year term granted city by act of 1851, cannot maintain McEnerney suit; Beadles v. Fry, 15 Okl. 433, 82 Pac. 1042, 2 L. R. A. (n. s.) 855, municipal property not reasonably necessary for public welfare may be sold under execution.

Municipal Ownership of Tide Lands. See note, 64 L. R. A. 334, 338.

15 Cal. 638–646, **BLANKMAN v. VALLEJO.**

Every Specific Averment must be Denied in substance and spirit, and a denial of its literal truth is not sufficient.

Approved in Preston v. Central Cal. etc. Irr. Co., 11 Cal. App. 197, 104 Pac. 465, denial of precise sum alleged in complaint insufficient.

Admission Contained in Answer is conclusive evidence against defendant.

Approved in Wyles v. Berry, 116 Ky. 380, 76 S. W. 127, answer, though superseded by amended answer, is admissible against defendant.

Court may Reject Testimony because of its inherent improbability.

Approved in Davis v. Judson, 159 Cal. 130, 113 Pac. 151, following rule.

Distinguished in People v. Mock Yick Gar, 14 Cal. App. 336, 111 Pac. 1040, reversing because testimony, uncontradicted and not improbable, raised a reasonable doubt.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 16 CALIFORNIA.

16 Cal. 11–65, PEOPLE v. BROOKS.

It is not Essential to the Validity of an appropriation that funds to meet the same should be in the treasury.

Approved in Stein v. Morrison, 9 Idaho, 448, 75 Pac. 253, reaffirming rule; People v. Chicago etc. Ry. Co., 249 Ill. 174, 94 N. E. 58, bridge tax not void though county board adopted resolution for issuing warrants to pay certain expenses thereof though there was no money in treasury; State v. Brian, 84 Neb. 33, 120 N. W. 917, it is not necessary that money appropriated be drawn from treasury during period for which appropriations are made; State v. Eggers, 29 Nev. 481, 91 Pac. 823, 16 L. R. A. (n. s.) 690, act creating commission sufficient appropriation for salary of chairman; Menefee v. Askew, 25 Okl. 630, 107 Pac. 162, holding that under statutes continuing appropriation is not permissible; State v. King, 108 Tenn. 280, 67 S. W. 814, legislature may pay salary fixed by law though not included in appropriation bill.

Requisites of Appropriation for official salary or expenses. See note, 16 L. R. A. (n. s.) 635.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 37, 56, 57.

What Constitutes "Indebtedness" of municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 406.

Mandamus will Issue to the governor in certain cases.

Approved in State v. Brooks, 14 Wyo. 414, 84 Pac. 491, 6 L. R. A. (n. s.) 750, granting mandamus to compel governor to issue certificate of election.

Mandamus to Governor. See note, 6 L. R. A. (n. s.) 752, 759.

Contract Entered into by Agents of State upon subject within control of legislature may be affirmed by state by legislation indirectly referring to contract.

Approved in Rogers v. Hawley, 19 Idaho, 763, 115 Pac. 691, holding act of 1911, accepting provisions of federal statutes relating to land grants and approving acts of state land commission, does not violate constitutional provision against retroactive laws.

Contract Giving Absolute Right to warrants is impaired by statute making approval of board of examiners necessary.

Approved in May v. Cass County, 12 N. D. 143, 96 N. W. 294, statute changing time for maturity of bonds does not affect bonds contracted for but not yet signed and delivered; dissenting opinion in Jobe v. Caldwell, 93 Ark. 520, 125 S. W. 429, majority holding appropriation for completion of state capitol was not available to pay for work already done.

Right to Compel Prisoners to labor. See note, 27 L. R. A. 593.

16 Cal. 65–69, SCHLOSS v. WHITE.

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 548.

16 Cal. 76–77, BAXTER v. McKINLAY.

Where Authority to Make Demand was not questioned at time, point cannot be raised after action brought.

Approved in dissenting opinion in Isenhour v. Barton County, 190 Mo. 179, 88 S. W. 764, majority holding that in order to recover interest on county warrant from time of presentment and refusal, regularity of assignment must be shown.

16 Cal. 81–82, HUGHES v. BORING.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 481.

16 Cal. 83–85, NATOMA WATER ETC. CO. v. PARKER.

An Injunction Granted upon an Order to show cause cannot be dissolved before final hearing.

Approved in Humphrey v. Buena Vista Water Co., 2 Cal. App. 544, 84 Pac. 298, preliminary injunction granted upon notice cannot be arbitrarily dissolved; 2 Cal. App. 543, 84 Pac. 297, dissenting opinion same case holding contrary; Ots v. Superior Court, 10 Cal. App. 171, 101 Pac. 432, court cannot dissolve temporary injunction granted upon notice prior to final trial upon merits.

16 Cal. 88–90, SMITH v. SHAW.

Denial of Tenancy as Waiver of Notice to quit or demand of possession. See note, 25 L. R. A. (n. s.) 105.

16 Cal. 93–98, PALMER v. SHAW.

Temporary Residence by Defendant is sufficient to set statute running.

Distinguished in McKee v. Dodd, 152 Cal. 639, 125 Am. St. Rep. 82, 93 Pac. 855, 14 L. R. A. (n. s.) 780, if, after entering state, defendant leaves it, the period of such absence will not be counted in period of limitation.

In Order to Set the Statute of Limitations in operation, the return from abroad must not be clandestine and with intent to defraud the creditor.

Distinguished in Stewart v. Stewart, 152 Cal. 165, 92 Pac. 89, where return was not secret, fact that it was unknown to creditor is immaterial.

Sufficiency and Effect of "Return" to state by defendant to start limitations running. See note, 23 L. R. A. (n. s.) 550, 552, 553.

16 Cal. 98–100, 76 Am. Dec. 505, PEOPLE v. LEVISON.

Instructions to Jury Should not Assign conclusive effect to circumstances or assume that such circumstances are proved.

Approved in People v. Elster (Cal.), 3 Pac. 888, error to instruct jury that they may find defendant guilty of larceny where no inculpatory facts connected with his possession of property recently stolen.

If Instructions are Erroneous under any and every state of facts, supreme court will review them, though there is no statement of facts.

Approved in Donovan-McCormick Co. v. Sparr, 34 Mont. 244, 85 Pac. 1030, reaffirming rule.

Knowledge Necessary to Convict One of receiving stolen goods. See note, 22 L. R. A. (n. s.) 839.

16 Cal. 104–106, MACOVICH v. WEMPLE.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 108.

16 Cal. 107–110, MINTURN v. BURR.

Actual Possession as Much Consists of a present power and right of dominion as an actual corporeal presence.

Approved in Knowles v. Crocker Estate Co., 140 Cal. 284, 86 Pac. 717, substantial inclosure constitutes actual possession; Tidwell v. Chiricahua Cattle Co., 5 Ariz. 364, 53 Pac. 195, possession is shown where land is fenced and under cultivation and there is a house thereon; Gordon v. Ross-Higgins Co., 162 Fed. 641, 89 C. C. A. 429, holding evidence showed lot in mining camp to have been abandoned.

Wrongful Detainer Lies Only against parties in possession.

Approved in St. Louis Brew. Assn. v. Niederluecke, 102 Mo. App. 308, 76 S. W. 646, tenant who, at expiration of term, wrongfully puts stranger in possession, is not thereafter liable for unlawful detainer.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 388.

16 Cal. 110–113, PEOPLE v. ECKERT.

Absence of Judge during trial. See note, 122 Am. St. Rep. 729.

Conviction on Testimony of accomplice. See note, 98 Am. St. Rep. 167.

16 Cal. 119–123, SACRAMENTO v. CROCKER.

Tax upon Business Graduated according to amount of sales is valid.

Approved in Aachen & Munich Fire Ins. Co. v. Omaha, 72 Neb. 528, 101 N. W. 7, tax upon gross amount of fire insurance premiums is valid; Hill v. City Council of Abbeville, 59 S. C. 428, 38 S. E. 24, upholding ordinance imposing license taxes on occupations.

Grading License Tax According to Volume of business, or capital employed. See note, 17 L. R. A. (n. s.) 898, 899.

Limit of Amount of license fees. See note, 30 L. R. A. 419.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 255, 273.

16 Cal. 124–126, WHEELER v. MILLER.

Municipal Ownership of Tide Lands. See note, 64 L. R. A. 335.

16 Cal. 128–137, PEOPLE v. REYNOLDS.

Peremptory Challenges must be Made before jury is sworn.

Approved in Republic of Hawaii v. Kapea, 11 Haw. 303, not error to allow prosecution to challenge jurors peremptorily after it had accepted them.

The Allowance of a Peremptory Challenge in a criminal case, after juror has been sworn, is permissible where good cause shown.

Approved in People v. Schmitz, 7 Cal. App. 347, 94 Pac. 411, reversing where challenge allowed though no cause shown.

Jurors may be Sworn as They are Accepted or after panel is completed.

Approved in Mathis v. State, 45 Fla. 61, 34 So. 291, time of swearing jurors in chief is within discretion of court.

Challenge for Implied Bias, in Criminal Cases, must specify particular cause of bias.

Approved in Robinson v. Territory, 16 Okl. 248, 85 Pac. 454; State v. McCarver, 104 Mo. 739, 92 S. W. 690, and State v. Myers, 198 Mo. 248, 94 S. W. 250, all reaffirming rule.

16 Cal. 137–138, PEOPLE v. AH FUNG.

Instruction Should not Assume Existence of fact not expressly admitted.

Approved in Territory v. Kay, 3 Ariz. 94, 21 Pac. 153, error to charge that it was admitted that accused fired fatal shot.

Proof of Corpus Delicti. See note, 68 L. R. A. 61.

16 Cal. 138–140, ADLER v. FRIEDMAN.

Parol Evidence is Admissible to Prove new agreement in substitution for old written agreement.

Approved in Pearsall v. Hervey, 153 Cal. 317, 325, 95 Pac. 157, 160, specifically enforcing oral agreement for sale and exchange of lands substituted by novation for canceled written contract and fully performed on plaintiff's part.

16 Cal. 140–142, 76 Am. Dec. 507, BRENNAN v. SWASEY.

Mechanic's Lien and Attachment are cumulative remedies.

Approved in Hunt v. Darling, 26 R. I. 484, 59 Atl. 400, 69 L. R. A. 497, subcontractor may petition for mechanic's lien, and attach part of contract price in hands of owner; Hatcher v. Hendrie etc. Supply Co., 133 Fed. 271, 68 C. C. A. 19, attachment and garnishment allowable in mechanic's lien suit; In re Smyth, 167 Fed. 870, creditor may withdraw claim in bankruptcy in order to pursue remedy in state court against exempt property.

Notice of Mechanic's Lien need not set out items of account.

Approved in O'Niel v. Taylor, 59 W. Va. 377, 53 S. E. 474, reaffirming rule.

16 Cal. 145–152, 76 Am. Dec. 508, NEALL v. HILL.

Equity has No Jurisdiction over corporations to restrain their operations or to wind up their concerns.

Approved in Vila v. Grand Island Electric Light etc. Co., 68 Neb. 241, 110 Am. St. Rep. 400, 97 N. W. 616, 63 L. R. A. 791, reaffirming

rule; State v. Foster, 225 Mo. 194, 125 S. W. 190, court of equity cannot dissolve corporation; Slover v. Coal Cr. Co., 113 Tenn. 436, 438, 106 Am. St. Rep. 851, 82 S. W. 1134, 1135, 68 L. R. A. 852, denying receivership of coal mining company asked for on ground that property would be exhausted by judgments for damages prior to that of plaintiff; dissenting opinion in Ashton v. Penfield, 233 Mo. 444, 135 S. W. 954, majority holding receiver might be appointed for corporation in event of gross mismanagement and fraud.

When and at Whose Instance receiver of corporation may be appointed. See note, 118 Am. St. Rep. 199.

Power to Appoint Receivers of corporations where no other relief asked. See note, 20 L. R. A. 214.

Liability of Directors to corporation. See note, 55 L. R. A. 754, 774.

16 Cal. 152–153, REEVES v. HOWE.

Necessity of Notice of Default to bind guarantor. See note, 20 L. R. A. 261.

16 Cal. 153–156, GILLAN v. HUTCHINSON.

Discovery of Mineral in mining claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 157.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769, 770.

16 Cal. 156–158, SKINNER v. BEATTY.

Plaintiff in Foreclosure, after receiving sheriff's deed, is prima facie entitled to writ of assistance against mortgagor and those entering under him subsequent to decree.

Approved in dissenting opinion in Anderson v. Thompson, 3 Ariz. 69, 20 Pac. 805, majority holding purchasers of property subject to mortgage could not set up title acquired under homestead laws in answer to foreclosure.

Lien for Purchase Money of homesteads. See note, 86 Am. St. Rep. 174.

16 Cal. 158–160, COYE v. PALMER.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 809, 810.

16 Cal. 160–161, VALLEJO v. GREEN.

Order to Show Cause must be served.

Approved in Andreen v. Andreen, 15 Cal. App. 730, 115 Pac. 762, valid interlocutory decree of divorce, rendered upon publication of summons, cannot be set aside without notice.

16 Cal. 161–165, ESTATE OF KIRTLAN.

Where Brother of Deceased, Being Entitled to letters, gave stranger a writing requesting court to appoint him administrator and stranger petitioned for letters, brother could not withdraw his assent at hearing.

Approved in Estate of King, 4 Cof. Prob. 21, request of executor, who is also next of kin, that another be appointed administrator, who is appointed and dies pending administration, does not deprive him of right to letters after death of such administrator; Estate of Bedell, 3 Cof. Prob. 82, where father of decedent requested ap-

pointment of competent person as administrator and nominee applied for letters, father is estopped from withdrawing waiver; Estate of Carlson, 2 Cof. Prob. 278, where executor died and his executor waited seven months before applying for letters on first estate and public administrator filed counter-petition four days later, latter cannot be held to have waived rights by laches.

16 Cal. 165–167, JONES v. MARTIN.

Recorder, in Certifying to Copy of Deed, need not transcribe notarial seal to acknowledgment.

Approved in Sibly v. England, 90 Ark. 425, 119 S. W. 822, record of deed purporting to be under seal need not contain copy of seal.

16 Cal. 173–180, BAKER v. JOSEPH.

Where There is a Continuous Trust, the statute of limitations does not begin to run until demand made.

Approved in Dillon v. Cross, 5 Cal. App. 769, 91 Pac. 440, reaffirming rule; Title Ins. etc. Co. v. Ingersoll, 158 Cal. 486, 111 Pac. 365, applying rule where wife gave husband money to keep and invest for her; Kamihana v. Glade, 5 Haw. 498, but holding that evidence did not establish express and continuous trust; Spencer v. Clarke, 25 R. I. 171, 55 Atl. 332, action at law will lie to recover trust fund after account is settled and demand made for balance due.

Limitation of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 488.

Where It is Sought to Impeach a witness by proving declarations of hostility, his attention must be called to these declarations on cross-examination.

Approved in Estate of Bedford, 158 Cal. 148, 110 Pac. 304, and Fagan v. Lentz, 156 Cal. 689, 105 Pac. 954, both reaffirming rule.

Motions for New Trial on the Ground of newly discovered evidence are regarded with disfavor and strictest showing of diligence is required.

Approved in People v. Boyd, 16 Cal. App. 134, 116 Pac. 324, upholding admission of testimony of absent witness given at preliminary hearing; Hall v. Jensen, 14 Idaho, 174, 93 Pac. 965, accident or surprise and diligence in attempting to procure evidence must appear from affidavit; Donahue v. State, 165 Ind. 157, 74 N. E. 999, defendant convicted of murder not entitled to new trial on ground of newly discovered evidence of insanity, when issue of insanity not raised at trial; In re Colbert's Estate, 31 Mont. 483, 107 Am. St. Rep. 439, 80 Pac. 250, showing of diligence in seeking evidence held insufficient.

16 Cal. 181–184, 76 Am. Dec. 516, ACKLEY v. CHAMBERLAIN.

Farm Held to be Homestead though dwelling-house used partly as hotel.

Approved in Hohn v. Pauly, 11 Cal. App. 729, 106 Pac. 268, fact that premises were used for hotel purposes held not to invalidate homestead; In re Allen (Cal.), 16 Pac. 320, premises properly set aside as homestead though wagon-shop thereon rented out; dissenting opinion in Smith v. Guckenheimer, 42 Fla. 49, 27 So. 904, majority affirming decree assigning part of building as homestead.

Lien of Judgment is Purely creature of statute.

Approved in Boggs v. Dunn, 160 Cal. 285, 116 Pac. 744, levy of execution creates no lien on homestead.

Priority of Judgment Over Conveyance made after beginning of term. See note, 38 L. R. A. 248.

16 Cal. 184–186, McCARTNEY v. FITZ HENRY.

If Exceptions to Rulings are not Taken at time they cannot be urged on appeal.

Approved in Carver v. San Joaquin Cigar Co., 16 Cal. App. 766, 118 Pac. 94, following rule; Randall v. Freed, 154 Cal. 301, 97 Pac. 670, fact that trial was conducted by person not versed in law gives court no discretion to disregard want of exceptions; People v. Emmons, 7 Cal. App. 688, 95 Pac. 1034, refusing to consider motion to set aside indictment and challenge to panel of grand jury in absence of exception.

16 Cal. 187–188, PEOPLE v. CORNELL.

Where an Offense is Punishable either as a felony or as a misdemeanor, the punishment awarded determines the grade of the offense.

Approved in In re O'Shea, 11 Cal. App. 574, 105 Pac. 778, applying rule to "Racetrack" bill.

16 Cal. 189–195, MONTGOMERY v. KASSON.

Legislature cannot Destroy Rights of grantee under swamp land act.

Approved in dissenting opinion in State v. Cantwell, 142 N. C. 618, 55 S. E. 825, 8 L. R. A. (n. s.) 498, majority holding exemption from jury duty may be revoked.

16 Cal. 195–200, 76 Am. Dec. 518, GUY v. DU UPREY.

One Erecting Buildings on Infant's Property, under contract with guardian, made without authority of law, has no equitable lien.

Approved in Los Angeles v. Winans, 13 Cal. App. 254, 109 Pac. 649, guardian cannot go into equity for authority, but must address probate side of court; Davis v. Davis, 81 Vt. 264, 130 Am. St. Rep. 1035, 69 Atl. 877, one who advances money to pay off mortgage on homestead is not entitled to subrogation.

Right to Mechanic's Lien for improvements on infant's land by authority of guardian. See note, 15 L. R. A. (n. s.) 1160.

Right of Subrogation. See note, 99 Am. St. Rep. 513, 519.

Reinstatement of Mortgage Released or discharged by mistake. See note, 58 L. R. A. 804.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 802, 904.

16 Cal. 200–202, LOGAN v. HILLEGASS.

Staying of Execution otherwise than by statutory proceedings. See note, 127 Am. St. Rep. 708.

Injunctions Against Judgments for want of jurisdiction or invalidity. See notes, 32 L. R. A. 326, 328; 31 L. R. A. 202, 204.

Effect of Writ or Process issued without seal of court. See note, 20 L. R. A. 427.

16 Cal. 202–207, TOMLINSON v. RUBIO.

When the Legal Remedy is adequate, plaintiff must proceed at law.

Distinguished in City of Bozeman v. Bohart, 42 Mont. 298, 112 Pac. 391, injunction may be granted as incident to action for unlawful detainer.

16 Cal. 208–213, ROBINSON v. SUPERVISORS.

Unauthorized Acts of Board of Supervisors in creating office and raising salaries may be reviewed on certiorari.

Approved in Kinsloe v. Pogue, 213 Ill. 304, 305, 72 N. E. 907, quashing proceedings of county court calling election on proposition to remove county seat; State v. District Court, 90 Minn. 464, 97 N. W. 135, since action of board in passing upon claim is quasi judicial, appeal may be allowed to district court.

Denied in Cook v. Civil Service Commission, 160 Cal. 592, 117 Pac. 664, denying certiorari to set aside examination held by San Francisco civil service commission, though it had not complied with charter provision relative to making of rules.

Where the Supervisors have Authority to allow a claim, it must be paid without inquiring whether the account was allowed upon insufficient evidence or for too large an amount.

Approved in Cahill v. Colgan (Cal.), 31 Pac. 617, approval of board of examiners and appropriation by legislature conclusive on validity of claim as against comptroller.

Distinguished in County of Tehama v. Sisson, 152 Cal. 174, 92 Pac. 67, enjoining evasion by supervisors of limitation upon power to incur indebtedness, by means of pretended sale and repurchase.

16 Cal. 220–248, PAYNE v. TREADWELL.

The Pueblo Lands of San Francisco are a trust, and can only be disposed of as directed by the legislature.

Approved in San Francisco v. Canavan, 42 Cal. 556, legislature might direct sale of pueblo lands and application of proceeds to erection of public buildings; Monterey v. Jacks, 139 Cal. 552, 554, 73 Pac. 440, upholding act of legislature confirming deed of pueblo lands; Mahoney v. Board of Education, 12 Cal. App. 296, 107 Pac. 586, board of education of San Francisco may lease school land not needed for school purposes; dissenting opinion in Bates v. Gregory (Cal.), 22 Pac. 686, majority holding legislature had no power to revive municipal debt barred by statute of limitations.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 465, 487.

16 Cal. 350–357, RUSS v. MEBINS.

Finding of Ownership is a Finding of ultimate fact.

Approved in Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, reaffirming rule.

In Ejectment Seisin of the Plaintiff and withholding of possession by the defendant are the only facts that need be alleged.

Approved in Casci v. Ozalli, 158 Cal. 283, 110 Pac. 933, McFarland v. Matthai, 7 Cal. App. 600, 95 Pac. 180, Victor Power & Mining Co. v. Cole, 11 Cal. App. 500, 105 Pac. 759, and Froman v. Madden, 13 Idaho, 143, 88 Pac. 895, all reaffirming rule; Corea v. Higuera, 153 Cal.

455, 95 Pac. 884, 17 L. R. A. (n. s.) 1018, finding that plaintiff is owner of way is finding of ultimate fact; Merryman v. Kirby, 13 Cal. App. 346, 109 Pac. 636, and Hayden v. Collins, 1 Cal. App. 261, 81 Pac. 1121, both holding allegations that plaintiff is the owner and entitled to the possession and that defendant refuses to surrender possession sufficient; McRae v. Blakeley, 3 Cal. App. 174, 84 Pac. 681, allegation that entry was "wrongful and unlawful" unnecessary; Bryan v. Tormey (Cal.), 21 Pac. 762, finding that plaintiff is "the owner in fee" sufficient; Estate of Donohue, 1 Cof. Prob. 198, allegation in widow's petition to have share of community property assigned to her by way of partial distribution, that property was acquired by decedent by purchase after marriage to her, and not by gift, devise, bequest or descent, sufficiently shows community character; Bena Townsite Co. v. Sauve, 104 Minn. 473, 116 N. W. 947, immediate right of possession need not be expressly averred; City of Butte v. Mikosowitz, 39 Mont. 354, 102 Pac. 594, applying rule to ejectment by city to recover street.

The Statute Authorizes a Sale and Conveyance of land held adversely by third persons.

Approved in Ohm v. San Francisco (Cal.), 25 Pac. 157, one alleging perfect title under Mexican grant need not resort to court of equity.

It is Too Late to Urge upon Motion for rehearing something which was not brought forward in argument or set up in briefs.

Approved in Powell v. Nevada etc. Ry., 28 Nev. 343, 344, 82 Pac. 97, reaffirming rule; Wundenberg v. Campbell, 9 Haw. 212, rule applicable unless decision is in conflict with express statute or controlling decision.

The Presumption of Validity Attends every grant issued by parties authorized to grant.

Approved in Sisk v. Caswell, 14 Cal. App. 391, 112 Pac. 190, grantee in deed is chargeable with notice of its covenants.

Facts of Which Courts will take judicial notice. See note, 124 Am. St. Rep. 35.

Statutes Legalizing Invalid municipal contracts. See note, 27 L. R. A. 702.

Miscellaneous.—Cited in Moore v. Moore (Cal.), 34 Pac. 92, answer denying plaintiff's title and right of possession sufficient evidence of ouster.

16 Cal. 248–255, KOPPIKUS v. STATE CAPITOL COMMISSION.

Act Providing for Construction of state capitol is not void as creating debt in excess of the constitutional limit.

Approved in Stein v. Morrison, 9 Idaho, 448, 75 Pac. 253, revenues may be appropriated in advance of their receipt without creating debt.

What Constitutes "Indebtedness" of municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 406.

Distinguished in Hagan v. Commissioner's Court of Limestone County, 160 Ala. 556, 49 So. 420, contract to build courthouse to be paid for by interest bearing warrants, secured by assignment of proceeds of special tax levy for stated years, created debt.

Right of Trial by Jury does not apply to proceeding to ascertain value of land to be condemned.

Approved in Portneuf Irr. Co. v. Budge, 16 Idaho, 126, 127, 100 Pac. 1049, 1050, reaffirming rule; Ingram v. Maine Water Co., 98 Me. 573,

57 Atl. 894, no right of jury trial to assess damages for property taken under mill act; Pittman v. Byars, 51 Tex. Civ. 86, 112 S. W. 104, no right of trial by jury in habeas corpus proceeding.

Number and Agreement of Jurors necessary to valid verdict. See note, 43 L. R. A. 40.

16 Cal. 255–284, **ARGENTI v. SAN FRANCISCO**; S. C., 30 Cal. 461.

Contracts of Corporations Stand on same footing with contracts of natural persons.

Approved in Bell v. Kirkland, 102 Minn. 217, 221, 120 Am. St. Rep. 621, 113 N. W. 273, 274, 13 L. R. A. (n. s.) 793, but holding contract within power of city, but defectively exercised, not void when substantially executed; Jersey City v. Town of Harrison, 71 N. J. L. 70, 58 Atl. 101, contract of town for water supply is within statute of frauds.

Liability of Municipality or Other Public corporation on implied contract. See note, 27 L. R. A. (n. s.) 1117.

Right of Lowest Bidder on public contract. See note, 26 L. R. A. 711.

A City Having Acquiesced in Contracts until she has received all the benefits is estopped from denying their validity.

Approved in City of Valparaiso v. Valparaiso etc. Water Co., 30 Ind. App. 325, 65 N. E. 1067, it is no defense to action for rental of fire hydrants that city made other stipulations beyond its authority; Union Nat. Bank v. Lyons, 220 Mo. 558, 564, 119 S. W. 545, 547, holding bank liable for money borrowed by cashier without authority; Aspinwall-Delafield Co. v. Aspinwall Boro., 229 Pa. 6, 77 Atl. 1100, city estopped by annexation of territory and acceptance of sewer from denying validity of agreement to exempt lots from sewer connecting charges; Bart v. Pierce County, 60 Wash. 510, 111 Pac. 583, 31 L. R. A. (n. s.) 1151, unearned portion of county liquor license is recoverable by licensee when license becomes inoperative by reason of territory becoming incorporated as town; dissenting opinion in Chicago Ind. etc. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 267, 70 N. E. 855, majority holding contract to construct and maintain railroad crossing entirely invalidated by provision in restraint of competition.

Disapproved in Shaw v. San Francisco, 13 Cal. App. 550, 110 Pac. 150, denying recovery for service of deputy registrars appointed in contravention of civil service provisions of charter.

Estoppel of County or Municipal Corporation to contest illegal claims or expenditures. See note, 137 Am. St. Rep. 355.

Limitation of Doctrine of Ultra Vires in respect to municipal corporations. See note, 19 L. R. A. 620.

Estoppel of Corporation to set up plea of ultra vires. See note, 20 L. R. A. 766.

A Municipal Corporation can Act only in the cases and in the mode prescribed by its charter.

Approved in Davoust v. Alameda, 149 Cal. 71, 84 Pac. 761, 5 L. R. A. (n. s.) 536, city liable for death due to negligence in operating its electric light system; McGee v. San Jose (Cal.), 7 Pac. 190, statutory amendment providing for payment of laborers and materialmen out of moneys due contractor becomes part of contract; Broad v. City of Moscow, 15 Idaho, 622, 99 Pac. 107, contractor for sewerage works to be paid for by special assessment must look to property in district

for payment; Farrell v. Chicago, 198 Ill. 561, 65 N. E. 104, where contractor agrees to take pay only out of special assessments, he cannot sue city except to compel supplemental assessment; In re Farrell, 36 Mont. 266, 92 Pac. 788, juror's certificate without seal of court void and not subject of forgery; Snyder v. Albuquerque, 10 N. M. 473, 62 Pac. 1093, denying recovery on quantum meruit where statute specifically limits power of municipal corporation to contract.

A City Which has Obtained Money or property under mistake or without authority of law is bound to return it.

Approved in Bluthenthal v. Town of Headland, 132 Ala. 251, 90 Am. St. Rep. 904, 31 So. 88, denying recovery for liquors bought by city on credit in violation of statutes; Chudnobiski v. Eckels, 232 Ill. 319, 83 N. E. 848, action against carrier for personal injuries to passenger is based on implied contract; Johnson v. School Corp. of Cedar, 117 Iowa, 326, 90 N. W. 715, school township liable for school supplies received and kept, though contract illegal; Kagy v. Indep. Dist. of West Des Moines, 117 Iowa, 699, 89 N. W. 973, denying recovery for moneys paid out on illegal contracts for school buildings; Central etc. Paving Co. v. City of Mt. Clemens, 143 Mich. 266, 106 N. W. 890, city liable for value of stone purchased by street commissioner without authority; McCurdy v. County of Shiawasse, 154 Mich. 565, 566, 118 N. W. 631, lender cannot recover from county money borrowed without authority; Sparks v. Jaspar County, 213 Mo. 240, 241, 112 S. W. 270, 271, county could not recover amount paid for bridges on ground that contract was illegally let, without returning bridges; Rogers v. Omaha, 82 Neb. 123, 117 N. W. 121, city warrant for demand payable out of general fund is not invalidated by recital that it shall be payable out of special fund; Miles v. Holt County, 86 Neb. 248, 125 N. W. 530, 27 L. R. A. (n. s.) 1130, allowing recovery for publication of notice, though not regularly authorized, in proceeding to collect delinquent taxes; Ward v. City of Lincoln, 87 Neb. 667, 128 N. W. 26, city liable for sidewalk where it failed to collect special assessment levied to pay for same; State v. Knoxville, 115 Tenn. 184, 90 S. W. 292, city liable to state for school moneys received through false reports of census enumerators.

Distinguished in Seaman v. Cap-Au-Gris Levee Dist., 219 Mo. 26, 27, 31, 32, 117 S. W. 1091, 1093, commissioner of drainage district employed as engineer thereof, in violation of statute, cannot recover compensation; First Nat. Bank v. New Castle, 224 Pa. 290, 132 Am. St. Rep. 779, 73 Atl. 332, city not bound to return money borrowed by treasurer without its knowledge.

Disapproved in Paul v. Seattle, 40 Wash. 299, 300, 82 Pac. 603, denying recovery for benefits received by city from irregularly executed contract with broker to sell municipal bonds.

City not Liable for Services Unless Acceptance thereof evidenced by ordinance.

Approved in Clark v. County of Lancaster, 69 Neb. 737, 96 N. W. 601, denying recovery for personal services rendered under void contract.

Contract With City is Made when bid is accepted.

Approved in State v. Board of State Prison Commissioners, 37 Mont. 388, 96 Pac. 740, holding acceptance not binding because qualified though board had no power to make qualifications.

City is Primarily Liable for street work.

Approved in Pine Tree Lumber Co. v. City of Fargo, 12 N. D. 368, 96 N. W. 359, cities not restricted to contract for street work payable only by special assessment.

Law Governing Liability of telegraph company. See note, 5 L. R. A. (n. s.) 753.

16 Cal. 291, WHEELER v. HAMPSON.

Miscellaneous.—Cited in Hart v. Burnett, 15 Cal. 623, referring historically to cited case.

16 Cal. 295–332, DOLL v. MEADOR.

A Patent, not Void upon Its Face, cannot be questioned, either collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title.

Approved in Payne v. Providence Gas Co., 31 R. I. 333, 77 Atl. 160, lease of fishing grounds, valid on its face, is not subject to collateral attack.

Distinguished in Williams v. San Pedro, 153 Cal. 47, 49, 51, 94 Pac. 235, 236, 237, where state tide lands within city of San Pedro had been reserved from sale, certificate of purchase thereof could be collaterally attacked.

16 Cal. 332–345, 76 Am. Dec. 521, PEOPLE v. SEYMOUR.

A Tax is a Personal Debt Due from the property holder.

Approved in dissenting opinion in William Ede Co. v. Heywood, 153 Cal. 620, 96 Pac. 83, 22 L. R. A. (n. s.) 562, majority holding that purchaser of land who pays tax on mortgage cannot recover same from mortgagee.

State may Impose Taxes for Previous Years to cure irregularities or omissions.

Approved in Galusha v. Wendt, 114 Iowa, 604, 606, 87 N. W. 514, 515, upholding act providing for collection of taxes on property which had escaped assessment.

Act Imposing Costs and Attorney's Fees upon delinquent taxpayer is valid.

Approved in Engebretson v. Gay, 158 Cal. 35, 109 Pac. 882, upholding allowance of attorney's fees in action to foreclose street assessment lien under act of 1885; Pittsburgh etc. Ry. Co. v. Taber, 168 Ind. 422, 77 N. E. 742, upholding law allowing attorney's fee to contractor in suit upon street assessment.

Constitutionality of Statutes allowing attorney's fees. See note, 79 Am. St. Rep. 179.

Validity of Statutory Provision for attorney's fees in proceedings involving collection of taxes or assessments. See note, 28 L. R. A. (n. s.) 1062.

Municipal Ownership of Tide Lands. See note, 64 L. R. A. 334.

No Resulting Trust can be Raised in opposition to the express terms of a conveyance.

Approved in Chamberlain v. Chamberlain, 7 Cal. App. 636, 95 Pac. 660, but holding fraud established by evidence in case.

Parol Evidence as to Consideration of deed. See note, 20 L. R. A. 108.

16 Cal. 358-366, PEOPLE v. ABBOTT.

In Quo Warranto Allegations as to relator's right cannot be reached by general demurrer.

Approved in People v. Rea, 2 Cal. App. 111, 83 Pac. 165, it is immaterial to defendants held to have no right to offices that judgment declared another defendant entitled thereto.

The Title of an Act cannot Control any positive provision thereof.

Approved in Forman v. Sewerage & Water Board, 119 La. 52, 43 So. 909, applying rule though act thereby rendered nugatory; dissenting opinion in Estate of Clark, 148 Cal. 123, 113 Am. St. Rep. 197, 82 Pac. 766, 1 L. R. A. (n. s.) 996, 7 Ann. Cas. 306, majority holding title of section 1322, Code of Civil Procedure, relating exclusively to "foreign wills," must be read into its language.

The Position of Pilot is an office.

Approved in Peterson v. Pilot Commissioners, 24 Tex. Civ. 42, 57 S. W. 1007, branch pilots are state officers, though required to obtain license from federal government.

16 Cal. 369-372, PEOPLE v. STONE.

Ownership of Stolen Property. See note, 88 Am. St. Rep. 595, 596.

16 Cal. 372-375, 76 Am. Dec. 538, STUART v. LANDER.

Court may Refuse Permission to set up statute of limitations after answer to the merits.

Approved in Hewel v. Hogin, 3 Cal. App. 252, 84 Pac. 1004, 1005, reaffirming rule; Rudd v. Byrnes, 156 Cal. 638, 105 Pac. 958, 26 L. R. A. (n. s.) 134, court may refuse such permission where only reason given is inadvertence; Trower v. San Francisco, 157 Cal. 769, 109 Pac. 620, discretion in granting such permission presumed to have been properly exercised.

Amendment to Pleading. See note, 199 Am. St. Rep. 964.

A Judgment is a Contract.

Approved in Harrison v. Magoon, 13 Haw. 358, action on judgment is action arising out of implied contract so that count thereon may be joined with count on different express contract.

As to Whether a Judgment is a contract. See note, 17 L. R. A. 614.

16 Cal. 375-377, KLOCKENBAUM v. PIERSON.

Notice to Indorser, not Signed by anyone indicating in any way from whom it proceeded, is insufficient.

Distinguished in Wiesner v. H. Graff & Co., 7 Cal. App. 583, 95 Pac. 169, holding written notice of exercise of option, though not signed, clearly indicated from whom it proceeded.

16 Cal. 378, BARBER v. BARBER.

Court Granting Divorce has No Power to impose restraint upon second marriage.

Approved in Durland v. Durland, 67 Kan. 741, 74 Pac. 277, 63 L. R. A. 959, though remarriage within six months after decree prohibited, one spouse could not, during that period, inherit from estate of the other.

16 Cal. 392-398, McCLOUD v. O'NEALL.

Verdict Obtained upon Incompetent Evidence cannot be set aside if evidence was admitted without objection.

Approved in Durkee v. Chino Land and Water Co., 151 Cal. 571, 91 Pac. 393, where both parties acquiesced in rule of damages, neither can be heard to question its correctness.

16 Cal. 403–423, CHAPIN v. BRODER.

Limitation Does not Run upon Deficiency Judgment in foreclosure suit until amount of deficiency has been ascertained.

Approved in Howe v. Sears, 30 Utah, 349, 84 Pac. 1108, reaffirming rule.

Collateral Attack upon Forged or altered judgment entries. See note, 80 Am. St. Rep. 482.

Docketing Judgments. See note, 87 Am. St. Rep. 668.

16 Cal. 423–431, CORNWALL v. CULVER.

Declarations of Deceased Person as to boundary are admissible.

Distinguished in Spencer v. Clarke, 15 Cal. App. 514, 115 Pac. 249, rejecting such testimony where monuments still existed and field-notes of government survey were in evidence.

Admissibility Against Third Persons of declarations of deceased persons. See note, 94 Am. St. Rep. 677, 681.

16 Cal. 434, ESTATE OF TAYLOR.

Claim Held by Executor or Administrator must be presented as any other claim.

Approved in Estate of Long, 9 Cal. App. 755, 100 Pac. 892, reaffirming rule.

16 Cal. 436–440, PEOPLE v. NORTON.

Mandamus will Lie to Compel Court to grant application for substitution of attorneys.

Approved in State v. District Court, 30 Mont. 12, 75 Pac. 518, applying rule though attorneys to be superseded have not been paid their fees.

16 Cal. 461–473, 76 Am. Dec. 540, GOODENOW v. EWER.

Purchaser of Mortgaged Realty is necessary party to foreclosure proceedings.

Approved in Holt Mfg. Co. v. Collins, 154 Cal. 272, 97 Pac. 518, owner of threshing machine is necessary party to suit to enforce laborers' liens thereon.

Where Plaintiffs Purchased at Foreclosure Sale, court will open decree and permit filing of supplemental complaint to cure mistake as to parties.

Approved in Investment Securities Co. v. Adams, 37 Wash. 217, 79 Pac. 627, reaffirming rule; Gillian v. McDowall, 66 Neb. 820, 92 N. W. 993, arguendo.

Right to Strict Foreclosure. See note, 20 L. R. A. 371.

Liability of Cotenants to Account for use and occupation and rents and profits. See note, 28 L. R. A. 843, 857.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 805, 809.

16 Cal. 473–504, 76 Am. Dec. 551, STUART v. ALLEN.

Reference to Inventory Makes It, for all purposes of the reference, a part of the petition for sale of property.

Approved in Burris v. Kennedy (Cal.), 38 Pac. 972, omission to state value in petition for sale of realty supplied by reference to inventory.

Administrator's Sale. See note, 92 Am. St. Rep. 51.

Administratrix may Agree to Ask for order of sale upon consideration that purchaser will give agreed sum.

Approved in Hyatt v. Anderson, 69 Neb. 704, 96 N. W. 621, guardian may, before applying for license to sell real estate, procure obligation of intending purchaser to bid adequate price.

Ejectment by Executor or administrator. See note, 136 Am. St. Rep. 82.

Miscellaneous.—Cited in Estate of Blythe (No. 2), 1 Cof. Prob. 116, discussing power of court to appoint attorney for absent heirs.

16 Cal. 505–514, DE RUTTE v. MULDROW.

Lessee Under Lease Containing Privilege of purchase has an equity against his lessor.

Approved in Smith v. Phenix Ins. Co. (Cal.), 23 Pac. 384, granting of privilege of purchase constitutes such change of title as will invalidate insurance policy.

Rights Conferred by a "Refusal" or "option." See note, 21 L. R. A. 128.

Right of Specific Performance of Option as affected by lack of mutuality. See note, 6 L. R. A. (n. s.) 408.

Privilege of Purchase Contained in Lease becomes valid agreement when accepted by lessee.

Approved in Elliott v. Delaney, 217 Mo. 33, 116 S. W. 499, reaffirming rule; Pollock v. Brookover, 60 W. Va. 79, 53 S. E. 796, 6 L. R. A. (n. s.) 403, specific performance will be denied unless option is accepted within time limited.

A Man may as Well Bind Himself to make a contract as to bind himself by contract.

Approved in Simpson v. Sanders, 130 Ga. 269, 60 S. E. 543, reaffirming rule.

Implied Powers Under Power of Attorney to transact business. See note, 4 L. R. A. (n. s.) 845.

16 Cal. 533–559, MOTT v. SMITH.

To Entitle Objections to Consideration, they must be presented to court below.

Approved in Luce v. Chin Wa, 5 Haw. 630, holding that there is no appeal from default judgment.

Acknowledgments may be Taken by consular officers of any grade.

Approved in Powers v. Baker, 152 N. C. 719, 68 S. E. 204, acknowledgment before United States "vice and deputy consul-general," sufficient.

Jurisdiction and Powers of consuls. See note, 45 L. R. A. 499.

Identity of Name is Prima Facie Evidence of identity of person.

Approved in Sturgis v. State, 2 Okl. Cr. 373, 102 Pac. 61, identity of names of houses and their proprietors is prima facie evidence of identity of houses.

Married Woman cannot Give Power of attorney to convey real estate.

Approved in Ricks v. Wilson, 154 N. C. 287, 70 S. E. 478, married woman cannot create parol trust in land.

Release of Inchoate Right of Dower by attorney under power given by married woman. See note, 16 L. R. A. 209.

Power of Attorney to Sell does not authorize conveyance in consideration of love and affection.

Approved in Hunter v. Eastham, 95 Tex. 653, 69 S. W. 67, power to sell does not authorize conveyance for consideration running to agent.

Action of Ejectment for Common Property should be brought in name of husband alone.

Approved in Reade v. de Lea, 14 N. M. 451, 95 Pac. 133, wife's interest in community property during marriage is mere expectancy.

Presumption That Property Acquired by Either Spouse after marriage, except such as is acquired by gift, devise or bequest, is community property can be overcome only by clear and convincing evidence.

Limited in Estate of Pepper, 158 Cal. 622, 112 Pac. 64, only that degree of proof producing conviction in unprejudiced mind is required.

What is Community Property. See notes, 126 Am. St. Rep. 121; 4 Cof. Prob. 63.

16 Cal. 559–566, 76 Am. Dec. 561, BOGGS v. FOWLER.

The Doctrine of Caveat Emptor applies to sales made upon valid judgments.

Approved in Judson v. Lyford (Cal.), 23 Pac. 59, reaffirming rule.

Relief of Purchaser upon Annulling Judicial or execution sale. See note, 69 L. R. A. 53.

Purchaser Under Invalid Decree of foreclosure may have decree set aside in order to bring in proper parties.

Approved in Investment Securities Co. v. Adams, 37 Wash. 217, 79 Pac. 627, reaffirming rule.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 791, 866.

16 Cal. 567–574, CORYELL v. CAIN.

Demurrer Overruled by Consent cannot be considered in supreme court.

Approved in Hibernia Savings etc. Soc. v. Waymire, 152 Cal. 287, 92 Pac. 646, appeal from consent judgment will be dismissed.

Actual Possession Means Subjection to the will and dominion of the claimant.

Approved in Lofstad v. Murasky, 152 Cal. 68, 91 Pac. 1010, actual possession under McEnerney Act must be such appropriation as will give community visible notice; Gordon v. Ross-Higgins Co., 162 Fed. 641, 89 C. C. A. 429, holding that evidence showed lot in mining camp to have been abandoned; Tidwell v. Chiricahua Cattle Co., 5 Ariz. 364, 365, 53 Pac. 195, 196, possession evidenced by house, fencing, irrigating ditch and crops both growing and stacked; Olson v. Howard, 38 Wash. 19, 80 Pac. 171, purchaser at mortgage sale acquired title by adverse possession, though he did not actually reside on land.

Defendant in Ejectment may show title in third person.

Approved in Rogers v. Clark Iron Co., 104 Minn. 209, 116 N. W. 743, reaffirming rule.

What Title or Interest will Support ejectment. See note, 18 L. R. A. 781, 785.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 67.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 768.

Miscellaneous.—Cited in People v. Scott, 32 Cal. 201, cited case incidentally referred to.

16 Cal. 574–580, HALLECK v. MIXER.

Executors may Sue in Replevin for wood taken from land of testator.

Approved in Whitaker v. Poston, 120 Tenn. 216, 110 S. W. 1022, owner may sue in assumpsit for value of timber wrongfully cut and removed; London etc. Bank v. Aronstein, 117 Fed. 605, 54 C. C. A. 663, executor is entitled to have shares of stock belonging to testator transferred to his name as executor.

Replevin by or Against One in adverse possession of land for things severed. See note, 69 L. R. A. 733.

Growing Timber is Part of the land.

Approved in Polk v. Carney, 17 S. D. 338, 97 N. W. 360, license to cut timber is revoked by conveyance of land to stranger.

Plaintiff cannot Sue Defendant in possession of premises for property severed from freehold.

Approved in Lieberman v. Clark, 114 Tenn. 131, 85 S. W. 262, 69 L. R. A. 732, plaintiffs in adverse possession of land can recover timber taken therefrom under deed from person out of possession; Parks v. Morris etc. Co., 63 W. Va. 57, 59 S. E. 755, plaintiff cannot sue for value of timber severed from land when title to land is in dispute between the parties.

Injunction Against Trespass on realty. See note, 99 Am. St. Rep. 749.

16 Cal. 580–590, McDERMOTT v. BURKE.

The Relation Between Purchaser and Tenant is that of owner and trespasser, until some agreement is made.

Approved in Knight v. Cohen, 7 Cal. App. 48, 93 Pac. 399, reaffirming rule.

16 Cal. 591–641, McCRACKEN v. SAN FRANCISCO.

Ordinance not Passed by Majority of assistant aldermen elected, held invalid.

Approved in McLean v. City of East St. Louis, 222 Ill. 516, 78 N. E. 817, ordinance must be passed by majority of aldermen provided for by law, regardless of vacancies; In re Majority of Legislature, 8 Haw. 597, "majority of all the elective members of the legislature" means majority of the full quota of elective members; Pollasky v. Schmid, 128 Mich. 700, 92 Am. St. Rep. 560, 87 N. W. 1031, 55 L. R. A. 614, where charter provided for two-thirds vote of members elected, where one died and one resigned, two-thirds of remainder insufficient; Wood v. Gordon 58 W. Va. 324, 52 S. E. 262, ma-

jority of common council is majority of members to which it is entitled under charter.

Seal is Prima Facie Evidence that it was affixed by proper authority.

Approved in Stone v. Gray, 10 Cal. App. 610, 103 Pac. 156, reaffirming rule.

The Mode of Selling City Property pointed out in the charter is the only mode that can be followed.

Approved in dissenting opinion in Marshall etc. Co. v. City of Nashville, 109 Tenn. 55, 7 S. W. 820, majority upholding contract for city printing, though invalid provision in advertisement forbids required printing to bear union label.

Illegal Sale of City Property cannot be ratified.

Approved in Britt v. Gordon, 132 Iowa, 435, 108 N. W. 321, owner by executing power of attorney does not ratify title bond previously executed by attorney, of which he did not know; Chenowith v. State, 50 Tex. Cr. 244, 96 S. W. 22, judge's act in certifying adoption of local option, based upon voluntary publication of order, was not ratification; dissenting opinion in Brandon v. Pritchett, 126 Ga. 296, 55 S. E. 246, majority upholding parol ratification of contract for sale of land made by one assuming to act for owner.

City is Bound to Return Money paid her by mistake.

Approved in Conner v. City of Nevada, 188 Mo. 155, 107 Am. St. Rep. 34, 86 S. W. 258, limitations upon city's tax rate and indebtedness have no application to liabilities arising ex delicto.

Ratification is Equivalent to previous authority.

Approved in Alexander v. Wade, 106 Mo. App. 151, 80 S. W. 21, arrangement by which deposit was made for benefit of creditors ratified by their interplea.

Where Authority can be Originally Conferred only in particular mode, ratification must follow the same mode.

Approved in dissenting opinion in Moore v. Hupp, 17 Idaho, 242, 243, 105 Pac. 212, majority holding act of mayor in authorizing another to select policemen ratified by act of council in allowing compensation therefor.

Validity of Contract Between Director and his corporation. See note, 139 Am. St. Rep. 625.

What Constitutes "Indebtedness" of municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 404.

Miscellaneous.—Cited in Spotswood v. Spotswood, 4 Cal. App. 715, 89 Pac. 363, assessment of property and petition and schedules in insolvency admissible to show that party did not claim property in question.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 17 CALIFORNIA.

17 Cal. 11–23, **BRODIE v. CAMPBELL.**

Terms of Statute Creating Office of district judge considered and held that term of elected judge began when he qualified as such, a preliminary term of uncertain length having been filled by appointment.

Distinguished in Harrison v. Colgan, 148 Cal. 75, 82 Pac. 677, holding law providing for increase of salaries of justices of supreme court did not go into effect until beginning of next regular term of office.

17 Cal. 23–37, **HOBART v. SUPERVISORS OF BUTTE CO.**

Legislature may Pass Local Law With Requirement that it shall be effective only upon approval of majority of voters of locality.

Approved in Wheeler v. Herbert, 152 Cal. 234, 92 Pac. 357, holding legislature could enact law changing county boundaries and make it take effect only upon vote of electors of counties affected.

Constitutionality of Local Option Laws. See note, 114 Am. St. Rep. 317, 323.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 77.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 34.

17 Cal. 37–44, 76 Am. Dec. 567, **ATWOOD v. FRICOT.**

Actual Prior Possession of Mineral Land, though not in pursuance of mining regulations of vicinage, is good as against anyone subsequently coming upon premises in same manner as possessor.

Approved in Walsh v. Ford, 1 Alaska, 152, holding possession of town lot on public land cannot be questioned without showing better title in claimant.

Discovery of Mineral in Mining Claim and rights of locators prior thereto. See note, 139 Am. St. Rep. 158.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 768, 772.

17 Cal. 44–57, **ELDRIDGE v. SEE YUP CO.**

Limitation upon Use of Land Conveyed by deed is void as against fee conveyed in previous granting clause.

Distinguished in Burnett v. Piercy, 149 Cal. 188, 86 Pac. 607, holding all parts of trust deed must be considered to arrive at meaning of limitations therein contained.

Effect of Provision Directing Particular Purposes to which gift to or for religious or charitable organization shall be devoted. See notes, 7 L. R. A. (n. s.) 1121.

Effect of Other Language in Deed to cut down estate conveyed by granting clause. See note, 12 L. R. A. (n. s.) 958.

Repugnant Clauses in Deeds. See note, 111 Am. St. Rep. 774.

Miscellaneous.—Cited in Jacobs v. All Persons, 12 Cal. App. 167, 106 Pac. 896, to point that it is tendency of courts in later decisions to adopt such construction of deeds as will effectuate manifest intention of parties.

17 Cal. 57–58, SEVERANCE v. LOMBARDO.

What Provable by Books of Account. See note, 52 L. R. A. 722.

17 Cal. 61–63, ROWE v. YUBA COUNTY.

Attorney Appointed by Court to Defend pauper prisoner cannot charge county for his services.

Distinguished in Hyatt v. Hamilton County, 121 Iowa, 294, 100 Am. St. Rep. 354, 96 N. W. 856, 63 L. R. A. 614, holding attorney appointed by court to draw up papers in disbarment proceedings entitled to compensation.

17 Cal. 70–75, GRIFFIN v. BLANCHAR.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 194.

17 Cal. 76–80, PEOPLE v. LEE.

Fact That Dying Person Sends for Priest is ground for admission of dying declarations.

Approved in People v. Buettner, 233 Ill. 277, 84 N. E. 219, following rule.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 656, 657; 56 L. R. A. 415.

Leave to Withdraw Plea of Guilty and interpose plea of not guilty will be granted only on discretion of court.

Approved in Curran v. State, 53 Or. 158, 99 Pac. 421, following rule.

Recommendation to Mercy in Verdict of Guilty is no part of verdict.

Approved in State v. Arata, 56 Wash. 187, 105 Pac. 228, and Niezorawski v. State, 131 Wis. 178, 111 N. W. 254, both following rule.

Correction of Verdict in criminal cases. See note, 23 L. R. A. 724.

17 Cal. 80–85, SULLIVAN v. CARY.

Mode of Demand on nonpayment of rent. See note, 120 Am. St. Rep. 52.

Whether Each Holding Over After Expiration of term for years constitutes new and separate term. See note, 25 L. R. A. (n. s.) 848.

17 Cal. 87–91, 76 Am. Dec. 571, CHAPMAN v. THORNBURGH.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 101.

17 Cal. 92, WALTON v. MAGUIRE.

Supreme Court will not Interfere with discretion of lower court in passing upon evidence.

Approved in Kellenberger v. Market St. etc. Ry. Co. (Cal.), 33 Pac. 90, following rule.

17 Cal. 93–97, BROWN v. LATTIMORE.

Sureties on Official Bond are Liable only for breach of official duties by principal during term of office for which bond was given.

Approved in Priet v. De La Montanya (Cal.), 22 Pac. 172, following rule.

Liability of Sureties on Official Bond after expiration of term of office. See note, 103 Am. St. Rep. 939.

17 Cal. 97–98, TODD v. COCHELL.

Liability for Escape of Dangerous Substance stored on premises. See note, 15 L. R. A. (n. s.) 542.

17 Cal. 107–119, 76 Am. Dec. 574, ENGLISH v. JOHNSON.

Fences are not Necessary to Show Possession of mining claims. The physical marks are sufficient to give notice of possession.

Approved in Ritter v. Lynch, 123 Fed. 934, holding construction of impounding reservoir on public land to preserve mill tailings sufficient to preserve ownership of tailings; Hinchman v. Ripinsky, 3 Alaska, 557, holding evidence did not show such possession and improvement of public land as to entitle claimant to homestead; Big Three Min. and Mill Co. v. Hamilton, 157 Cal. 142, 137 Am. St. Rep. 118, 107 Pac. 307, holding possession of and work done on part of mining claim extended possession to visible boundaries.

Possession of Mineral Land not Taken in Pursuance of law or custom of vicinage is good as against one subsequently taking possession in same manner.

Approved in Walsh v. Ford, 1 Alaska, 152, holding first occupant of town lot on public land has better right than later claimant who shows no better title.

Discovery of Mineral in Mining Claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 186.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 772, 773, 775.

Actual Possession of Part of Mining Claim extends to the whole.

Approved in Bulette v. Dodge, 2 Alaska, 431, following rule.

Distinguished in Harper v. Hill, 159 Cal. 258, 113 Pac. 166, where claim of statutory size was originally located in good faith, but by mistake as to actual location of vein as evidenced by subsequent exploration side lines were not each three hundred feet distant from center thereof, locator is entitled to excess.

Miscellaneous.—Cited in Zimmerman v. Funchion, 161 Fed. 860, 89 C. C. A. 53, to point that mining claim staked out exceeded legal limit of twenty acres rendered claim void only as to excess.

17 Cal. 121–122, **ROUSH v. VAN HAGEN.**

Sureties on Appeal Bond must Justify in five days after being excepted to, or appeal is nullity.

Approved in Crowley Launch Co. v. Superior Court, 10 Cal. App. 345, 101 Pac. 936, following rule; Hoffman v. Lewis, 31 Utah, 191, 87 Pac. 171, dismissing appeal where no undertaking was filed.

17 Cal. 123–128, **KUHLAND v. SEDGWICK.**

Denial in Very Words of Complaint without denying substance is of no effect.

Approved in Knight v. Denman, 64 Neb. 816, 90 N. W. 864, following rule.

Amended Answer, Complete in Itself, supersedes original answer.

Approved in Evinger v. Moran, 14 Cal. App. 329, 112 Pac. 69, following rule.

Absence of Evidence is not Ground for continuance unless reasonable diligence has been used to procure it.

Approved in Rankin v. Caldwell, 15 Idaho, 632, 99 Pac. 110, refusing continuance for absence of witness in absence of showing of use of diligence and legal means to procure his attendance.

17 Cal. 128–132, **SELDEN v. MEEKS.**

Notice of Mechanic's Lien Filed With Recorder need not set out items of account.

Approved in O'Niel v. Taylor, 59 W. Va. 377, 53 S. E. 474, following rule.

17 Cal. 142–148, **PEOPLE v. WILLIAMS.**

All Facts Explaining Conduct of Party charged with crime should, as general rule, be admitted.

Approved in State v. Marren, 17 Idaho, 779, 107 Pac. 997, holding admissible evidence of practicing of shooting as showing preparation for crime.

Court Should not, in Charge, directly or indirectly assume guilt of accused.

Approved in People v. Elster (Cal.), 3 Pac. 888, and People v. Howland, 13 Cal. App. 366, 109 Pac. 895, both following rule; People v. Conboy, 15 Cal. App. 101, 113 Pac. 704, reversing conviction for murder on ground court intimated guilt of prisoner in remarks to jury; Territory of Arizona v. Kay, 3 Ariz. 94, 21 Pac. 153, holding erroneous charge which assumed material fact to have been proved.

Evidence of Antecedent Threats on trial for homicide. See note, 3 L. R. A. (n. s.) 525.

17 Cal. 149–152, **HEAD v. FORDYCE.**

Mere Pendency of Suit Does not Charge purchaser of subject matter as purchaser pendente lite at common law, but notice of lis pendens must appear of record.

Approved in Gilman v. Carpenter, 22 S. D. 129, 115 N. W. 662, holding judgment in quiet title suit in which no lis pendens was recorded was not binding on party who claimed property under unrecorded deed.

Statute Giving Right of Action to Party in Possession to determine adverse claimant embraces every description of claim which

may cloud his title, depreciate value, or deprive him of property, or whereby he may be incommoded by assertion of outstanding title.

Approved in Dorris v. McManus, 3 Cal. App. 581, 86 Pac. 911, holding action lies to quiet title against asserted right based on fraudulent transfer; Devine v. City of Los Angeles, 202 U. S. 333, 26 Sup. Ct. 652, 50 L. Ed. 1046, holding nature of estate claimed by defendant need not be alleged in complaint under section 738, Code of Civil Procedure.

Distinguished in Keelikolani v. Lunalilo Trustees, 4 Haw. 632, holding action does not lie to quiet title as against occasional oral assertion of ownership.

17 Cal. 166-172, PEOPLE v. YBARRO.

Where Error is Shown, Burden of Showing its immateriality rests on party in whose favor it was committed.

Approved in Taggart v. Bosch (Cal.), 48 Pac. 1094, following rule.

Dying Declarations Made Under Sense of impending death are admissible.

Approved in People v. Wong Loung, 159 Cal. 530, 114 Pac. 833, decedent's statement reciting he knew he was going to die sufficiently shows it was made in extremis in absence of specific objection.

Dying Declarations as Evidence. See note, 56 L. R. A. 384, 450.

17 Cal. 172-178, UNDERHILL v. TRUSTEES OF CITY OF SONORA.

Municipal Corporations must Plead statute of limitations to be effective in same manner as other persons.

Approved in Hewel v. Hogin, 3 Cal. App. 253, 84 Pac. 1006, following rule.

Acts of Legislature Providing for Payment of municipal debt considered and held to take bonds out of statute of limitations.

Distinguished in Bates v. Gregory (Cal.), 22 Pac. 686, 687, holding act of 1864 to liquidate city debt of Sacramento did not take bonds from statute; Schoenhoeft v. Kearney County, 76 Kan. 887, 92 Pac. 1098, 16 L. R. A. (n. s.) 803, holding rule of law that limitations do not run in favor of city on outstanding warrants until it has funds to redeem them does not apply to ordinary negotiable bonds.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 157.

As to When Limitation Begins to Run against action upon general municipal bonds. See note, 16 L. R. A. (n. s.) 804, 806.

Beginning of Statute to Run against action upon obligations of municipal, or quasi-municipal, body, payable out of particular fund. See note, 10 L. R. A. (n. s.) 480.

17 Cal. 178-182, SMITH v. FAGAN.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 407.

17 Cal. 182-194, DE LA GUERRA v. PACKARD.

Where Rights and Liabilities of Heirs under Mexican law were such that estate was not subject to administration under California statutes, whatever was done in this respect was illegal.

Approved in Estate of Blythe, 2 Cof. Prob. 158, 163, an administrator cannot deal with lands situated in foreign country and cannot expend money to preserve such lands from forfeiture.

17 Cal. 194–195, CROWELL v. GILMORE.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

Miscellaneous.—Cited in Crowell v. Gilmore, 18 Cal. 371, on another appeal.

17 Cal. 199–226, 79 Am. Dec. 123, MOORE v. SMAW (FREEMONT v. FLOWER).

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 7.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 778, 786.

Miscellaneous.—Cited in Boggs v. Merced Mining Co., 14 Cal. 374, as to ownership of minerals in public lands.

17 Cal. 233–239, ABEL v. LOVE.

Petition for Letters of Administration stating deceased was "late a resident" of county, is sufficient to give jurisdiction.

Approved in Palmer v. Bradley, 142 Fed. 197, holding petition for letters contains sufficient averment of residence of deceased.

Tenants in Common of Water Ditch are regarded as partners entitled to participate in profits thereof.

Approved in dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, majority holding majority of owners of community ditch could not change course of it over protest of minority.

Liability of Cotenants to Account for use and occupation and rents and profits. See note, 28 L. R. A. 839.

17 Cal. 239–246, COFFEE v. TEVIS.

Effect of Payment by one joint judgment debtor. See note, 100 Am. St. Rep. 401.

Extinction of Judgments Against Principals by sureties' payment. See note, 68 L. R. A. 517.

17 Cal. 260–262, PEOPLE v. SKIDMORE.

Instance Where Bond to Indemnify Bail was given.

Cited in Essig v. Turner, 60 Wash. 178, 110 Pac. 1000, bond to indemnify sureties on bail bond is not against public policy.

Validity of Agreement to Indemnify Bail in criminal case. See note, 20 L. R. A. (n. s.) 59.

17 Cal. 262–270, DUPUY v. LEAVENWORTH.

Rights of Tenants in Dower and by the curtesy, and of heirs, etc., of deceased partner, in partnership realty. See note, 27 L. R. A. 348.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 451, 461, 468.

Rights of Partners Inter Se in partnership realty. See note, 28 L. R. A. 87, 102, 133.

Rights and Position of Creditors, purchasers, and other third parties in partnership realty. See note, 28 L. R. A. 167.

17 Cal. 270–271, BRYAN v. STIDGER.

Order for Issue of Execution on Judgment more than five years old may be made ex parte.

Approved in In re Rebman, 150 Fed. 761, 762, 80 C. C. A. 594, following rule; Bredfield v. Hannon, 151 Cal. 498, 91 Pac. 34, and

Doehla v. Phillips, 151 Cal. 495, 91 Pac. 333, both holding under section 685, Code of Civil Procedure, judgment more than five years old may be enforced by leave of court without notice to other party.

Distinguished in National Bank of California v. Los Angeles Iron etc. Co., 2 Cal. App. 662, 84 Pac. 468, holding under code notice necessary for issuance of execution on judgment more than five years old.

17 Cal. 271-274, LENTZ v. VICTOR.

Justification for Entry upon Lands of another must be pleaded affirmatively.

Approved in McRae v. Blakeley, 3 Cal. App. 172, 84 Pac. 680, holding leave and license to maintain ditch across plaintiff's land must be pleaded to prevent injunction against use of ditch.

In Order to Sustain Location of Mining Claim on agricultural land, locator must show that land is public land and that it contains minerals.

Approved in McLemore v. Express Oil Co., 158 Cal. 566, 139 Am. St. Rep. 147, 112 Pac. 62, one claiming land, upon which there is homestead entry, as valuable for oil, without proof of its present value for such mineral purposes, cannot enter thereon and prospect it for oil.

Discovery of Mineral in Mining Claim and rights of locators prior thereto. See note, 139 Am. St. Rep. 157.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 771.

17 Cal. 276-278, PEOPLE v. MILLS.

Indictment for Rape Charging as to Age that girl was "under ten years of age, to wit, of the age of nine years and upwards," is sufficient.

Approved in State v. Jones, 32 Mont. 447, 80 Pac. 1097, upholding indictment for rape containing similar averment.

17 Cal. 279-282, CONNER v. HUTCHINSON.

Objection to Amended Bill of Particulars cannot be made at very moment of trial when bill was served reasonable time before trial.

Approved in Ames v. Bell, 5 Cal. App. 4, 89 Pac. 620, holding objection will not lie to evidence on bill of particulars when defendant made no objection to bill for five months.

17 Cal. 283-285, PEOPLE v. GIBSON.

In Capital Cases Judges Should Confine instructions to jury to a few plain principles of law, when counsel do not ask for charges.

Approved in People v. Lee (Cal.), 8 Pac. 687, criticising excessive charge to jury on court's own motion.

17 Cal. 298-305, WOODSON v. McCUNE.

Possession of Land as notice of title. See note, 13 L. R. A. (n. s.) 74.

17 Cal. 308-310, COMERFORD v. DUPUY.

Liability of Owner for trespass of cattle. See note, 22 L. R. A. 56.

Denials upon Information and Belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 777.

17 Cal. 316–320, PEOPLE v. LOMBARD.

Evidence of Threats in Prosecution for homicide. See notes, 89 Am. St. Rep. 705; 3 L. R. A. (n. s.) 525.

17 Cal. 320–322, PEOPLE v. CHUNG LIT.

Objection That Juror in Criminal Case was an alien cannot be taken after verdict on motion for new trial.

Approved in People v. Duncan, 8 Cal. App. 197, 199, 96 Pac. 419, 420, holding substitution of juror without objection cannot be objected to after verdict.

17 Cal. 323–324, PEOPLE v. LAMB.

Self-defense Set Up by Accused, who began conflict. See note, 45 L. R. A. 688, 691.

17 Cal. 363–371, PEOPLE v. ROBINSON.

Charge of Time and Place in indictment for homicide. See note, 3 L. R. A. (n. s.) 1026.

17 Cal. 377–379, PEOPLE v. AH LUNG.

Where No Motive for Murder Appears, it does not follow that there is none.

Approved in State v. Davis, 226 Mo. 515, 126 S. W. 477, upholding conviction of murder where there was no apparent motive.

17 Cal. 380–385, FRATT v. FISKE.

Waiver of Purchaser's Right to rescind land contract. See note, 30 L. R. A. (n. s.) 873.

17 Cal. 389–401, PEOPLE v. BEALOBA.

Statute Defining Murder construed.

Approved in Ex parte Williams (Cal. App.), 87 Pac. 567, interpreting statute regulating gaming devices, as to inclusion under statute of acts constituting operating of slot machine.

Intent to Kill, to Make Homicide Murder, need not have existed any given length of time before fatal blow.

Approved in People v. Machuca, 158 Cal. 64, 109 Pac. 887, following rule; Morgan v. Territory, 7 Ariz. 227, 64 Pac. 422, holding charge in regard to murder in second degree not objectionable as omitting element of malice aforethought; State v. McPherson, 114 Iowa, 497, 87 N. W. 423, holding indictment sufficient to charge murder in first degree.

In Statute Defining Murder, the words or "any other kind of killing" refer to other modes of killing than those just previously enumerated.

Distinguished in Territory v. Gutierrez, 12 N. M. 275, 78 Pac. 144, holding words "or otherwise" following enumeration in statute of ways of office becoming vacant should not be construed ejusdem generis, but as extending scope of statute.

Unintentional Homicide in Commission of unlawful act. See notes, 90 Am. St. Rep. 575; 63 L. R. A. 355, 358.

17 Cal. 403–406, WILLIAMS v. YOUNG.

Lien for Purchase Money of homesteads. See note, 86 Am. St. Rep. 174, 175.

What Constitutes a "Family" under homestead and exemption laws. See note, 4 L. R. A. (n. s.) 368.

17 Cal. 407–411, **WHITING v. CLARK.**

Claim of Plaintiff on Written Guaranty for goods sold and delivered is barred only by limitations on guaranty, not on original debt guaranteed.

Approved in Kinsel v. Ballou, 151 Cal. 761, 91 Pac. 623, holding indorsee of note may be sued without foreclosing mortgage security.

Distinguished in Towle v. Sweeney, 2 Cal. App. 34, 83 Pac. 76, holding statute of limitations defense against claim on building contractor's bond given as collateral to obligation, when principal obligation is not sued on in statutory time.

17 Cal. 418–420, **HUNTER v. HOOLE.**

Injunctions Against Judgments for errors and irregularities. See notes, 32 L. R. A. 326; 30 L. R. A. 704, 708, 797.

17 Cal. 424–431, **PEOPLE v. HOBSON.**

Change in Personnel of Justice of Court of Sessions pending motion for new trial does not affect right of court to pass on new trial.

Approved in People v. Casselman, 10 Cal. App. 237, 101 Pac. 695, holding change of judges during forgery trial does not affect jurisdiction of court.

Instruction in Murder Case, When Defense was insanity, considered and held not to prejudice defendant in assuming the commission of homicide by defendant, which fact had been admitted as part of defense.

Approved in State v. Gordon, 35 Mont. 469, 90 Pac. 177, upholding instruction which assumed commission of crime, when defense was alibi.

17 Cal. 431–433, **TURNER v. CARUTHERS.**

Suit may be Dismissed on Showing by Affidavit that attorney had no authority from plaintiff to bring it.

Approved in Magnolia etc. Fruit Cannery v. Guerue (Cal.), 31 Pac. 363, following rule.

Presumption of Attorney's Authority to appear for party whom he assumes to represent. See note, 126 Am. St. Rep. 39.

Method of Attacking Attorney's Authority to appear for party whom he assumes to represent. See note, 126 Am. St. Rep. 43, 44.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 851.

17 Cal. 433–436, **HEYNEMANN v. EDER.**

Conditions of Surety Bond must be Interpreted in light of statute under which it is given.

Approved in Bailey v. Aetna Indemnity Co., 5 Cal. App. 744, 91 Pac. 417, bond considered and held to substantially comply with statute for release of attachment.

17 Cal. 436–443, 79 Am. Dec. 139, **BUFFANDEAU v. EDMONDSON.**

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 141, 142.

17 Cal. 443–464, **SAN FRANCISCO v. BIEDEMAN.**

Decisions of Supreme Court Affirming Validity of act of 1858, giving effect to Van Ness ordinance, are reaffirmed.

Approved in Carleton v. Townsend, 28 Cal. 223, following rule.

Jurisdiction Over Action to Quiet Title and obtain possession of land against persons holding under common source, but claiming distinct tracts of the land. See note, 126 Am. St. Rep. 998.

17 Cal. 464–466, CALDWELL v. McDERMITT.

Admissibility in Evidence of books of account. See notes, 138 Am. St. Rep. 463; 52 L. R. A. 574.

17 Cal. 471–476, PEOPLE ex rel. BOWMAN v. HOVIOUS.

Estates and Interests to which judgment liens attach. See note, 117 Am. St. Rep. 789.

Priority of Judgment Over Conveyance made after beginning of term. See note, 38 L. R. A. 248.

17 Cal. 476–486, PEOPLE v. DOANE.

Under Van Ness Ordinance City Lands are held in trust for public use and cannot be sold on execution.

Approved in Tulare Irr. Dist. v. Collins, 154 Cal. 443, 97 Pac. 1125, holding under irrigation acts trustees of irrigation district cannot sell lands unnecessary to and not used in irrigation scheme, nor can they be sold on execution at instance of judgment creditor of district.

17 Cal. 487–499, 79 Am. Dec. 142, JONES v. STEAMSHIP CORTES.

Action in Tort may be United With Action on Contract when growing out of same transaction.

Approved in Kirk v. Kimball Co., 152 Cal. 184, 92 Pac. 86, holding action for injury to passenger resulting from breach of contract of carriage sounds in tort; Delmonte v. Southern Pacific Co., 2 Cal. App. 215, 83 Pac. 271, holding plaintiff could sue in tort for wrongful expulsion from train and was not compelled to rely on breach of contract of carriage; Emerson v. Nash, 124 Wis. 387, 109 Am. St. Rep. 944, 102 N. W. 928, 70 L. R. A. 326, holding several causes of action arose from one transaction and were joinable in one suit.

17 Cal. 500–503, PEOPLE v. JENKINS.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 205.

17 Cal. 510–512, GARFIELD v. KNIGHT'S FERRY ETC. WATER CO.

Special Verdict, When Relied on as basis of judgment, must contain enough to show in and of itself a legal conclusion of liability.

Approved in Coburn Cattle Co. v. Small, 35 Mont. 293, 88 Pac. 955, holding special verdict insufficient to sustaining judgment.

What Special Judgment must Contain. See note, 24 L. R. A. (n. s.) 8, 16.

17 Cal. 515–516, COGHLIN v. MAY.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 774.

Effect of Transfer, After Maturity, of accommodation paper diverted from intended use. See note, 11 L. R. A. (n. s.) 1037.

17 Cal. 525–541, PACKARD v. ARELLANES.

Interest of Wife in Community Property while community exists is mere expectancy.

Approved in Estate of Moffitt, 153 Cal. 364, 95 Pac. 1026, 20 L. R. A. (n. s.) 207, holding inheritance tax properly levied on share of community estate taken by wife as heir; Hall v. Johns, 17 Idaho, 228, 105 Pac. 72, holding community property not bound for payment of postnuptial contracts of wife made for benefit of her separate property; Reade v. de Lea, 14 N. M. 462, 474, 95 Pac. 137, 142, upholding deed of husband alone to property acquired during community relation by onerous title, not joined in by wife.

Relation of Husband and Wife under civil law is species of partnership, property of which is primarily liable for its debts.

Approved in In re Chavez, 149 Fed. 76, 80 C. C. A. 451, holding claims of antenuptial creditor must be postponed to those of community creditors on bankruptcy.

Liability of Community Property for debts. See notes, 19 L. R. A. 234.

Liability of Community Property to succession tax. See note, 20 L. R. A. (n. s.) 210.

17 Cal. 541-547, 79 Am. Dec. 147, BERNAL v. HOVIOUS.

Under Cropping Lease Parties are Cotenants in crops raised during contract.

Approved in Garber v. Granella (Cal.), 30 Pac. 842, and Manchester Fire Assur. Co. v. Abrams, 89 Fed. 939, 32 C. C. A. 426, both following rule; Adams v. Thornton (Cal. App.), 82 Pac. 216, and Adams v. Thornton, 5 Cal. App. 457, 90 Pac. 714, both holding lease a cropping contract.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 125.

Crops as Personalty for purpose of levy and sale. See note, 23 L. R. A. 260.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 450.

17 Cal. 547-564, PEOPLE ex rel. SMITH v. JUDGE OF TWELFTH DISTRICT.

Legislature may Pass Special Law though in derogation of or exception to operation of general statute.

Approved in Rambo v. Larrabee, 67 Kan. 646, 73 Pac. 919, holding void act of 1903 relating to criminal appeals in counties of over 65,000 inhabitants as general law not having uniform operation throughout state; Picton v. Cass County, 13 N. D. 254, 100 N. W. 715, upholding act of 1903 for enforcement of payment of taxes by county commissioners by judicial proceedings as being general law having uniform operation.

Mandamus is not Proper Remedy When District Court refuses to transfer indictment for murder pending therein to another court for trial, such transfer having been directed by special act of legislature.

Approved in State v. Superior Court, 40 Wash. 558, 111 Am. St. Rep. 925, 82 Pac. 878, 2 L. R. A. (n. s.) 395, holding prohibition did not lie to prevent court hearing cause after denial of change of venue.

Unconstitutionality of Statute as Defense against mandamus to compel enforcement. See note, 47 L. R. A. 516.

Discretion of Court Depends upon Law granting it, and it may be taken away by law.

Approved in State v. Clancy, 30 Mont. 540, 77 Pac. 316, upholding act of 1903 providing for disqualification of judge on filing of affidavit of prejudice.

Test of Validity of Municipal Ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 50.

17 Cal. 564–566, **KELLY v. VAN AUSTIN.**

Clerk Entering Judgment on Default acts in ministerial capacity, and must conform strictly to statute or proceedings are without binding force.

Approved in Old Settler's Investment Co. v. White, 158 Cal. 245, 110 Pac. 927, mere filing by clerk and recording in judgment book of stipulation of parties that judgment be entered as prayed for in complaint does not show existence of judgment; San Francisco v. Brown, 153 Cal. 649, 96 Pac. 283, holding change in judgment as entered by clerk from that rendered mere clerical error.

In Action Against Several Defendants on joint liability where part only were served with summons, entry of judgment by default against those served is void.

Approved in Dible v. Hanson, 17 N. D. 23, 114 N. W. 372, holding void judgment by default entered by clerk without an order.

17 Cal. 566–569, **HICKS v. HERRING.**

In Forcible Detainer Suit Proof of Damage may extend up to time of verdict.

Approved in McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 247, following rule.

17 Cal. 569–574, **CAULFIELD v. SANDERS.**

Where Existence of Debt is Omitted Burden of proving payment is on defendant.

Approved in Barrett-Hicks Co. v. Glas, 14 Cal. App. 300, 111 Pac. 765, following rule.

Plea of Statute of Limitations must aver facts which bring demand within operation of statute, as that alleged cause of action has not accrued within certain designated period prior to suit.

Approved in Osborn v. Hopkins, 160 Cal. 504, 117 Pac. 521, defense of statute of limitations is sufficiently pleaded by answer, though section and subdivision of statute are not alleged, where facts showing bar of statute are pleaded.

Party's Books of Account as evidence in own favor. See note, 52 L. R. A. 582.

17 Cal. 574–578, **BARRON v. KENNEDY.**

Payment of Interest on Debt Takes It from statute of limitations.

Approved in Hughes v. Thomas, 131 Wis. 323, 111 N. W. 477, 11 L. R. A. (n. s.) 744, following rule.

17 Cal. 582–585, **CRANE v. HIRCHFELDER.**

Judgment Entered by Clerk When not Authorized by statute is void.

Approved in Old Settlers' Investment Co. v. White, 158 Cal. 245, 110 Pac. 927, mere filing by clerk and recording in judgment book of stipulation of parties that judgment be entered as prayed for does not show existence of judgment.

17 Cal. 589–593, FOGARTY v. SAWYER; S. C., 23 Cal. 570.

Section 260 of Practice Act is intended to control terms of grant, bargain, and sale, generally employed in mortgages, and directed to language of alienation and transfer.

Approved in Adams v. Hopkins (Cal.), 69 Pac. 231, where conveyance of land was accompanied by reconveyance, latter is mortgage although in same terms as former; Stearns-Rogers Co. v. Aztec Co., 14 N. M. 332, 93 Pac. 714, mortgagee has no such interest in realty, on which mechanic's lien is claimed as to compel him to post notice required under Compiled Laws, section 2226, where mortgage was recorded prior to performance of labor or furnishing of materials; dissenting opinion in Jackson v. Lodge, 36 Cal. 59, 60, majority holding instrument in terms a deed to be a mortgage.

Mortgagor may Invest Mortgagee with power to sell premises upon default in payment of debt secured.

Approved in Moncrieff v. Hare, 38 Colo. 226, 232, 87 Pac. 1084, 1085, 7 L. R. A. (n. s.) 1001, upholding contract embodied in mortgage granting rents and profits to mortgagee.

Sales Under Powers in Mortgages and trust deeds. See note, 92 Am. St. Rep. 574.

17 Cal. 594–596, FRAYLOR v. SONORA MINING CO.

Right of Officers of Corporations to compensation for services rendered. See note, 136 Am. St. Rep. 916.

17 Cal. 598–602, CASE v. CASE.

Actual Marriage must be Proven in Suit for divorce on ground of adultery.

Approved in People v. Le Doux, 155 Cal. 548, 102 Pac. 522, applying rule on admitting evidence in bigamy case to show marriage; Estate of Campbell, 12 Cal. App. 723, 108 Pac. 675, holding presumption of marriage does not arise from cohabitation and repute.

Cohabitation, Attended with Other Facts, is merely circumstance from which marriage may be presumed.

Approved in Estate of Klippel v. Klippel, 41 Colo. 47, 124 Am. St. Rep. 96, 92 Pac. 28, holding marriage not proven.

Presumption Flowing from Marriage Ceremony. See note, 14 L. R. A. 544.

17 Cal. 605–613, FULLER v. FULLER.

Religious Belief as Qualification of witness. See note, 42 L. R. A. 554, 555.

17 Cal. 613–618, DE COSTA v. MASSACHUSETTS ETC. MINING CO.

Plaintiff in Action for Damages caused by defendant's digging a ditch on plaintiff's land cannot recover cost of filling up ditch, but only damages for amount of injury.

Approved in Mustang Canal & Land Co. v. Hissman, 49 Colo. 311, 112 Pac. 801, measure of damages for injury to land by its being covered with debris caused by breaking of reservoir is difference between value of land before and after injury and not reasonable cost of clearing land.

Power of Appellate Court Over Verdict for excessive damages. See note, 26 L. R. A. 391.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 18 CALIFORNIA.

18 Cal. 11–30, 79 Am. Dec. 151, TESCHEMACHER v. THOMPSON.

Ordinary High-water Mark as Applied to tidal waters refers to limit reached by neap tides.

Approved in Eichelberger v. Mills Land etc. Co., 9 Cal. App. 639, 99 Pac. 122, holding limit of neap tides is boundary of private land bordering on ocean.

Under Mexican Cession of California to United States, the United States took the public lands subject to prior equities of Mexican grantees, and has power to perfect such equitable claims.

Approved in People v. San Francisco (Cal.), 15 Pac. 749, 750, holding claims of state to tide land subordinate to prior equities, and subject to power of federal government to confirm prior Mexican grants.

Mexican Government Could Make Grants of land extending below high-water mark on seashore.

Approved in De Guyer v. Banning (Cal.), 25 Pac. 255, holding valid Mexican grant to lands in San Pedro bay.

Miscellaneous.—Cited in United States Land Assn. v. Knight (Cal.), 23 Pac. 270.

18 Cal. 42–47, MULFORD v. COHN.

Bill in Equity for New Trial is Proper Method to restrain execution on judgment at law on ground of newly discovered facts.

Approved in Bailey v. Aetna Indemnity Co., 5 Cal. App. 747, 91 Pac. 419, holding pleading insufficient to show fraud on former trial in suppressing evidence, and relied on by defendant.

18 Cal. 47–49, PROSSER v. PARKS.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 773.

18 Cal. 60–66, EX PARTE PERKINS.

Alimony Ordered Paid Wife Pendente Lite in divorce action is not debt within statute that prohibits imprisonment for debt except for fraud, and order is not appealable.

Approved in State v. Cook, 66 Ohio St. 575, 4 N. E. 569, 58 L. R. A. 625, holding alimony not debt such that imprisonment cannot be ordered for refusal to pay; dissenting opinion in Sharon v. Sharon, 67 Cal. 204, 7 Pac. 636, majority holding order directing payment of alimony pendente lite is appealable.

Constitutionality of Imprisonment for debt. See note, 34 L. R. A. 665.

Contempt Proceedings to Compel Payment of alimony. See note, 24 L. R. A. 433, 435.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 453.

18 Cal. 67–76, ORD v. DE LA GUERRA.

Community Property is Held in a sort of matrimonial copartnership.

Approved in Reade v. de Lea, 14 N. M. 450, 95 Pac. 133, holding wife's interest in community property to be mere expectancy during life of husband.

Liability of Community Property for debts. See note, 19 L. R. A. 234.

Possession Friendly in Inception cannot be turned into adverse possession by mere change of mental attitude.

Approved in Coberly v. Coberly, 189 Mo. 17, 87 S. W. 961, following rule.

18 Cal. 77–80, ORD v. CHESTER.

Cotenancy in Mines. See note, 91 Am. St. Rep. 882.

18 Cal. 80–82, McLAREN v. HUTCHINSON.

Where Promise to Pay Debts of Vendor is part of consideration for purchase of land, such debts cannot be sued on by any person not a party or assenting to the contract.

Criticised in Northup v. Altadena etc. Syndicate, 6 Cal. App. 102, 91 Pac. 422, holding when purchaser of business of maker of note assumes all liabilities including note, promise of transferee is for benefit of plaintiff, who may maintain action on note.

18 Cal. 83–89, DREUX v. DOMEE.

Complaint in Malicious Prosecution Considered and held sufficient.

Approved in Dowdell v. Carpy (Cal.), 61 Pac. 949, holding complaint in malicious prosecution bad on demurrer as not showing probable cause; Runk v. San Diego Flume Co. (Cal.), 43 Pac. 519, holding complaint in malicious prosecution states cause of action.

Action Lies for Conspiracy for Unjustly prosecuting party.

Approved in Russell v. Chamberlain, 12 Idaho, 303, 85 Pac. 927, holding action lies for malicious prosecution when parties conspired together after action was begun.

18 Cal. 89–94, PEOPLE v. ROMERO.

To Authorize Mandamus Act Desired must not only be duty resulting from office, but must have been requested and refused.

Approved in Shirley v. Board of Trustees of Cottonwood School Dist. (Cal.), 31 Pac. 366, refusing mandamus to compel trustees who have wrongfully dismissed teacher to pay salary for term of contract

where no demand was made; Meyer v. City and County of San Francisco, 150 Cal. 134, 88 Pac. 703, 10 L. R. A. (n. s.) 110, refusing mandamus when complaint on which based failed to allege existing official duty and failure to perform demand; Cavanaugh v. Mayor of Pawtucket, 23 R. I. 107, 49 Atl. 496, holding demand and refusal of performance of required act not shown in petition for mandamus.

Prisoner is Bound to Know When Jury Meets, and to apply for leave to challenge, otherwise he waives privilege of excepting to panel.

Approved in Territory of Hawaii v. Ferris, 15 Haw. 142, State v. Miller, 191 Mo. 606, 607, 90 S. W. 773, and State v. Taylor, 171 Mo. 474, 71 S. W. 1007, all following rule.

Indictment is Void if Accused Requests and is denied opportunity to challenge panel of grand jury.

Distinguished in State v. Claybaugh, 220 Mo. 22, 119 S. W. 394, holding appeal from judgment of conviction on ground that indictment was void because of disqualification of foreman of grand jury did not raise question of accused being deprived of liberty without due process of law.

18 Cal. 94–96, HARRISON v. GREEN.

Liability of Vessel or Owner for compulsory pilotage fees. See note, 39 L. R. A. 180.

18 Cal. 102–108, RICHARDSON v. WHITE.

Purchaser of Real Property Pending Suit concerning title is not bound by judgment unless notice of lis pendens was recorded.

Approved in Brandt v. Scribner, 13 Ariz. 175, 108 Pac. 493, lis pendens in partition suit dates from complaint though it is thereafter amended so as to include necessary allegation of value of property; Gilman v. Carpenter, 22 S. D. 130, 115 N. W. 662, holding one who claimed title under unrecorded deed not bound by judgment in quiet title suit brought by another during his claim of ownership against his grantor in which no lis pendens was recorded.

18 Cal. 108–111, GRADY v. EARLY.

Where Lower Court Exercises its discretion in excusing juror to attain justice, appellate court will not interfere.

Approved in McKernan v. Los Angeles Gas etc. Co., 16 Cal. App. 283, 116 Pac. 678, following rule.

18 Cal. 111–112, SMITH v. MAINE BOYS TUNNEL CO.

Stockholders of Corporation Whose Stock has been sold by it for nonpayment of assessment cannot sue corporation for a proportionate share of profits.

Approved in Hearst v. Putnam Mining Co., 28 Utah, 196, 107 Am. St. Rep. 698, 77 Pac. 757, 66 L. R. A. 784, where corporation had disposed of property over which it had dominion, stockholders cannot sue in own right to cancel conveyance and declare trust on ground of fraud.

Forfeiture of Corporate Stock. See note, 27 L. R. A. 313.

18 Cal. 117–120, PEOPLE ex rel. FORD v. IRWIN.

Deed and Contract of Reconveyance considered and held to be deed and not mortgage.

Approved in Northern Central Ry. Co. v. Hering, 93 Md. 176, 48 Atl. 463, contract for release of debt to state by payment of annuity secured by mortgage considered and mortgage held to be security for payment of annuity at times and in manner stated.

18 Cal. 121, PEOPLE v. SHIRLEY.

Justification of Sureties is No Part of Sureties' Contract on bond, and they cannot defend in suit thereon that they justified for amounts insufficient under statute.

Distinguished in San Francisco v. Hartnett, 1 Cal. App. 654, 82 Pac. 1065, holding where amount of bail bond in criminal case was fixed by clerk bond is void.

18 Cal. 122–126, PEOPLE v. QUINN.

Assessor's Memorandum-book is not Admissible to show valuation placed on property by person on trial for perjury in making oath to false list of property.

Approved in dissenting opinion in Greene v. United States, 154 Fed. 415, 85 C. C. A. 251, majority upholding judgment founded on evidence of conspiracy to defraud government obtained from bank account-books.

18 Cal. 126–128, WIGGINS v. McDONALD.

Action to Enforce Private Right must be in name of real party in interest.

Approved in Lake Erie & Western Ry. Co. v. Hobbs, 40 Ind. 517, 81 N. E. 92, holding where fire loss was only partly met by insurance, insurer and insured could join in tort action against one who caused loss.

As to Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 596.

18 Cal. 131–137, WOODBECK v. WILDERS.

In Action for Trespass for Driving Cattle upon land, it was competent to ask witness what would be injury from such acts.

Approved in Pac. Livestock Co. v. Murray, 45 Or. 109, 76 Pac. 1080, holding qualified witness could give estimate of value of grass destroyed by trespassing sheep.

18 Cal. 141–144, HORN v. VOLCANO WATER CO.

When Order Refusing to Vacate Writ of Assistance is not appealed from, judgment of court is still in force, and order granting writ is not subject of appeal.

Approved in In re Sullivan's Estate, 40 Wash. 211, 111 Am. St. Rep. 895, 82 Pac. 299, where petition to contest will was dismissed, and subsequently order of dismissal was set aside by order also dismissing petition, appeal must be from second order.

18 Cal. 144–149, EL DORADO COUNTY v. ELSTNER.

Allowance of Claims by Board of Supervisors is action in quasi-judicial capacity and is conclusive.

Distinguished in County of Tehama v. Sisson, 152 Cal. 174, 92 Pac. 67, holding unauthorized action of board of supervisors in attempting to pay expenses of one year from revenues of succeeding year.

18 Cal. 149–152, TERRILL v. GROVES.

Revenue Act of 1857 Intends That Each of several city lots assessed to same owner shall be separately assessed and valued, so as to bear its own portion of public burdens.

Approved in North Real Estate Co. v. Billings Loan & Title Co., 36 Mont. 363, 364, 93 Pac. 43, holding void tax deed which showed several disconnected town lots were assessed together and sold en masse.

Distinguished in Houghton v. Kern Valley Bank, 157 Cal. 294, 107 Pac. 115, holding several contiguous unimproved lots owned by same person may be assessed together, and sold in bulk on tax sale.

18 Cal. 152–155, 79 Am. Dec. 162, FRIDENBERG v. PIERSON.

Junior Attaching Creditor cannot Take Advantage of irregularities in affidavit or bond given by prior attaching creditor of common debt.

Approved in Hillman v. Griffin (Cal.), 59 Pac. 195, holding affidavit of attachment cannot be impeached by stranger to suit seeking to recover property attached.

Right of Creditors to Question validity of attachments. See note, 35 L. R. A. 772, 778.

18 Cal. 160–165, McFADDEN v. O'DONNELL.

Where Building Contract Provides "No Extra Work shall be paid for except by contract in writing," parties may verbally rescind provision and agree to alterations.

Approved in German Am. Ins. Co. v. Yeagley, 163 Ind. 657, 71 N. E. 899, issuance of insurance policy and retention of premium with knowledge of existence of chattel mortgage on property waived condition in policy avoiding it for encumbrance on property; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 262, 100 N. W. 718, where contract provides accounts under it could be settled only in writing with approval at home office, parties may make valid settlement although not made or approved in writing.

Conclusiveness of Testimony of Experts. See note, 42 L. R. A. 770.

18 Cal. 176–180, HIGBY v. CALAVERAS COUNTY.

Claim of District Attorney for Commission on debts recovered is barred by statute in three years.

Approved in Harby v. Board of Education, 2 Cal. App. 420, 83 Pac. 1082, denying mandamus to restore teacher to position on ground of laches and acquiescence for three and one-half years; Burleigh County v. Kidder County, 20 N. D. 35, 125 N. W. 1066, action against county for debt due another county, charged by statute segregating from plaintiff portion of territory and adding it to defendant, is on a specialty created by statute and is not within statute of limitations.

18 Cal. 180–186, PEOPLE v. MAHONEY.

Court is not Compelled to Grant Change of Venue on unsupported affidavit of defendant that he cannot have fair trial because victim of general prejudice.

Distinguished in Day v. Day, 12 Idaho, 563, 565, 86 Pac. 533, 534, granting change of venue on affidavits of prejudice of trial judge.

Judge is not Disqualified for Trial of Party who had before been banished from state by vigilance committee of which judge was active member.

Approved in McDowell v. Levy (Cal.), 8 Pac. 857, holding bias on part of judge not legal disqualification.

Disqualification of Judge by prior connection with case. See note, 25 L. R. A. 118.

Court may Exercise Reasonable Discretion as to granting motion for change of venue on ground that fair trial cannot be had.

Approved in State v. Dwyer, 29 Nev. 427, 91 Pac. 305, holding court abused discretion in refusing change of venue.

18 Cal. 203–205, LOUCKS v. EDMONDSON.

Notice of Motion to Strike Out Statement on motion for new trial must specify grounds upon which motion will be made.

Approved in Jackson v. Barrett, 12 Idaho, 469, 86 Pac. 272, motion to dismiss appeal on ground "that no sufficient undertaking on appeal was ever filed" states no definite ground; Cupit v. Bank of Park City (Utah), 40 Pac. 707, holding motion to discharge attachment must state grounds.

18 Cal. 206–210, HICKS v. COMPTON.

Injunction Against Trespass. See note, 13 L. R. A. (n. s.) 178.

18 Cal. 211–217, HEAD v. HORN.

Assumption by Partnership of Partner's individual debts. See note, 29 L. R. A. 693.

18 Cal. 217–219, NORRIS v. HOYT.

Nonresident Alien can Acquire by Deed and hold title to real property in this state until office found.

Approved in Louisville etc. Co. v. Mayor etc. of Nashville, 114 Tenn. 221, 84 S. W. 812, holding nonresident corporation which had not filed copy of articles with Secretary of State could purchase real estate in state and recover by suit damages thereto caused by change of grade of street.

Alien's Right to Inherit. See note, 31 L. R. A. 86, 177, 178.

Effect of Treaties upon alien's right to inherit. See note, 32 L. R. A. 187.

18 Cal. 219–224, LICK v. STOCKDALE.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 622.

Miscellaneous.—Miscited in State v. Carrasco, 67 Cal. 386, 7 Pac. 766, for 18 Cal. 217.

18 Cal. 229–260, GILMER v. LIME POINT.

Public Use Means a Use Which Concerns whole community, as distinguished from particular individuals or a number of individuals.

Approved in Leavitt v. Lassen Irrigation Co., 157 Cal. 90, 106 Pac. 407, a public service water company which is appropriating water cannot confer on consumer any preferential right to use of any part of its water; Shasta Power Co. v. Walker, 149 Fed. 571, holding private corporation seeking to condemn land for construction of ditch to supply water to municipality entitled to action on ground of public use; Tanner v. Treasury Tunnel Min. Co., 35 Colo. 598, 83 Pac. 466, 4 L. R. A. (n. s.) 106, holding condemnation of land for tunnel to drain mines to be for public use; State v. Barnes, 22 Okl. 196, 97

Pac. 999, holding convention hall to be owned, controlled, and used exclusively by city for public gatherings to be "public utility"; Fallsburg etc. Co. v. Alexander, 101 Va. 106, 99 Am. St. Rep. 855, 43 S. E. 197, 61 L. R. A. 129, holding void provision in charter giving right of eminent domain to corporation organized to generate power from river and to utilize and transmit such for its own use or for sale; State v. White River Power Co., 39 Wash. 668, 82 Pac. 153, 3 L. R. A. (n. s.) 842, holding taking of land for use of corporation, to erect electric light and power and water plants, which has no franchise to enter cities and no contracts with same, to be taking for private use; Burr v. Maclay Rancho Water Co., 160 Cal. 280, 116 Pac. 721, water pumped from wells on land overlying percolating waters, extending under adjacent lands, to fulfill private contracts to deliver water to land sold with water right, is taking for private use.

Act of Legislature Authorizing Condemnation Proceedings by United States for lighthouses and other purposes is constitutional.

Cited in Branch v. Lewerenz, 75 Conn. 323, 53 Atl. 659, holding Connecticut statute unconstitutional.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 6, 7, 9, 10, 39, 42, 49, 59, 66.

Exercise of Eminent Domain by one corporation for public purpose to be subserved by another. See note, 21 L. R. A. (n. s.) 452.

Validity of Ordinance Excluding Persons from saloon during hours of closing. See note, 4 L. R. A. (n. s.) 109.

18 Cal. 265–275, 79 Am. Dec. 176, BRUMAGIN v. TILLINGHAST.

Money Voluntarily Paid on Claim of Right Thereto, with knowledge of facts, cannot be recovered back, though claim is illegal.

Approved in Newhall v. Jordan, 149 Fed. 589, and Thorsen v. Hooper, 50 Or. 500, 93 Pac. 362, both following rule; Warren v. San Francisco, 150 Cal. 170, 88 Pac. 713, holding payment under protest by lot owner of assessment on public street to prevent sale thereof not involuntary and not recoverable; Decker v. Perry (Cal.), 35 Pac. 1018, holding complaint to recover money paid on public assessment must show threat which amounted to compulsion; Knudsen-Ferguson Fruit Co. v. Chicago etc. Ry. Co., 149 Fed. 974, 79 C. C. A. 483, denying recovery for icing charges paid voluntarily in addition to freightage on shipment of fruit; In re Hills' Bottling License, 1 Alaska, 438, refusing recovery of license money a year after payment when mistake in payment is set up; Morris v. City of New Haven, 78 Conn. 675, 63 Atl. 124, holding as voluntary payment of taxes under protest in response to bill submitted; Manning v. Poling, 114 Iowa, 24, 83 N. W. 896, denying right to recover redemption money paid under protest as being voluntary payment; New Orleans & N. E. R. Co. v. Louisiana Const. & Imp. Co., 109 La. 26, 94 Am. St. Rep. 393, 33 So. 56, voluntary payment under claim of right asserted by creditor, where debtor had knowledge of facts, cannot be recovered back; First Nat. Bank of David City v. Sargeant, 65 Neb. 607, 91 N. W. 599, payment of money to bank in excess of amount justly due considered and held to be under such duress that it could be recovered back.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 412.

Controlling Necessity upon Party making payment is essential to render such payment involuntary.

Approved in Wheeler v. County of Plumas, 149 Cal. 788, 87 Pac. 804, allowing recovery of license tax paid under threat of arrest when ordinance requiring tax had been repealed; Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 759, 103 Pac. 943, holding in absence of contract relation after expiration of prior contract there was no duress of plaintiff in requiring of defendant payment of higher market price as condition of sale of boxes; Harlan v. Gladding, McBean & Co., 7 Cal. App. 53, 93 Pac. 402, holding duress shown where order for payment of part of funds in hands of maker was given to secure release from illegal attachment; Lewis v. San Francisco, 2 Cal. App. 118, 82 Pac. 1108, holding money demanded under invalid law and paid under protest to county clerk may be recovered; Pembroke v. Hayes, 114 Iowa, 578, 87 N. W. 492, upholding verdict for plaintiff in action to recover money paid under duress.

18 Cal. 275–291, RAUN v. REYNOLDS.

Reversal of Judgments. See note, 96 Am. St. Rep. 128.

18 Cal. 291–303, PAYNE v. PAYNE.

Statute Providing That if Testator Omits to provide in his will for children, they shall inherit legal heritable share unless such omission was intentional, is satisfied by mention of children in will.

Approved in Allison v. Allison, 101 Va. 573, 44 S. E. 916, 63 L. R. A. 920, following rule.

Where Will Gives Executor Authority to Sell realty, court order is not necessary.

Approved in Wisker v. Rische, 167 Mo. 532, 67 S. W. 220, upholding sale by executor without court order to pay debts under authority of will.

Where Property Left by Husband was Common Property and will devises all to wife and codicil mentions children, wife takes half in own right and other half as devisee under will.

Approved in Painter v. Painter, 4 Cof. Prob. 345, holding widow took half of all community estate as survivor and half of remainder under will.

18 Cal. 303–309, BURR v. HUNT.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 702, 705.

18 Cal. 315–327, NIGHTINGALE v. SCANNELL.

Where Evidence Objected to is Absolutely Incompetent, general objection is sufficient.

Approved in Humphrey v. Pope, 1 Cal. App. 377, 82 Pac. 224, excluding declarations of husband made to wife as to his relations with defendant and desire for divorce to marry her are properly excluded under general objection.

Motives of Plaintiff cannot be Given in evidence in aggravation of damages against sheriff in action for wrongful seizure.

Cited in Davis v. Hearst, 160 Cal. 165, 116 Pac. 540, arguendo.

Abuse of Lawful Process and liability therefor. See note, 86 Am. St. Rep. 410.

Damages for Tort as Affected by loss of profits. See note, 52 L. R. A. 35, 53, 57.

18 Cal. 330–334, HIGGINS v. WORTELL.

Certificate of Notary to Deposition need only substantially comply with requirements of statute.

Approved in Short v. Frink, 151 Cal. 90, 90 Pac. 203, certificate of notary considered and held sufficient.

18 Cal. 337–338, PEOPLE v. JERSEY.

Where Indictment for Stealing Horse was in usual form, and proof was that defendant hired it but did not return it, intention to steal at time of hiring must be proven to sustain conviction.

Approved in Flohr v. Territory, 14 Okl. 489, 78 Pac. 569, holding where property was bailed and bailee charged with larceny thereof, evidence showed intent to steal at time of bailment.

18 Cal. 350–351, PURDY v. IRWIN.

Mortgagee's Right of Action against third persons for invasion of their rights. See note, 109 Am. St. Rep. 436.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 126.

18 Cal. 351–358, RICHMOND v. SACRAMENTO VALLEY R. R. CO.

Railroad is Liable for Negligent Injury to stock run over on track, even though owner lets stock run at large near track.

Approved in Atchison etc. Ry. Co. v. Davis, 26 Okl. 363, 109 Pac. 552, holding railroad liable for negligent injury to mules which escaped to track without owner's fault.

Duty of Train Employees to Keep Lookout for livestock. See note, 24 L. R. A. (n. s.) 859.

Duty to Maintain Lookout on Train. See note, 25 L. R. A. 291.

Doctrine of "Last Clear Chance." See note, 55 L. R. A. 419, 432.

18 Cal. 359–368, HAVENS v. DALE.

Possession of One Acre of Land Raises no presumption of title to unlimited tract in same locality.

Approved in Crawford v. Burr, 2 Alaska, 38, holding plaintiff limited to land actually used on townsite, when he had no fixed boundaries or other claim of right.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 78, 85, 86, 92.

Repugnant Clause in Deeds. See note, 111 Am. St. Rep. 772.

Duty of One Debtor to Exonerate the other, as ground for marshaling assets. See note, 12 L. R. A. (n. s.) 965.

18 Cal. 370–372, CROWELL v. GILMORE.

Holder of Mechanic's Lien Who Began Work before execution of mortgage on premises has priority over mortgage, but holders of later acquired liens have not.

Approved in Pac. States Savings etc. Co. v. Dubois, 11 Idaho, 327, 83 Pac. 515, following rule; Ward v. Yarnelle, 173 Ind. 551, 91 N. E. 14, holding mechanic's lien cannot extend beyond interest of owner at time contract giving rise to lien was made.

Distinguished in dissenting opinion in Pacific States Savings etc. Co. v. Dubois, 11 Idaho, 333, 334, 83 Pac. 517, majority following rule.

18 Cal. 378–382, 79 Am. Dec. 184, DAVIS v. EPPINGER.

In Attachment Suit Judgment Creditors of defendant may intervene to set aside attachment because void as to them.

Approved in Potlatch Lumber Co. v. Runkel, 16 Idaho, 197, 101 Pac. 397, 23 L. R. A. (n. s.) 536, holding claimant of property attached in action for debt can intervene to assert his right; Faricy v. St. Paul Inves. & Sav. Soc., 110 Minn. 317, 125 N. W. 678, holding claimant of bonds whose recovery was demanded of another could intervene and assert his right.

Intervention in Attachment. See notes, 123 Am. St. Rep. 309; 23 L. R. A. (n. s.) 537.

Right of Creditors to Question validity of attachment. See note, 35 L. R. A. 766, 777.

18 Cal. 382–384, PEOPLE v. CHAMBERS.

Possession of Stolen Property is Only a Circumstance to be considered in arriving at guilt or innocence of party in possession.

Approved in People v. Nicolosi (Cal.), 34 Pac. 825, and People v. Elster (Cal.), 3 Pac. 885, both following rule; Taylor v. Territory, 7 Ariz. 239, 64 Pac. 424, approving instruction in regard to possession of stolen goods as evidence of guilt.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 486.

18 Cal. 384–385, CRAMER v. SUPERVISORS OF SACRAMENTO.

Petition for Mandamus to Compel Drawing warrant on county treasurer for audited claims must aver there is sufficient money in funds for that purpose.

Approved in Meyer v. San Francisco, 150 Cal. 135, 88 Pac. 723, 10 L. R. A. (n. s.) 110, refusing mandamus for failure to allege sufficiency of funds to pay claim on which sought.

18 Cal. 385–388, GOSTORFS v. TAAFE.

Sham Answer is One Good in Form but false in fact and pleaded in bad faith, and should be stricken out.

Approved in White v. Calhoun, 83 Ohio St. 404, 94 N. E. 744, following rule.

Sham Pleadings. See note, 113 Am. St. Rep. 640, 641, 652.

18 Cal. 388–390, BECKMAN v. MANLOVE.

Judgment for Value of Exempt Property sold on execution takes place of property and is exempt, and judgment creditor cannot set off another judgment against it.

Approved in Treat v. Wilson, 65 Kan. 733, 70 Pac. 895, following rule.

Distinguished in Caldwell v. Ryan, 210 Mo. 35, 108 S. W. 539, 16 L. R. A. (n. s.) 494, holding judgment for conversion of defendant's exempt property by plaintiff in replevin suit which failed could be set off against prior judgments against the plaintiff.

Setting Off One Judgment against another. See note, 109 Am. St. Rep. 150.

18 Cal. 390–391, HASTINGS v. DOLLARHIDE.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 525.

18 Cal. 391–394, WARD v. PACKARD.

Fact That Vendor of Land Knew of judgment which was encumbrance upon land at time of sale and did not inform vendee is not such fraud as constitutes defense to suit on purchase money note where means of information were equally accessible to both parties.

Approved in Norton v. Stroud State Bank, 17 Okl. 301, 87 Pac. 850, holding invalidity of lease of land of minor by guardian could not be set up as defense to note given in consideration of assignment of lease.

As to Whether Fraud may be Predicated of misstatement as to title to realty. See note, 28 L. R. A. (n. s.) 208, 209.

Right of Grantee in Possession to question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 371.

18 Cal. 399–401, LEWIS v. CLARKIN.

In Action on Joint Contract Judgment may be had against any defendant found liable.

Approved in Morgan v. Righetti (Cal.), 45 Pac. 260, and Duncan v. Capehart, 40 Colo. 448, 90 Pac. 1034, both following rule; Redwood City Salt Co. v. Whitney, 153 Cal. 423, 95 Pac. 886, holding judgment against partnership and individual may be modified, without reversal, when evidence shows only partnership is liable.

18 Cal. 402–404, PEOPLE v. FRISBIE.

In Suit on Joint Assessment for Taxes, judgment may be rendered against one defendant only if other is not found liable.

Approved in Dobbs v. Purington, 136 Cal. 71, 68 Pac. 324, following rule; Morgan v. Righetti (Cal.), 45 Pac. 260, holding judgment may be rendered against one defendant when two are sued on joint obligation.

18 Cal. 404–408, GARRISON v. TILLINGHAST.

Money Voluntarily Paid on Claim of Right, knowing the facts thereof, though claim is illegal, cannot be recovered back.

Approved in Decker v. Perry (Cal.), 35 Pac. 1018, and Garrison v. Tillinghast, 18 Cal. 409, both following rule.

18 Cal. 408–409, GARRISON v. TILLINGHAST.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 437.

Right to Recover License Fee unlawfully exacted under color of authority. See note, 22 L. R. A. (n. s.) 863, 866.

18 Cal. 409–411, GILLESPIE v. BENSON.

Number and Agreement of Jurors necessary to valid verdict. See note, 43 L. R. A. 68.

18 Cal. 415–416, TUOLUMNE REDEMPTION CO. v. PATTERSON.

Necessity of Jury to Compute Damages on default judgment. See note, 20 L. R. A. (n. s.) 7.

18 Cal. 420–421, BOWERS v. DICKERSON.

Answer Filed After Time to Answer has expired but before default can only be stricken out at discretion of court, and must be stricken out before default can be entered.

Approved in Lunnun v. Morris, 7 Cal. App. 712, 715, 716, 95 Pac. 909, 910, following rule.

18 Cal. 422–431, PICO v. DE LA GUERRA.

Statement of Claims against estates of decedents. See notes, 130 Am. St. Rep. 320; 5 Cof. Prob. 306.

Contingency of Claim as Affecting limitation of time for presentation. See note, 58 L. R. A. 88.

18 Cal. 433–436, FREMONT v. SEALS.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 715.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 771, 778, 786.

18 Cal. 436–438, FORE v. MANLOVE.

Priority Rights of Different Assignees of fund in hands of third person. See note, 66 L. R. A. 776.

18 Cal. 443–447, DAUBENSPECK v. GREAR.

Injunction Lies to Prevent Destruction of ornamental or fruit trees, by mining company, the injury being irreparable.

Approved in Mountain Copper Co. v. United States, 142 Fed. 648, 73 C. C. A. 621, refusing injunction to prevent operation of smelter on ground that fumes injured adjacent property; American Smelting etc. Co. v. Godfrey, 158 Fed. 233, 89 C. C. A. 139, upholding injunction to prevent operation of smelter on ground of irreparable injury to adjacent orchards.

Injunction Against Trespass on realty. See notes, 99 Am. St. Rep. 750; 13 L. R. A. (n. s.) 175.

Injunction Against Trespass to cut timber. See note, 22 L. R. A. 236.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 770.

18 Cal. 451–455, WINTON v. SPRING.

Where It Does not Appear from Facts and circumstances attending cancellation of contract that parties intended it to have retroactive effect upon rights already acquired under it, it will be construed so as not to affect those rights.

Approved in Alabama Oil & Pipe Line Co. v. Sun Co., 99 Tex. 612, 92 S. W. 255, following rule.

18 Cal. 455–458, ROLAND v. KREYENHAGEN.

Default Judgment will be Set Aside in discretion of court upon showing of excusable neglect.

Approved in Sherman v. Southern Pac. Co., 31 Nev. 289, 291, 102 Pac. 258, 259, following rule.

Technicalities are Obstacles to be Avoided rather than principles to which effect is to be given in derogation of substantial right.

Approved in Farmers' etc. Bank v. City of Los Angeles, 151 Cal. 663, 91 Pac. 798, holding failure to allege demand for repayment of taxes paid under protest is fatal to complaint in action to recover same.

18 Cal. 460, TAGGART v. SAN ANTONIO ETC. MINING CO.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 741, 744.

18 Cal. 465–478, 79 Am. Dec. 187, SAN FRANCISCO v. LAWTON.

Only Mortgagor and Mortgagee and those who have obtained interests under them are proper parties to foreclosure suit.

Distinguished in St. Lawrence Co. v. Holt, 51 W. Va. 379, 41 S. E. 362, holding judgment dissolving injunction granted in suit to enjoin sale under deed of trust in which party claiming by prior adverse title was joined was final determination of his rights; Tinsley v. Atlantic Mines Co., 20 Colo. App. 66, 77 Pac. 14, holding in foreclosure suit party joined under allegation it held interest in property subsequent to mortgage could not be compelled to litigate its title in that action.

After-acquired Title Feeds a mortgage.

Approved in Bernardy v. Colonial etc. Mortgage Co., 17 S. D. 642, 106 Am. St. Rep. 791, 98 N. W. 167, holding title acquired by patent passes under prior deed purporting to be in fee.

By Quitclaim Deed Grantor Does not Affirm possession of any title and is not precluded from subsequently acquiring valid title and attempting to enforce it.

Distinguished in Foster v. Hobson, 131 Iowa, 61, 107 N. W. 1102, where husband conveyed by quitclaim deed to wife all his interest as heir to his father's estate, and thereafter by voluntary partition received from other heirs conveyance of specific portion of estate, he did not thus acquire new title.

Estoppel by Quitclaim Deed. See note, 105 Am. St. Rep. 863.

Grantee of Land by Quitclaim Deed may deny he received any title thereunder.

Approved in Bryan v. Eason, 147 N. C. 293, 61 S. E. 74, holding quitclaim deed did not operate to estop grantee from denying he received any estate thereby or from setting up rights under superior title.

Perjury as Ground for Relief against judgment. See note, 23 L. R. A. (n. s.) 564.

Miscellaneous.—Cited in Rosenberg v. Frank, 58 Cal. 403, to point that probate court has exclusive jurisdiction over probate matters.

18 Cal. 478–481, CASTRO v. RICHARDSON.

Plaintiff in Ejectment Attempting to Allege a specific deraignment of title must aver every fact he could be required to prove in order to recover.

Approved in Emerson v. Yosemite Gold Min. etc. Co., 149 Cal. 59, 85 Pac. 125, following rule.

A Will cannot be Given in Evidence to support title thereunder until probated.

Approved in Estate of Patterson, 155 Cal. 636, 132 Am. St. Rep. 116, 102 Pac. 945, discussing effect of destruction of will by fire without testator's knowledge on rights of devisees; McDaniel v. Pattison (Cal.), 27 Pac. 653, devisees under will who are also heirs at law cannot maintain action in equity to set aside alleged fraudulent deed of decedent and claim distribution under lost will not entitled to probate; Goodell v. Sanford, 31 Mont. 171, 77 Pac. 525, will must be admitted to probate before power of sale given by it can be executed.

Probate of Will, Until Revoked, is conclusive in its validity in all collateral proceedings.

Cited in Estate of Miehle, 3 Cof. Prob. 101, arguendo.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 681.

18 Cal. 482–491, LORD v. MORRIS.

Statute of Limitations Runs Against Mortgage given to secure note at same time it runs against note, and when recovery on note is barred it is also barred on the mortgage.

Approved in Allen v. Allen (Cal.), 27 Pac. 32, following rule; Lilly-Brackett Co. v. Sonnemann, 157 Cal. 199, 106 Pac. 718, holding bar of action on note in foreign state bars foreclosure on mortgage security in this state; Bell v. Bank of California, 153 Cal. 243, 94 Pac. 893, holding cause of action for damages for conversion of pledged property, or for excess of value of pledged property over debt, are both barred by limitation in three years; Puckhaber v. Henry, 152 Cal. 422, 125 Am. St. Rep. 75, 93 Pac. 115, holding claim on insurance policy given as pledge for payment of note barred when note is barred.

Distinguished in Green v. Frick, 25 S. D. 344, 126 N. W. 580, holding foreclosure of mortgage not barred by limitations against debt, but may be had at any time before expiration of period of limitations against mortgage itself.

Effect of Bar of statute of limitations. See note, 95 Am. St. Rep. 666.

Effect of Statutory Bar of Principal Debt on right to foreclosure of mortgage or deed of trust. See note, 21 L. R. A. 554.

Where Note Secured by First Mortgage is barred and afterward second mortgage is executed, the second mortgagee can set up statute of limitations to suit on first mortgage.

Approved in Evans v. Faircloth-Byrd Mer. Co., 165 Ala. 180, 51 So. 786, reaffirming rule; Newhall v. Hatch (Cal.), 64 Pac. 252, holding mortgagor estopped to maintain action on new promise to pay debt for which he held mortgage when foreclosure proceedings had been dismissed as barred by statute.

Distinguished in Saenger v. Nightingale, 48 Fed. 712, holding that fact mortgage was foreclosed by assignee in name of original mortgagee after such assignee had transferred it to mortgagor's children does not permit second mortgage to attack title of children as purchasers at foreclosure sale.

Who may Plead statute of limitations. See note, 104 Am. St. Rep. 744, 764.

Effect of Payment or Acknowledgment by mortgagor to toll limitations as against person holding through him. See note, 28 L. R. A. (n. s.) 171.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 683, 689.

18 Cal. 491–493, KEARSING v. KILIAN.

Effect of Destruction or Cancellation, or redelivery to grantor for that purpose, of delivered but unrecorded deed. See note, 18 L. R. A. (n. s.) 1168.

18 Cal. 494–496, LUMLEY v. CORBETT.

Agent for Undisclosed Principal when empowered to sell may receive payment.

Approved in Tustin Fruit Assn. v. Earl Fruit Co. (Cal.), 53 Pac. 696, holding agent who contracted directly as principal could sue in his own name; Birch Tree State Bk. v. Brown, 152 Mo. App. 599, 133 S. W. 863, applying rule where agent was in possession of bank stock to sell.

Right in Action by Undisclosed Principal to defenses available in action by agent. See note, 28 L. R. A. (n. s.) 230.

18 Cal. 499–508, IRWIN v. SCRIBER.

Same Presumptions as to Jurisdiction attach to proceedings of probate courts, within jurisdiction conferred on them, as in case of district courts.

Approved in Dunsmuir v. Coffey, 148 Cal. 141, 82 Pac. 684, refusing to declare void probate of will after lapse of time for appeal; In re Twombley's Estate, 120 Cal. 351, 52 Pac. 815, holding every presumption must be indulged in favor of regularity of probate order on motion to set aside made many years after.

Letters of Administration Granted by Probate Court cannot be collaterally attacked by showing deceased did not reside in county at time of death, and court had no jurisdiction.

Approved in Estate of Clark, 148 Cal. 116, 113 Am. St. Rep. 197, 82 Pac. 763, 1 L. R. A. (n. s.) 996, 7 Ann. Cas. 306, and Balsewecz v. Chicago, Burlington etc. R. R. Co., 240 Ill. 247, 88 N. E. 737, both following rule; Goldtree v. McAlister (Cal.), 23 Pac. 209, holding action of court in admitting will to probate which has already been probated in foreign state not subject to collateral attack, but remedy is by appeal; Guardianship of Treadwell, 3 Cof. Prob. 316, 317, applying rule in guardianship proceedings; Estate of Welch, 3 Cof. Prob. 304, order making family allowance is conclusive as to widow's right to allowance and as to amount properly to be allowed widow; Stull v. Veatch, 236 Ill. 213, 86 N. E. 229, holding certified copy of will and transcript of order of probate in another state valid upon its face to be conclusive in validity of foreign probate as against collateral attack; Beresford v. American Coal Co., 124 Iowa, 37, 98 N. W. 903, 70 L. R. A. 256, holding question of defect in administration bond could not be raised collaterally in action brought by administrator.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 550.

Conclusiveness of Probate as Res Judicata. See note, 21 L. R. A. 681, 682, 685.

Collateral Impeachability of Findings as to jurisdictional facts on which administration is based. See note, 18 L. R. A. 242.

18 Cal. 526–535, 79 Am. Dec. 193, SHELDON v. STEAMSHIP UNCLE SAM.

Husband and Wife must Join in action for injury done to person of latter.

Approved in Gomez v. Scanlan, 2 Cal. App. 580, 84 Pac. 50, following rule; Gomez v. Scanlan, 155 Cal. 530, 102 Pac. 13, holding wife necessary party in action for damages for her false imprisonment.

Action for Injuries Resulting from Breach of contract may be redressed by suit in tort or in contract.

Approved in Justis v. Atchison etc. Ry. Co., 12 Cal. App. 641, 108 Pac. 329, and Delmonte v. Southern Pacific Co., 2 Cal. App. 215, 83 Pac. 271, both following rule; dissenting opinion in Beaulieu v. Great Northern Ry. Co., 103 Minn. 59, 114 N. W. 357, 19 L. R. A. (n. s.) 564, majority holding damages for mental anguish for failure to transport corpse could not be recovered in action for breach of contract of transportation where breach did not amount to willful tort.

Where Breach of Contract for Carriage involves a tort such as breach of carrier's common-law duty, damages other than those incident to breach of contract may be recovered.

Approved in Billinger v. Clyde S. S. Co., 158 Fed. 519, holding defendant steamboat company had no right to relegate second-class passengers to steerage.

18 Cal. 535–575, LEESE v. CLARK; S. C., 28 Cal. 26.

Judicial Delivery of Possession is Essential to validity of Mexican land grant.

Approved in Ohm v. San Francisco (Cal.), 25 Pac. 156, following rule.

Title to Land Between High and low water mark. See note, 45 L. R. A. 238.

18 Cal. 576–582, CORDIER v. SCHLOSS.

Previous Decision of Supreme Court is Conclusive in same case upon the rights of parties and is not subject to revision.

Approved in People v. Bennett (Cal.), 50 Pac. 704, following rule.

18 Cal. 582–590, GORE v. McBRAYER.

Oral Agreement to Locate Mining Claim is not within statute of frauds.

Approved in Hendricks v. Morgan, 167 Fed. 108, 109, 92 C. C. A. 558, Cascaden v. Dunbar, 157 Fed. 65, 84 C. C. A. 566, Copper River Mining Co. v. McClellan, 2 Alaska, 144, and Mack v. Mack, 39 Wash. 196, 81 Pac. 710, all following rule; Morrow v. Matthew, 10 Idaho, 435, 79 Pac. 201, enforcing "grubstake" agreement to locate mining claim.

Validity of Parol Partnership to deal in real property. See note, 4 L. R. A. (n. s.) 429.

Party Locating Land as Agent for another on oral agreement will be declared in equity to hold it as trustee for his principal.

Approved in Elliott v. Elliott, 3 Alaska, 362, and Thompson v. Burk, 2 Alaska, 252, both following rule; Stevens v. Grand Central Min. Co., 133 Fed. 30, 67 C. C. A. 284, holding relocation of mine by co-owner in his own name merely creates him trustee for all; Shea v. Nilima, 133 Fed. 213, 66 C. C. A. 263, holding party who locates claim in his own name in pursuance of partnership agreement is trustee for partnership.

Cotenants in Mines. See note, 91 Am. St. Rep. 855.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 774, 817, 818.

18 Cal. 590–615, GROGAN v. SAN FRANCISCO.

Majority of Votes of All Aldermen whom charter of 1851 provided should be elected is necessary to pass valid ordinance.

Approved in In re Majority of Legislature, 8 Haw. 597, holding vote of want of confidence in cabinet can be passed only by majority of full quota of elective members required by constitution.

Statutes Legalizing Invalid municipal contracts. See note, 27 L. R. A. 702.

As Branch of State Government, City levies taxes on her corporators for use of state, and money thus acquired is subject to legislative control entirely.

Approved in State v. Aberdeen, 34 Wash. 69, 74 Pac. 1024, in collection of liquor licenses, municipal corporations are mere agents of state and limitations cannot run in their favor against collection of such license from them by state.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 162.

Power of Legislature to Impose Burdens upon municipalities and to control their administration and property. See note, 48 L. R. A. 487.

Act of April 26, 1858, Relating to Execution of certain deeds and canceling certain claims by treasurer of San Francisco was never accepted by city, and deeds so executed did not pass title to property in question.

Distinguished in Ware v. Fitchburg, 200 Mass. 73, 85 N. E. 954, holding legislative act creating corporation to administer charitable trust created by bequest to city for hospital when accepted by city made corporation agent of city for purposes of executing trust.

18 Cal. 619–621, HALL v. DOWLING.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 294, 332, 349.

18 Cal. 622–625, STARK v. RANEY.

Indemnity to Sheriffs. See note, 86 Am. St. Rep. 555, 557, 558.

18 Cal. 625–629, DOWLING v. POLOCK.

Dismissal of Suit in Which Temporary Injunction was granted, for want of prosecution, has same effect on rights of parties as would have resulted from same judgment upon merits.

Approved in Quinn v. Baldwin Star Coal Co., 19 Colo. App. 504, 76 Pac. 554, holding counsel fees incurred in preparing motion to dissolve writ of injunction to be within condition of bond and recoverable in action thereon, though plaintiff dismissed injunction suit and dissolved writ before motion was filed; St. Joseph etc. Power Co. v. Graham, 165 Ind. 19, 74 N. E. 499, holding no action lay for breach of injunction on bond after dismissal of action by consent; In re Ward's Estate, 152 Mich. 237, 116 N. W. 30, holding dismissal by consent of such suit dissolved injunction and left parties in same position as if no suit had been brought; Sammons v. Pike, 105 Minn. 110, 117 N. W. 245, holding dismissal of action extinguished previous judgment rendered therein, and left parties in same situation as before suit begun; Kelly v. Mead, 18 S. D. 597, 101 N. W. 882, holding dismissal of action for injunction on motion of plaintiff in effect determines injunction was improperly issued.

Action upon Injunction Bond Lies only after main action has been determined.

Approved in Lacey v. Davis, 126 Iowa, 677, 102 N. W. 535, dismissing suit on injunction bond when complaint did not allege main action had been disposed of.

Grounds for Injunction cannot be Inquired into in suit on injunction bond.

Approved in Revell v. Smith, 25 Okl. 512, 106 Pac. 865, following rule.

18 Cal. 629–632, **KELSEY v. TRUSTEES OF NEVADA.**

Act Allowing Collection of Taxes based on assessment of previous year is valid.

Approved in Worten v. City of Paducah, 123 Ky. 55, 93 S. W. 620, upholding act providing for collection of taxes on realty for period of four years based on assessment of first year.

18 Cal. 636–639, **PEOPLE v. KEEFER.**

Where One Shoots at Another With Intent to kill but wounds a third person, he is not guilty of assault with intent to kill such third person under statute creating such offense.

Approved in State v. Mulhall, 199 Mo. 216, 219, 97 S. W. 587, 588, 7 L. R. A. (n. s.) 630, holding one who wounded third person while attempting to assault another could not be convicted of assault with intent to kill such third person.

18 Cal. 640–643, **HIHN v. PECK.**

Injunction Does not Lie Against Cutting Timber pending partition of land where insolvency of tenant cutting the timber is not shown.

Distinguished in Scarborough v. Woodill, 7 Cal. App. 41, 93 Pac. 384, granting injunction to prevent cutting down of line trees by coterminous owner.

18 Cal. 643–649, **DOUGLASS v. MAYOR ETC. OF PLACERVILLE.**

Charters of Municipal Corporations are special grants of power from sovereign authority and must be strictly construed.

Approved in Wichman v. Placerville, 147 Cal. 164, 81 Pac. 538, holding invalid bond issue not authorized by city charter; State v. Clifford, 228 Mo. 205, 128 S. W. 759, upholding city ordinance regulating width of tires on all classes of vehicles used in city.

18 Cal. 650–653, **HOCKER v. REAS.**

Payment of Judgment Obtained on Foreclosure of senior mortgage before sheriff's deed is executed redeems the property, and leaves it subject to junior mortgage existing at time of foreclosure.

Approved in Wemple v. Yosemite Gold Min. Co., 4 Cal. App. 87, 87 Pac. 283, holding redemption of foreclosed property by judgment debtor places all parties in original position except that debt is paid.

18 Cal. 654–659, **LEWIS v. LEWIS.**

Where at Marriage Deceased, a Cattleman, owned cattle valued at $20,000 and died in five years leaving $40,000 worth of cattle, $4,000 of which was original stock, community property was differ-

ence between original value of stock at marriage and value of property possessed at death.

Distinguished in Estate of Granniss, 3 Cof. Prob. 439, 440, holding where only earnings of testator after his second marriage were $900 during eight years while estate appraised at $88,000, entire estate was separate property.

What is Community Property. See notes, 126 Am. St. Rep. 114; 4 Cof. Prob. 56.

18 Cal. 669-671, RENIFF v. THE CYNTHIA.

Miscellaneous.—Cited in Gervaise v. Brookins, 156 Cal. 112, 103 Pac. 333.

18 Cal. 678-686, EX PARTE ANDREWS.

Sabbath Observance Act of 1861 is valid.

Approved in State v. Dolan, 13 Idaho, 709, 710, 711, 712, 716, 92 Pac. 999, 1000, 1002, 14 L. R. A. (n. s.) 1259, upholding law restricting certain kinds of business on Sunday; State v. Weiss, 97 Minn. 129, 105 N. W. 1128, upholding act prohibiting public traffic in certain articles of merchandise on Sunday; Ex parte Kair, 28 Nev. 147, 113 Am. St. Rep. 817, 80 Pac. 466, upholding eight-hour smelter and mining law of 1903.

Constitutionality of Sunday Law. See note, 22 L. R. A. 721.

Power of Municipal Corporations to define, prevent, and abate nuisances. See notes, 38 L. R. A. 643; 36 L. R. A. 601.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

Miscellaneous.—Cited in dissenting opinion in Walling v. Bown, 9 Idaho, 751, 76 Pac. 322, to point that supreme court is not bound by previous decisions of same court on similar question.

18 Cal. 689-693, CASSIN v. MARSHALL.

Where Supreme Court Modifies Judgment Below for apparent error, which appellant might have corrected below on motion, respondent will not be taxed with costs.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, following rule.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 37.

18 Cal. 694-696, BAY v. POPE.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 177.

18 Cal. 699-700, PEOPLE v. BERNSTEIN.

Statute on New Trial in Criminal Cases names all grounds on which it may be had.

Approved in People v. Amer, 151 Cal. 305, 90 Pac. 699, following rule.

18 Cal. 704-709, SCOTT v. HARBOR.

What "Taking" is Sufficient in larceny. See note, 88 Am. St. Rep. 561.

Larceny—What Constitutes Asportation. See notes, 88 Am. St. Rep. 584, 585; 29 L. R. A. (n. s.) 38.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 19 CALIFORNIA.

19 Cal. 28–40, PATTERSON v. ELY.

Allegation in Ejectment Suit of Value of use and occupation, rents and profits considered, and held to be in effect that value of use of premises during exclusion was amount stated.

Approved in Leyson v. Davenport, 38 Mont. 67, 98 Pac. 642, complaint alleging wrongful occupation of plaintiff's land and value of use and occupation held to be for wrongful occupation under Revised Codes, section 6069; Phillips v. Reynolds, 79 Neb. 629, 113 N. W. 235, upholding petition for recovery of mesne profits of land held under void lease.

Verbal Stipulations of Parties cannot be Considered on appeal except when they have been admitted.

Approved in Hearne v. De Young, 111 Cal. 377, 43 Pac. 1109, following rule.

Failure to Make Specific Denial of Allegations of amount of damage in ejectment admits the damage.

Overruled in McGrath v. Valentine, 167 Fed. 476, 93 C. C. A. 109, holding general denial of allegation of value cannot be negative pregnant and admission of any value at all.

19 Cal. 40–41, PEOPLE v. ROBINSON.

Talk of Person in Sleep is Inadmissible as evidence against him in criminal case.

Approved in Hart v. Miller, 29 Ind. App. 239, 64 N. E. 245, holding inadmissible admissions of insane person.

Distinguished in Chadwick v. United States, 141 Fed. 239, 72 C. C. A. 343, admitting self-charging letters in evidence against defendant.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 789.

19 Cal. 41–46, WHEATON v. NEVILLE.

Participation in Fraudulent Intent of Debtor which will invalidate transfer to pay or secure debt as to other creditors. See note, 31 L. R. A. 616, 620.

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 339.

19 Cal. 47–60, GILMER v. LIME POINT.

Value of Land for Special Uses cannot be considered in condemnation proceedings.

Approved in Sacramento etc. R. R. Co. v. Heilbron, 156 Cal. 410, 104 Pac. 980, following rule.

19 Cal. 64–77, 79 Am. Dec. 196, WRIGHT v. SOLOMON.

When Person Holding Property under conditional sale may transfer perfect title. See note, 134 Am. St. Rep. 281, 283.

Agent's Power to Use Principal's Property for payment of own debt. See note, 14 L. R. A. 235.

19 Cal. 77–80, COMSTOCK v. CLEMENS.

Justice's Court has Jurisdiction of motion to quash execution on its own judgment.

Denied in Carr v. Pennsylvania R. R. Co., 108 Mo. App. 391, 83 S. W. 982, holding justice of peace has no jurisdiction of motion to quash execution.

Justice Court Judgment Alleged Void may be Reviewed on certiorari although time for appeal has expired.

Approved in Olcese v. Justice's Court, 156 Cal. 85, 103 Pac. 317, holding certiorari lies to review judgment of superior court on appeal from justice court on question of jurisdiction of person of defendant.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 327.

Injunctions Against Judgments for want of jurisdiction or invalidity. See note, 31 L. R. A. 201, 207, 209.

19 Cal. 82–93, ADDISON v. SAULNIER.

Act of May 3, 1852, Providing for Appointment of gauger of port of San Francisco, is valid.

Distinguished in State v. Butterfield Livestock Co., Ltd., 17 Idaho, 447, 134 Am. St. Rep. 263, 106 Pac. 457, 26 L. R. A. (n. s.) 1224, holding void act imposing license tax on sheep brought in from other states.

19 Cal. 85–86, SMITH v. HALL.

Statute of Limitations Does not Begin to Run when no administration exists on estate of deceased at time cause of action accrued.

Approved in Hibernia Savings etc. Society v. Farnham, 153 Cal. 580, 126 Am. St. Rep. 129, 96 Pac. 11, and Heeser v. Taylor, 1 Cal. App. 621, 82 Pac. 978, both following rule; dissenting opinion in Colonial etc. Mortgage Co. v. Flemington, 14 N. D. 187, 116 Am. St. Rep. 670, 103 N. W. 930, majority holding failure to appoint administrator of estate of deceased mortgagor does not prevent limitations from running in favor of his heirs against foreclosure.

Limitation of Actions. See note, 116 Am. St. Rep. 673.

19 Cal. 87–97, SOTO v. KRODER.

Decree of Federal Court Confirming Mexican Land Grant entitles owner to maintain ejectment to recover premises granted.

Approved in De Guyer v. Banning (Cal.), 25 Pac. 255, following rule.

19 Cal. 97-101, **QUIVEY v. HALL.**

Judgment Against Administrator in Action on judgment recovered against intestate in lifetime should include interest on first judgment.

Approved in Estate of Mallon, 3 Cof. Prob. 126, 127, preference given to judgments rendered against decedent in his lifetime includes interest due thereon at time of payment.

19 Cal. 101-106, **BREEZE v. DOYLE.**

Special Verdict must Find Facts expressly and specially, not generally and impliedly.

Approved in Coburn Cattle Co. v. Small, 35 Mont. 293, 88 Pac. 955, holding special verdict insufficient to sustain judgment.

What Special Verdict must contain. See note, 24 L. R. A. (n. s.) 53, 54.

19 Cal. 109-113, 79 Am. Dec. 204, **BICKERSTAFF v. DOUB.**

Sheriff Seizing Goods of Debtor in possession of stranger must justify under judgment authorizing issuance of writ.

Approved in Old Settlers' Investment Co. v. White, 158 Cal. 243, 110 Pac. 926, applying rule where controversy was between officer seizing on execution and chattel mortgagee.

19 Cal. 113-118, **HAIGHT v. GREEN.**

Complaint in Ejectment Alleging That Plaintiff is owner of specific real property is an averment of an ultimate fact.

Approved in Corea v. Higuera, 153 Cal. 455, 95 Pac. 884, 17 L. R. A. (n. s.) 1018, holding allegation that plaintiff is owner of right of way over defendant's land, and that such easement is appurtenant to plaintiff's land, is sufficient statement of ultimate fact.

Failure of Attorney to Appear at Trial for Defendant because of attendance at another trial is not ground for setting aside judgment.

Approved in Cox v. O'Neil (Cal.), 4 Pac. 457, refusing to set aside judgment because of absence of attorney for defendant without good cause shown.

19 Cal. 120-124, **BRADBURY v. BARNES.**

Who may not Purchase at judicial, execution and other compulsory sales. See note, 136 Am. St. Rep. 817.

Rights of Partners Inter Se in partnership realty. See note, 28 L. R. A. 92.

19 Cal. 127, **SWAIN v. NAGLEE.**

Court has Power to Amend Clerical Errors in entering judgment at any time so that entry corresponds to judgment as rendered.

Approved in San Francisco v. Brown, 153 Cal. 651, 96 Pac. 284, holding court could vacate judgment incorrectly entered and correct it.

19 Cal. 130-131, **EX PARTE BIRD.**

Issues of Fact cannot be Retried on habeas corpus.

Approved in In re Myrtle, 2 Cal. App. 386, 84 Pac. 337, holding habeas corpus cannot be invoked to review judgment for error committed in exercise of jurisdiction, nor to review any matter of defense.

Complaint Charging Violation of Law need not set up and negative exceptions, such being matter of defense.

Approved in Ex parte Fedderwitz (Cal.), 62 Pac. 941, holding sufficient complaint charging in general terms violation of liquor ordinance, without alleging defendant to be licensed druggist.

19 Cal. 133–140, EX PARTE BRANIGAN.

Magistrate Examining Person Accused of Crime must make written order signed by him holding accused to answer to the charge as prerequisite to valid filing of information.

Approved in People v. Siemsen, 153 Cal. 389, 95 Pac. 864, holding such order necessary prerequisite to information; Ex parte Fowler, 5 Cal. App. 554, 90 Pac. 960, holding omission of words, "with malice aforethought," in order for commitment for assault with deadly weapon, does not invalidate such order.

19 Cal. 140–143, 79 Am. Dec. 206, GRIM v. NORRIS.

Right of Trial by Jury in Common-law Cases may be insisted upon.

Approved in Russell v. Alt, 12 Idaho, 794, 88 Pac. 417, 13 L. R. A. (n. s.) 146, holding court could not submit common-law case to referee over objection of either party; Avery Mfg. Co. v. Crumb, 14 N. D. 63, 103 N. W. 411, plaintiff in action to foreclose chattel mortgage and praying equitable relief not entitled to jury trial.

Constitutionality of Compulsory Reference in actions at law. See note, 13 L. R. A. (n. s.) 146, 148.

19 Cal. 143–145, FORD v. CHAMBERS; S. C., 28 Cal. 13.

Preponderance of Evidence Only is necessary to establish fact in civil action.

Approved in Big Three Min. and Mill Co. v. Hamilton, 157 Cal. 140, 137 Am. St. Rep. 118, 107 Pac. 306, approving charge as to preponderance of evidence; Cooper v. Spring Valley Water Co, 16 Cal. App. 22, 116 Pac. 300, in action for conversion of corporate stock claimed to have been stolen by third party, instructions on burden of proof held erroneous.

19 Cal. 150–158, HENSHAW v. BUTTE COUNTY.

Action of Board of Supervisors in Granting Ferry License cannot be reviewed on certiorari.

Approved in City Council v. Hanley, 9 Colo. App. 394, 75 Pac. 601, on certiorari to review action of city council in aldermanic election contest court could only inquire into jurisdiction of council.

19 Cal. 188–209, TOWNSEND v. GORDON.

Sale of Land by Administrator which is included in order of sale but not in petition therefor is void.

Approved in Colligan v. Cooney, 107 Tenn. 220, 64 S. W. 33, holding void decree of sale in proceedings to enforce tax lien where description of property in pleadings was insufficient to support deed.

Cause for Which Decedent's Real Estate may be sold. See note, 79 Am. St. Rep. 82.

19 Cal. 210–219, 79 Am. Dec. 212, WATERMAN v. LAWRENCE.

Guardian ad Litem Appointed to Represent Infant in partition suit has power to defend for infant solely against claim set up for partition of common estate.

Approved in Skinner v. Knickrehm, 10 Cal. App. 601, 102 Pac. 449, holding order appointing guardian ad litem for bringing suit against individual is valid if another party is later made joint defendant; Missouri Pacific Ry. Co. v. Lasca, 79 Kan. 319, 99 Pac. 619, 21 L. R. A. (n. s.) 338, parent acting as next friend of infant cannot bind infant by settlement of action.

Rights, Duties and Powers of guardian ad litem of infants. See notes, 97 Am. St. Rep. 996, 997; 3 Cof. Prob. 16, 17.

Guardian ad Litem cannot Admit Away Rights of ward by answer.

Approved in Kimble v. Dailey, 127 Iowa, 673, 103 N. W. 1012, guardians ad litem, upon application of regular guardian for order to sell lands to pay debts, may interpose as affirmative defense claim that guardian had mismanaged estate and should account for loss through negligence.

Admissions and Waivers by Fiduciaries in actions. See note, 32 L. R. A. 671.

Action for Partition is Special Statutory Proceeding and must be strictly pursued.

Approved in Hurley v. O'Neill, 31 Mont. 600, following rule.

19 Cal. 219–248, CHATER v. SAN FRANCISCO SUGAR REFINING CO.

Corporation Organized With Full Knowledge of Agreement among corporators, which was for a long time acted upon, thereby adopts and is bound by the agreement.

Approved in Turner v. Markham, 155 Cal. 571, 102 Pac. 275, upholding agreement among corporators to exchange stock for mining property; Baldwin v. Miller and Lux, 152 Cal. 457, 92 Pac. 1034, corporation may lawfully be trustee of property as to its stockholders, though holding no beneficial interest therein; Kelly v. Ning Yung Ben. Assn., 2 Cal. App. 463, 84 Pac. 332, parent corporation is liable for work performed through agency of auxiliary corporation formed for purpose of performing such work; Turner v. Fidelity Loan Concern, 2 Cal. App. 131, 83 Pac. 66, adoption of incorporators' agreement by corporation cannot be objected to on ground of directors' interest, who, though trustees, were sole beneficiaries and in this capacity could act.

Contract for Issuance of Corporate Stock to purchaser will be specifically enforced where there is special cause for requiring stock to be delivered.

Approved in Schmidt v. Pritchard, 135 Iowa, 248, 112 N. W. 804, upholding order for specific performance of delivery of pro rata share of newly issued corporate stock to stockholder when stock had no market value and could not be purchased.

Specific Performance of Contracts for sale of corporate stock. See notes, 135 Am. St. Rep. 699; 50 L. R. A. 511.

Miscellaneous.—Cited in Baldwin v. Miller and Lux, 152 Cal. 463, 92 Pac. 1033, to point that corporation may legally be formed to take over assets and close up business of partnership.

19 Cal. 248–275, ESTRADA v. MURPHY.

Equitable Defense in Ejectment must first be passed on by court before trial of issues at law.

Approved in Kenny v. McKenzie, 25 S. D. 495, 127 N. W. 601, following rule; Cotton v. Butterfield, 14 N. D. 469, 105 N. W. 237, holding equitable counterclaim should be passed on by court before trial of issues of law; Tonopah & Goldfield R. R. Co. v. Fellanbaum, 32 Nev. 295, 107 Pac. 887, arguendo.

19 Cal. 278–291, 79 Am. Dec. 215, MEEKER v. HARRIS.

Facts Constituting Fraud must be Stated in complaint with sufficient distinctness to put adverse party on defense.

Approved in Fox v. Hale etc. Silver Min. Co. (Cal.), 53 Pac. 36, following rule.

Participation in Fraudulent Intent of debtor which will invalidate transfer to pay or secure debt as to other creditors. See note, 31 L. R. A. 617.

19 Cal. 291–292, 79 Am. Dec. 218, WEBSTER v. WADE.

Employer is Liable for Wages for Full Contract period of service if servant is discharged without good cause before termination of such period.

Approved in Shirley v. Board of Trustees of Cottonwood School Dist. (Cal.), 31 Pac. 366, holding demand for payment essential to relief on such discharge; School Dist. of Omaha v. McDonald, 68 Neb. 621, 94 N. W. 833, holding on breach of contract for certain personal services, measure of damages is contract price less what it would have actually cost to carry out contract.

Right of Wrongfully Discharged Servant to wages for contract period subsequent to discharge. See note, 5 L. R. A. 441.

Effect of Part Performance of contract for services. See note, 24 L. R. A. 232.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 59.

19 Cal. 302–305, DEPUTY v. STAPLEFORD.

Fraud in Obtaining Deed to Property will not affect title of bona fide purchaser for value from vendee in such deed.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, holding fraud of third party, who was agent of grantor, will not avoid deed to grantee who was ignorant of fraud.

19 Cal. 306–319, WOLF v. BALDWIN.

Possession Accompanied by Real and Effectual Enjoyment is the kind of occupation contemplated under Van Ness ordinance.

Approved in Lofstad v. Murasky, 152 Cal. 68, 91 Pac. 1010, holding possession under McEnerney act must be actual, visible, exclusive use and enjoyment; Ill. Steel Co. v. Jeka, 123 Wis. 428, 101 N. W. 402, holding in ejectment suit, evidence of adverse possession was sufficient to go to jury; Pioneer Investment etc. Co. v. Board of Education, 35 Utah, 9, 136 Am. St. Rep. 1016, 99 Pac. 152, holding evidence of adverse possession sufficient to sustain title thereunder.

19 Cal. 330–354, RICKETSON v. RICHARDSON.

Where Mortgage Mentions Interest Without Stipulating Rate, subsequent purchasers are liable for principal and interest stipulated in notes secured thereby.

Approved in Hindricks v. Brady, 20 S. D. 602, 605, 108 N. W. 334, 335, Hinrichs v. Brady, 23 S. D. 253, 121 N. W. 778, and Stewart

v. Walker, 80 Neb. 71, 127 Am. St. Rep. 747, 113 N. W. 815, all holding subsequent purchasers liable only for interest rate stipulated in recorded mortgage.

19 Cal. 354–364, JUNGERMAN v. BOVEE.

Tenant's Duty to Leave Premises in good condition. See note, 64 L. R. A. 663.

19 Cal. 374–388, KENNEDY v. HAMER.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 379.

19 Cal. 391–393, FALL v. MARYSVILLE.

Exemption from Taxation or assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 309, 325, 331.

19 Cal. 425–426, PEOPLE v. HALL.

Indictment for Larceny of Property of Estate is bad. Property should be charged as belonging to particular individual who is unknown.

Approved in State v. Hammons, 226 Mo. 613, 126 S. W. 424, following rule.

Distinguished in State v. Rathbone, 8 Idaho, 173, 67 Pac. 189, holding no material variance existed when proof showed stolen property to belong to two persons jointly when indictment avers it belonged to one.

Denied in Hendee v. State, 80 Neb. 82, 113 N. W. 1051, upholding indictment charging property embezzled belonged to an estate.

19 Cal. 426–447, PEOPLE v. BONNEY.

Court may Permit Jury in Criminal Trial to view physical objects connected with the crime without presence of prisoner.

Approved in Elias v. Territory, 9 Ariz. 14, 76 Pac. 610, holding view of place of homicide properly taken in absence of prisoner where no witnesses were examined at the view.

View by Jury. See note, 42 L. R. A. 372, 378.

Separation of Jurors After Retirement considered and held not to be ground for new trial.

Approved in Shivers v. Territory, 13 Okl. 477, 74 Pac. 903, holding technical separation of jury did not prejudice defendant.

19 Cal. 447–461, WEBER v. MARSHALL.

Parol Contract for Purchase of Land held to be invalid after party claiming benefit had delayed five years to demand performance.

Approved in Brown v. Town of Sebastopol, 153 Cal. 709, 96 Pac. 365, 19 L. R. A. (n. s.) 178, holding irregularity of parol contract to purchase land obviated by part performance.

Parties in Ejectment are Entitled to Trial by jury on legal issues, but not on equitable issues.

Approved in Reay v. Butler (Cal.), 7 Pac. 671, holding plaintiff in ejectment had right to jury trial, although intervener prayed equitable relief.

19 Cal. 476–485, SMITH v. RICHMOND.

Defense of Limitations may be Taken Advantage of by demurrer if it appears on face of pleadings, otherwise by answer.

Approved in Chemung Min. Co. v. Hanley, 9 Idaho, 794, 77 Pac. 228, following rule; Palmtag v. Roadhouse (Cal.), 34 Pac. 112, holding complaint did not sufficiently show cause barred by limitation to sustain demurrer.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 690.

19 Cal. 486–491, DANA v. SAN FRANCISCO.

Warrants Drawn by City Auditor specifying what they are drawn for are not negotiable instruments.

Approved in Swanson v. City of Ottumwa, 131 Iowa, 548, 106 N. W. 12, 5 L. R. A. (n. s.) 860, where negotiable bonds were void for want of power, they could not be recovered on as non-negotiable instruments.

19 Cal. 491–498, AH HEE v. CRIPPEN.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 786.

19 Cal. 501–513, STATE v. CONKLING.

Revision of Statute is New Law and repeals whatever is not included in the revision.

Approved in Southern Pac. Co. v. Bartine, 170 Fed. 741, holding Nevada act of March, 1907, regulating railroads, not amendatory of former acts but complete act covering entire subject.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 279, 280, 281.

19 Cal. 513–536, LATHROP v. MILLS.

Where General Provision of Act is Unconstitutional, particular provisions, not independent, are void also.

Approved in Western Union Tel. Co. v. Austin, 67 Kan. 215, 72 Pac. 852, holding two separate acts were in effect one act, and declaring void the second when first had already been declared void.

19 Cal. 539–550, 81 Am. Dec. 77, PEOPLE v. TINDER.

Admission to Bail Except in Capital Cases is a right of the accused which cannot be properly refused.

Approved in Ex parte Ruef, 8 Cal. App. 469, 97 Pac. 90, following rule; State v. Kauffman, 20 S. D. 620, 108 N. W. 246, holding void act providing court could exercise discretion in admitting to bail in capital cases.

Burden of Proof on Application for Bail, after indictment is on applicant.

Approved in dissenting opinion in Ex parte Firmin, 60 Tex. Cr. 371, 131 S. W. 1114, majority holding where on habeas corpus by one charged with murder to obtain bail, state introduced only indictment, warrant and return, and relator introduced no evidence, bail should have been granted.

Presumption of Innocence in habeas corpus proceedings. See note, 22 L. R. A. 678.

19 Cal. 563–576, RICKS v. REED.

Pleader Desiring to Avail Himself of statutory right granted on particular facts must allege such facts in complaint.

Approved in Sherwood v. Stephens, 13 Idaho, 406, 90 Pac. 348, in order to maintain action for damages resulting from release of fish from private pond, facts showing pond was established in accordance with law must be pleaded.

19 Cal. 579–597, PEOPLE v. BLAKE.

Water Collected in Reservoirs or Pipes and thus separated from original source of supply is personal property.

Distinguished in Stanislaus Water Co. v. Bachman, 152 Cal. 725, 93 Pac. 862, 15 L. R. A. (n. s.) 359, holding right to water diverted from stream by canal is realty.

Title to Land Condemned for Use of water company vests only to extent necessary for purposes of corporation.

Approved in Sherman v. Sherman, 23 S. D. 503, 122 N. W. 446, release of land to railroad considered and held to have effect of warranty deed.

Act of 1858, Providing for Estimation of compensation in condemnation proceedings, is not void as depriving party of right of jury trial.

Approved in Portneuf Irr. Co. v. Budge, 16 Idaho, 127, 100 Pac. 1050, holding right to trial by jury in condemnation proceedings does not exist independently of statute.

Existence of Public Use as question for courts. See note, 88 Am. St. Rep. 946.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 157.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 40.

19 Cal. 600–601, PEOPLE v. POGGI.

Indictment for Larceny by Bailee must state fact of conversion, with intent to steal, without particulars as to mode of commission.

Approved in State v. Holton, 88 Minn. 173, 92 N. W. 542, holding indictment for larceny by bailee must state name of bailor and precise purpose for which bailment was made.

Embezzlement by Bailees. See note, 87 Am. St. Rep. 44.

Larceny from Possession of Servants or Agents. See note, 88 Am. St. Rep. 583.

19 Cal. 605–606, MULHOLLAND v. HEYNEMAN.

Order of Lower Court Refusing to Set Aside Judgment on ground of inadvertence, surprise and excusable neglect affirmed.

Approved in Cox v. O'Neil (Cal.), 4 Pac. 457, following rule.

19 Cal. 609–616, BUTTE TABLE MOUNTAIN CO. v. MORGAN.

Change of Use or Channel of water appropriated. See note, 30 L. R. A. 386.

19 Cal. 617–623, KNOX v. MARSHALL.

Sheriff Seizing Goods in Possession of stranger claiming them as his own must justify under both writ and judgment.

Approved in Old Settlers' Investment Co. v. White, 158 Cal. 243, 110 Pac. 925, applying rule where controversy was between officer seizing on execution and chattel mortgagee.

19 Cal. 623–626, 81 Am. Dec. 90, **LOGAN v. DRISCOLL.**

Owner of Mining Claim may Use It in lawful manner, but no manner is lawful which precludes another from the enjoyment of his rights.

Approved in dissenting opinion in Mountain Copper Co. v. United States, 142 Fed. 647, 73 C. C. A. 621, majority refusing injunction to restrain smelter company from continuing operations which injured vegetation on adjacent lands.

Pollution of Stream by Mining. See note, 24 L. R. A. 64.

19 Cal. 626–628, **MAHONE v. MAHONE.**

Drunkenness as Affecting Divorce. See note, 34 L. R. A. 451.

19 Cal. 629–632, **GRONIFIER v. PUYMIROL.**

Admissions and Waivers by fiduciaries in actions. See notes, 32 L. R. A. 677, 685.

19 Cal. 632–635, **BARRETT v. GRAHAM.**

When Order is Made upon Affidavits and there is conflict in affidavits, those supporting prevailing party will be taken as true on appeal.

Approved in Doak v. Bruson, 152 Cal. 19, 91 Pac. 1002, following rule.

19 Cal. 644–645, **THOMAS v. FOGARTY.**

Judgment of Court Entered One Week After Term Day held valid although sheriff had on fifth day after term day adjourned court for nonattendance of judge.

Approved in Wilson v. State, 3 Okl. Cr. 716, 109 Pac. 290, holding void proceedings before court after lapse of term by reason of failure of judge to attend for two days from day set.

19 Cal. 646–660, **DUFF v. HOBBS.**

What may be Subject of Counterclaim discussed.

Cited in Potter v. Lohse, 31 Mont. 98, 77 Pac. 421, holding judgment could not be set off in action of conversion.

19 Cal. 660–676, **LESTRADE v. BARTH.**

Court of Equity can Correct Error in material particular of written agreement so as to make it conform to the intention of parties.

Approved in House v. McMullen, 9 Cal. App. 669, 100 Pac. 346, following rule.

Open and Exclusive Possession of Lot to which occupant did not have legal title is sufficient to put subsequent purchaser of title upon inquiry as to occupant's rights.

Approved in Edwards v. Montgomery, 26 Okl. 863, 110 Pac. 780, following rule.

Effect of Possession of Real Property as notice. See notes, 104 Am. St. Rep. 394; 13 L. R. A. (n. s.) 56, 60.

19 Cal. 676–683, PEOPLE v. LOVE.

Distinction Between Penalty Bonds and liquidated damages discussed.

Cited in People v. Barrett, 6 Cal. App. 580, 92 Pac. 647, holding appeal bond void as being too onerous; Barber Asphalt Pav. Co. v. City of Wabash, 43 Ind. App. 174, 86 N. E. 1036, holding provision to "pay or forfeit" certain sum as "liquidated damages," in contract for street improvement, to be for liquidated damages and not penalty.

Recognizance Need not be Signed by Accused to render sureties liable.

Approved in State v. Quattlebaum, 67 S. C. 205, 45 S. E. 162, following rule.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 20 CALIFORNIA.

20 Cal. 39–45, PHELAN v. SAN FRANCISCO.

Ruling by Appellate Court on Point Distinctly Made upon previous appeal is final authority on that point in all subsequent proceedings.

Approved in People's Lumber Co. v. Gillard, 5 Cal. App. 438, 90 Pac. 557, Hall v. Blackman, 9 Idaho, 559, 75 Pac. 609, Dye v. Crary, 13 N. M. 456, 85 Pac. 1039, 9 L. R. A. (n. s.) 1136, and Crary v. Field, 10 N. M. 264, 61 Pac. 119, all following rule.

Distinguished in Lorimer v. Fairchild, 68 Kan. 342, 75 Pac. 128, holding supreme court on second appeal would review case which had been remanded for new trial by court of appeals, which court had given decision at variance with decision of another department on same point.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

Court of Sessions cannot be Invested with other than judicial functions.

Approved in State v. Brill, 100 Minn. 518, 111 N. W. 647, holding void statute requiring judges of district court to appoint members of county board of control.

20 Cal. 45–48, MITCHELL v. DAVIS.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 373.

Occupation of Premises as a Servant and as a tenant. See note, 4 L. R. A. (n. s.) 717.

20 Cal. 56–68, 81 Am. Dec. 93, SELDEN v. CASHMAN.

One Acting in Good Faith on erroneous advice of reputable counsel is not chargeable with willful intent to commit wrongful act.

Approved in United States v. Homestake Min. Co., 117 Fed. 488, 54 C. C. A. 303, following rule.

Damages for Trespass Without Malice is limited to direct and natural consequences of act, and must be susceptible of computation.

Distinguished in Lum Ah Lee v. Ah Soong, 16 Haw. 165, 166, assessing damages for illegal diversion of water causing injury to crop although partly caused by drought.

Damages for Tort as Affected by loss of profits. See note, 52 L. R. A. 57.

20 Cal. 68–69, BLOCK v. SHAW.

Where Party Dies Pending Decision on Appeal, judgment should be entered as of day anterior to death.

Approved in Teske v. Dittberner, 70 Neb. 559, 113 Am. St. Rep. 802, 98 N. W. 62, following rule.

20 Cal. 72–75, CRANDALL v. AMADOR COUNTY.

Mandamus Lies Only to Enforce Performance of duty resulting from office, trust or station.

Approved in Meyer v. San Francisco, 150 Cal. 134, 88 Pac. 723, 10 L. R. A. (n. s.) 110, refusing mandamus to compel payment of bonds because duty to pay could not arise until funds were in treasury for purpose; Williams v. Bagnelle (Cal.), 70 Pac. 1058, refusing mandamus to compel superintendent of schools to draw requisition for teacher's salary; dissenting opinion in Cornell Co. v. Barber, 31 R. I. 423, 76 Atl. 825, majority holding mandamus proper remedy to compel town treasurer to pay audited claims.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 881.

20 Cal. 76–80, PEOPLE v. MYERS.

Indictment for Arson Need not State in terms defendant "set fire" to dwelling.

Approved in State v. Judd, 132 Iowa, 298, 109 N. W. 893, holding indictment for felony need not aver act was done "feloniously"; State v. Ham, 21 S. D. 601, 114 N. W. 715, holding information for larceny of cattle did not sufficiently identify cattle.

Crime of Arson, and who may commit same. See note, 101 Am. St. Rep. 22.

Arson in Setting Fire to one's own building. See note, 32 L. R. A. 647.

20 Cal. 81–83, PEOPLE v. HUBER.

Strict Compliance With Statute Providing for substituted service of summons by publication is essential to validity of such service.

Approved in Livermore v. Ratti, 150 Cal. 465, 89 Pac. 328, holding invalid order settling final account of ward's estate where notice by posting was insufficient.

20 Cal. 85–89, CRARY v. BOWERS.

Prior Security is not Merged and Extinguished by taking new security from same party on same property on same obligation.

Approved in Alferitz v. Ingalls, 83 Fed. 970, holding that taking second mortgage to secure same debt and further advances does not release first mortgage.

20 Cal. 92–93, PLANT v. FLEMING.

Under Reference to Try Issues and Report a judgment, referee may exercise all powers of judge in relation to trial of cause referred.

Approved in Estate of Burns, 2 Cof. Prob. 46, where executor refers doubtful claim to referee, claimant cannot testify as to any matter of fact occurring after death of decedent.

20 Cal. 94–96, PEOPLE v. DURICK.

Offices of County Clerk and County Recorder are distinct offices, although held by same person.

Approved in State v. La Grave (Nev.), 48 Pac. 195, holding offices of clerk of supreme court and court reporter distinct, and clerk declared ex-officio reporter entitled to salary for both.

Act Containing Clause Repealing All Acts and parts of acts inconsistent with its provisions, but not repealing by name previous act on same subject, leaves in force all parts of such previous act not inconsistent with later act.

Approved in Swem v. Monroe, 148 Cal. 743, 83 Pac. 1075, holding section 926, Code of Civil Procedure, not repealed by implication by amendment of 1880 to section 978; dissenting opinion in Wilson v. People, 36 Colo. 429, 85 Pac. 190, majority holding registration act of 1905 repealed penalty provided by previous act, and prosecution for violation of earlier act was terminated by its passage.

20 Cal. 96–109, 81 Am. Dec. 96, ZOTTMAN v. SAN FRANCISCO.

No Municipal Contract Binds Corporation unless made in mode prescribed by charter.

Approved in Newport v. Schoolfield, 142 Ky. 294, 134 S. W. 506, no implied promise by city to make payment above contract price of street improvement arises from its acceptance of work with knowledge of beneficial changes therein.

Work Done for City Under Contract Void for want of authority of those purporting to act for city creates no liability of city to pay therefor, although it receives benefits.

Approved in Shaw v. San Francisco, 13 Cal. 549, 550, 110 Pac. 150, refusing compensation for work of deputy registrars irregularly appointed; Griffith Co. v. Los Angeles (Cal.), 54 Pac. 385, holding city not liable on quantum meruit for extras on sewer contract ordered by city engineer without authorization of council; American-Hawaiian Engineering etc. Co. v. Territory of Hawaii, 16 Haw. 716, disallowing claim for extras on public contract as unauthorized; Neill v. Trans-Atlantic etc. Co., 89 Mo. App. 646, 647, holding lien of void tax bill issued for building sewer cannot be enforced against property for reason that owner of property uses sewer.

Distinguished in City Street Imp. Co. v. Kroh, 158 Cal. 327, 110 Pac. 942, invalid specification against employment of unnaturalized aliens does not avoid street contract.

Estoppel of County or Municipality to contest illegal claims or expenditures. See note, 137 Am. St. Rep. 376.

Liability of Municipality or Other Public Corporation on implied contract. See note, 27 L. R. A. (n. s.) 1117.

Municipal Contract Derives All Power from charter, and mode for making contracts prescribed in charter must be followed.

Approved in Inge v. Board of Public Works, 135 Ala. 197, 93 Am. St. Rep. 20, 33 So. 681, reaffirming rule; Mono County v Depauli, 9 Cal. App. 711, 100 Pac. 719, holding county ordinance regulating sheep herding adopted in substantial compliance with

statute; Cordilla v. City of Pueblo, 34 Colo. 295, 82 Pac. 595, holding complaint against city based on ordinance sufficiently alleged its adoption to admit proof of manner of adoption; Sauer v. Town of Gillett, 20 Colo. App. 369, 78 Pac. 1069, holding void city water bonds issued under ordinance which did not provide for tax levy to pay interest; Weaver v. Canon Sewer Co., 18 Colo. App. 245, 70 Pac. 954, holding void ordinance granting individual right to construct and maintain sewer system; Wadsworth v. Concord, 133 N. C. 590, 45 S. E. 949, holding void contract of town commissioners for public lighting made without calling election as provided by statute, to give them power; Bosard v. City of Grand Forks, 13 N. D. 591, 102 N. W. 165, holding city not liable for services of attorney to advise mayor, whose appointment was not made in formal mode; Lund v. Washoe County, 31 Nev. 236, 101 Pac. 552, holding engineer authorized to supervise repairing of bridge could not bind county by requiring contractor to perform extra work not called for in contract; Paul v. Seattle, 40 Wash. 300, 82 Pac. 604, holding city not liable on irregularly executed contract for public work; Chippewa Bridge Co. v. Durand, 122 Wis. 95, 106 Am. St. Rep. 931, 99 N. W. 607, holding void contract for public work not let in manner prescribed by charter.

Power to Ratify Exists Only Where Party ratifying could make the contract in the same way as it was made.

Approved in Moore v. Hupp, 17 Idaho, 242, 105 Pac. 212, holding city council by providing for payment of policemen which mayor selected in excess of his authority thereby ratified his act; Larsen v. Thuringia etc. Ins. Co., 208 Ill. 171, 70 N. E. 32, holding plaintiff in suit on insurance policy ratified acts of insurer's agent in canceling policy, although agent was not authorized thereto by insurer; Paul v. Seattle, 40 Wash. 302, 82 Pac. 604, holding by acceptance of public work, city did not ratify irregularly executed contract therefor; Chippewa Bridge Co. v. Durand, 122 Wis. 96, 106 Am. St. Rep. 931, 99 N. W. 607, holding city could not by any acts short of making new contract ratify contract for public work void for want of power.

Miscellaneous.—Cited in Goldtree v. San Diego, 8 Cal. App. 510, 97 Pac. 218, to point that court has jurisdiction to render judgment against fund in city treasury where city is party but judgment sought only against fund.

20 Cal. 109–115, BIBEND v. KREUTZ.

Equitable Action to Set Aside Judgment on ground of fraud can not be maintained so long as remedy by motion in original case exists.

Approved in Chielovich v. Krauss (Cal.), 9 Pac. 946, holding it must be shown proper action was taken by motion to set aside judgment, when fraud was known, before seeking equitable relief; Hanby v. Hanby, 4 Cof. Prob. 478, applying rule where homestead is procured to be set apart by fraud; State v. District Court, 38 Mont. 172, 129 Am. St. Rep. 636, 99 Pac. 294, holding suit in equity lay to set aside decree where no other remedy was available.

Distinguished in Bacon v. Bacon, 150 Cal. 491, 89 Pac. 322, holding decree of distribution of estate of deceased subject to review

in equity on ground of mistake in procurement; Estudillo v. Security Loan etc. Co., 149 Cal. 563, 87 Pac. 22, setting aside default judgment and vacating sale thereunder on ground of fraud in procurement of judgment and in sale.

20 Cal. 126–130, LOCKWOOD v. CANFIELD.

Where Person Takes Assignment of Personal Property under agreement to pay therefrom debt due from assignor to third person, assignee is trustee for creditor, and is liable in direct action on the debt.

Approved in Whitney v. American Ins. Co. (Cal.), 56 Pac. 52, holding contract of insurance company to pay losses on policies issued by another company as promptly as on its own makes it directly liable to insured.

20 Cal. 130–137, CHIPMAN v. MORRILL.

Payment by Surety Extinguishes Principal Obligation, and action of surety against principal is on assumpsit.

Approved in Bray v. Cohn, 7 Cal. App. 126, 93 Pac. 894, following rule; Crystal v. Hutton, 1 Cal. App. 254, 81 Pac. 1116, holding comaker of note designating himself as surety extinguishes obligation on note by payment; Yule v. Bishop (Cal.), 62 Pac. 70, holding indorser of corporation note paying same and taking assignment cannot recover on statutory liability of stockholders on original note.

Distinguished in Du Burtz v. Bank of Visalia, 4 Cal. App. 206, 87 Pac. 469, holding obligation to pay bank on checks honored by bank for drawer is founded upon the check and is only barred in four years; Fabian v. Lammers, 3 Cal. App. 112, 84 Pac. 433, holding as not based on new or implied contract claim for compensation from adjacent land owner for completing levee, built for joint protection, where written contract had been made requiring each to build levee on his own land within given time; Thomas v. Pacific Beach Co. (Cal.), 44 Pac. 476, holding action by vendee to recover purchase price paid vendor on written contract for sale of land, on vendor's breach, is founded on instrument in writing.

As to When Sureties' Cause of Action against principal becomes perfect and enforceable. See note, 134 Am. St. Rep. 558.

Actions for Contribution not founded on express promise. See note, 98 Am. St. Rep. 35.

20 Cal. 142–146, PEOPLE v. TURNER.

Party Elected District Judge While Holding position of customs inspector but whose appointment had not been approved by secretary of treasury was not for that reason ineligible to office.

Approved in Kierskey v. Kelly, 80 Miss. 810, 51 So. 902, holding Constitution, section 266, did not prevent one who was contesting right to hold state office from accepting office under United States.

20 Cal. 146–149, PEOPLE v. GATEWOOD.

Indictment is not Vitiated by Presence in court with other jurors when indictment is presented of grand juror, who has been challenged and excluded from deliberation on case.

Approved in People v. Simmons, 119 Cal. 4, 50 Pac. 845, disqualification of grand juror does not vitiate indictment where he was absent during consideration of case.

Indictment can be Found by Thirteen Members of grand jury of sixteen, the others being challenged for cause.

Approved in Jones v. United States, 162 Fed. 422, 89 C. C. A. 303, holding valid indictment preferred by twelve grand jurors, one being improperly discharged.

Number of Grand Jurors necessary or proper to act. See notes, 28 L. R. A. 35; 27 L. R. A. 846.

Action of Trial Court in Refusing Challenge for bias will not be reviewed on appeal unless injury is shown.

Approved in Melone v. Sierra Ry. Co., 151 Cal. 114, 91 Pac. 522, following rule; Territory v. Shankland, 3 Ariz. 411, 77 Pac. 494, holding it not reversible error to refuse proper challenge when peremptories were not exhausted on going to trial.

20 Cal. 150–163, 81 Am. Dec. 108, TOUCHARD v. CROW.

County Clerk may Issue Process and attest proceedings of courts of which he is ex-officio clerk, over his signature as county clerk.

Approved in Lucas v. Boyd, 156 Ala. 429, 47 So. 209, holding mayor of city could take acknowledgments of conveyances under charter providing mayor may exercise powers of justice of peace; Lewis v. Russell, 47 Fla. 187, 36 So. 168, failure of clerk of circuit court who is also ex-officio county clerk to add words "county clerk" after his signature in issuing execution did not render execution absolutely void.

Authority of Deputy County Clerk in taking and certifying to acknowledgments of conveyances is coextensive with that of his principal.

Approved in dissenting opinion in Ex parte Corliss, 16 N. D. 539, 114 N. W. 992, majority holding deputy enforcement commissioner had no right to visit against orders grand jury sessions.

Persons in Whose Name deputy should act. See notes, 106 Am. St. Rep. 828, 830; 19 L. R. A. 181.

Acknowledgments. See note, 87 Am. St. Rep. 783.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 530.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 712.

20 Cal. 164–166, PEOPLE v. NOLL.

When Defendant in Criminal Proceeding has pleaded guilty, further proceedings to determine degree of crime are not a trial, and defendant cannot demand jury to determine degree of offense.

Approved in Marx v. People, 204 Ill. 251, 252, 68 N. E. 437, holding evidence unnecessary to prove guilt after plea of guilty on indictment setting forth the facts; Hollibaugh v. Hehn, 13 Wyo. 277, 79 Pac. 1047, on plea of guilty all material facts are admitted and there is nothing to be tried by jury; Krolage v. People, 224 Ill. 459, 79 N. E. 571, arguendo.

20 Cal. 169–172, HART v. BURNETT.

What Adjudications of State Courts can be brought up in United States supreme court by writ of error. See note, 62 L. R. A. 516.

20 Cal. 177–180, PEOPLE v. AH KI.

Possession of Stolen Property is not sufficient evidence to convict possessor of theft.

Approved in People v. Elster (Cal.), 3 Pac. 885, following rule.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 491.

Admissibility of Evidence Obtained by aid of involuntary or inadmissible confession. See note, 53 L. R. A. 403, 407.

20 Cal. 180–182, GRIFFIN v. POLHEMUS.

Granting or Refusing Continuance rests in sound discretion of court.

Approved in Territory v. Livingston, 13 N. M. 327, 84 Pac. 1023, following rule; Abrook v. Ellis, 6 Cal. App. 454, 92 Pac. 397, holding continuance properly refused.

20 Cal. 182–186, SWAN v. CHORPENNING.

Agreement Tending to Suppress Bidding on public contracts is fraudulent and void.

Approved in In re Salmon, 145 Fed. 653, holding fraudulent agreement between banks to obtain deposit of county funds by one of them at low rates; State v. Standard Oil Co., 218 Mo. 350, 116 S. W. 1009, dissolving oil company on ground it prevented competition; Hardison v. Reel, 154 N. C. 277, 70 S. E. 464, holding void contract by notary not to divulge bid to contract for carrying mails.

Effect of Preventing or Checking Bids upon validity of auction sales. See note, 20 L. R. A. 550.

20 Cal. 198–211, TABLE MOUNTAIN TUNNEL CO. v. SHRANAHAN.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 773.

20 Cal. 211–219, MASON v. CRONISE.

Actions on Judgments Recovered in courts of this state are barred in five years.

Approved in Feeney v. Hinckley (Cal.), 64 Pac. 409, following rule; National Bank of California v. Los Angeles Iron etc. Co., 2 Cal. App. 662, 84 Pac. 468, holding improper order for execution without notice more than five years after judgment; In re Rebman, 150 Fed. 762, 80 C. C. A. 594, holding proceeding under section 685, Code of Civil Procedure, allows enforcement of judgments after five years, independently of statute of limitations; Sublette v. St. Louis Iron Mountain & So. Ry. Co., 96 Mo. App. 122, 69 S. W. 748, holding suit upon judgment of justice court barred in five years, but scire facias lies to revive at any time within ten years.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 64.

20 Cal. 219–224, CLARK v. TROY.

"Valuable Consideration" has No Reference to adequacy of price, or of value of property conveyed, but is distinguished from good consideration.

Approved in Lindley v. Blumberg, 7 Cal. App. 145, 93 Pac. 897, holding one dollar sufficient to sustain deed on ground of valuable consideration.

20 Cal. 233–277, 81 Am. Dec. 118, **STATE v. McGLYNN.**

Equity cannot Set Aside Decree admitting will to probate.

Approved in In re Burton, 5 Cof. Prob. 241, following rule.

Distributees Under Fraudulent Will hold property in trust for rightful parties.

Approved in Estate of Walker, 160 Cal. 549, 117 Pac. 511, applying rule where will was found after decree of distribution of estate of intestate was rendered.

Relief from Decrees of Courts having exclusive jurisdiction over estates of decedents, minors and incompetent persons. See notes, 106 Am. St. Rep. 643; 1 Cof. Prob. 266.

Duly Probated Will can Only be Attacked under the statute providing for reopening decision within one year from probate.

Approved in Tracy v. Muir, 151 Cal. 370, 371, 121 Am. St. Rep. 117, 90 Pac. 834, and Estate of Davis, 151 Cal. 327, 121 Am. St. Rep. 105, 86 Pac. 186, both following rule; Del Campo v. Camarillo, 154 Cal. 662, 98 Pac. 1056, holding sole remedy for fraud in establishing will is contest under statute; Goldtree v. McAlister (Cal.), 23 Pac. 209, holding probate of will in this state on finding that it has been probated in foreign country is not subject to collateral attack, but may be attacked only by direct appeal; McDaniel v. Pattison (Cal.), 27 Pac. 654, refusing equitable aid to establish rights under will claimed to have been fraudulently suppressed, and contents of which could not be proven by two witnesses; Akeau v. Iakona, 13 Haw. 216, refusing as court of equity to set aside probate of will on ground of fraud; Medell v. Snyder, 71 Kan. 594, 81 Pac. 217, holding time for bringing action to contest will is not extended when such action is brought and plaintiff fails other than on merits after time has expired; State v. District Court, 34 Mont. 101, 115 Am. St. Rep. 510, 85 Pac. 868, 6 L. R. A. (n. s.) 617, holding will first probated in California and later in Montana could not be contested in Montana on ground of testator's lack of testamentary capacity; Ward v. Co. Commrs. of Logan County, 12 Okl. 275, 280, 70 Pac. 381, 382, holding plea that will duly probated was void could not be considered in ejectment suit for land demised; Bryan v. Nash, 110 Va. 334, 66 S. E. 71, holding order of court admitting copy of foreign will to probate and reciting that it was properly authenticated could not be collaterally attacked on ground will was not properly authenticated; Horton v. Barto, 57 Wash. 485, 135 Am. St. Rep. 999, 107 Pac. 194, holding failure of subscribing witness to will to comply with statute could not be raised on collateral attack.

Distinguished in Bacon v. Bacon, 150 Cal. 483, 89 Pac. 319, holding decree of distribution of decedent's estate can be reviewed in equity on ground of fraud or mistake in procurement.

Probate of Will. See note, 121 Am. St. Rep. 117.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 561.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 680, 682, 684, 686.

Validity of Acts Under Letters Testamentary or of administration afterward revoked or held invalid. See note, 21 L. R. A. 152.

20 Cal. 288–318, **HAYNES v. MEEKS.**

Sale of Real Property During Course of administration of estate must be commenced by petition.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 217, 82 Pac. 620, holding petition by state board essential to condemn swamp land for use for city levee outside city limits.

Authority of Probate Court to Order Sale of real property of intestate is purely statutory and limited thereby.

Approved in Noons' Estate, 49 Or. 291, 88 Pac. 675, holding ineffectual order of probate court to sell real estate when not called for in petition; Plains L. & I. Co. v. Lynch, 38 Mont. 279, 129 Am. St. Rep. 645, 99 Pac. 849, holding petition to sell real estate of decedent to pay debts did not sufficiently set forth condition of estate.

Probate Court Acquires No Jurisdiction over sale of realty unless petition alleges statutory requisites.

Qualified in Matter of Hughes, 159 Cal. 365, 113 Pac. 687, erroneous determination of superior court that petition for habeas corpus is sufficient is not reviewable by certiorari.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 325.

20 Cal. 318–351, **PERRY v. WASHBURN.**

A Tax is a Charge upon Persons or Property to raise money for public purposes.

Approved in Peter v. Parkinson, 83 Ohio St. 47, 93 N. E. 199, following rule; McRae v. County of Cochise, 5 Ariz. 33, 44 Pac. 300, holding void law offering bounty for locating artesian well on ground it was appropriation of funds raised by taxes for other than public use.

A Tax Does not Establish Relation of debtor and creditor between taxpayer and state, yet personal action may be had for its recovery.

Approved in Sonnesyn v. Akin, 12 N. D. 231, 97 N. W. 559, reaffirming rule; Buster & Jones v. Wright, 5 Ind. Ter. 417, 82 S. W. 859, holding tax collector of Creek Nation acting under Secretary of Interior could close place of business upon refusal to pay license tax therefor; Bailies v. City of Des Moines, 127 Iowa, 127, 102 N. W. 814, holding unpaid taxes are not such debts as may be deducted from taxpayer's gross assessment for taxes; Boston v. Turner, 201 Mass. 194, 87 N. E. 636, note holding tax not debt; dissenting opinion in William Ede Co. v. Heywood, 153 Cal. 620, 96 Pac. 83, 22 L. R. A. (n. s.) 562, majority holding purchaser of real property who pays taxes assessed on interest of mortgagee to remove lien cannot recover amount so paid from mortgagee.

Constitutionality of Imprisonment for debt. See note, 34 L. R. A. 654.

20 Cal. 352–387, **FITCH v. MILLER.**

Guardian may be Authorized to Sell real property of ward to provide for maintenance.

Approved in Guardianship of Hayden, 1 Cal. App. 77, 81 Pac. 668, following rule.

Petition by Guardian of Infant to Sell Real Estate of ward is essential to confer jurisdiction on court to make valid order of sale.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 217, 82 Pac. 620, holding petition by state board necessary to give jurisdiction to court to condemn swamp lands for city levee outside city limits.

When Devises and Bequests Vest. See note, 4 Cof. Prob. 449.

Validity of Acts Under Letters Testamentary or of administration afterward revoked or held invalid. See note, 21 L. R. A. 152.

20 Cal. 387–426, LEESE v. CLARK.

Supreme Court Loses Jurisdiction of Case when remittitur has been sent down and filed in court below.

Approved in Ott v. Boring, 131 Wis. 487, 111 N. W. 833, following rule; Jackson v. Barrett, 12 Idaho, 466, 86 Pac. 271, when appeal was dismissed without prejudice, second appeal could be perfected at any time after dismissal regardless of whether remittitur was filed in trial court; Horton v. State, 63 Neb. 38, 88 N. W. 148, jurisdiction of supreme court continues during term at which decision was rendered unless its mandate was acted upon by court below.

United States Patent Issued to Confirmee of Mexican land grant takes effect by relation at date of presentation of petition to board of land commissioners, and is conclusive evidence that title was in patentee at time of Mexican treaty.

Approved in Thompson v. Felton, 54 Cal. 554, following rule.

Previous Ruling of Appellate Court on Point distinctly made is law on that point on future appeals of that case.

Approved in Philbrook v. Newman, 148 Cal. 175, 82 Pac. 773, People v. Bennett (Cal.), 50 Pac. 704, and Messinger v. Anderson, 171 Fed. 790, 96 C. C. A. 445, all following rule.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 328.

General Verdict is Controlled by special findings.

Approved in Napa Val. Pkg. Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 471, 119 Pac. 472, following rule.

20 Cal. 427–431, FLETCHER v. DAINGERFIELD.

Attorney cannot be Disbarred Without Hearing on charges against him.

Approved in In re Boone, 83 Fed. 947, and Ex parte Robinson, 86 U. S. 513, 22 L. Ed. 205, both following rule; People v. Amos, 246 Ill. 302, 138 Am. St. Rep. 239, 92 N. E. 859, holding court's power to remove attorneys should be exercised according to same rules of law which govern determination of civil rights; In the Matter of Ebbs, 150 N. C. 54, 63 S. E. 195, 19 L. R. A. (n. s.) 892, and State v. Gebhardt, 87 Mo. App. 549, both holding court has inherent power independent of statute to disbar attorneys for cause.

20 Cal. 431–432, MORRISON v. MORRISON.

What Constitutes Desertion as ground for divorce. See note, 138 Am. St. Rep. 147.

Desertion as Ground for divorce. See note, 119 Am. St. Rep. 618.

20 Cal. 432–435, PEOPLE v. BOGGS.

Misconduct of Jurors, other than separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1041, 1043.

Correction of Verdict in criminal cases. See note, 23 L. R. A. 724, 728.

20 Cal. 436, PEOPLE v. BOSCOVITCH.

Court may Exclude Some Witnesses from courtroom during trial and allow others to remain.

Approved in State v. Worthen, 124 Iowa, 411, 100 N. W. 331, following rule.

Where Witness Ordered Excluded from Courtroom violated the order, his testimony cannot on that ground be excluded.

Approved in Loose v. State, 120 Wis. 121, 97 N. W. 528, following rule.

20 Cal. 439–441, PEOPLE v. NEWBERRY.

When Codefendant is Tried Separately, he is competent witness for defendant.

Approved in State v. Knudtson, 11 Idaho, 527, 83 Pac. 227, one jointly indicted with defendant but who has pleaded guilty is competent witness for state against codefendant.

Accessory Charged as Aider and Abetter of manslaughter may be convicted though principal be acquitted.

Approved in State v. Gray, 116 Iowa, 235, 89 N. W. 989, following rule.

20 Cal. 442–450, SPENCER v. VIGNEAUX.

Injunctions Against Judgments obtained by fraud, accident, mistake, surprise, and duress. See notes, 30 L. R. A. 791; 26 L. R. A. (n. s.) 538.

20 Cal. 450–489, FULTON v. HANLOW.

Pueblo Lands were Held in Trust to Use of city of San Francisco and were not subject to seizure on execution.

Approved in Tulare Irr. Dist. v. Collins, 154 Cal. 443, 97 Pac. 1125, holding unused lands in irrigation district are held in trust to uses specified in act creating such districts, and are not subject to execution; Smith v. Cowell, 41 Colo. 189, 92 Pac. 23, holding judgment in equity conclusive in action at law as to all matters determined in equity.

Decree Adjudging No Equity in Complaint establishes that equity has no jurisdiction, and findings of fact are unnecessary and cannot bind parties in subsequent action at law.

Approved in Collins v. Gray, 154 Cal. 135, 97 Pac. 144, holding that finding outside issues is immaterial cannot be carried into judgment, and could not bind defendant in any subsequent action.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 129.

20 Cal. 497–503, MURPHY v. NAPA COUNTY.

Complaint on Alleged Contract With County for public work should show authority of party contracting for county to make contract.

Approved in McPherson v. San Joaquin County (Cal.), 56 Pac. 804, holding authority of agent of county sufficiently alleged; Castle v. Bannock County, 8 Idaho, 130, 67 Pac. 37, holding individual member of board of county commissioners could not employ physician at expense of county to care for smallpox patients.

20 Cal. 509–516, McCABE v. GREY.

Subsequent Purchasers and Mortgagees of Real Property are charged with notice of all prior recorded conveyances.

Approved in State v. Grimes, 29 Nev. 85, 124 Am. St. Rep. 883, 84 Pac. 1073, 5 L. R. A. (n. s.) 545, holding abstract title companies have right of inspection of public records of conveyances.

Effect of Immaturity of Claim at time of insolvency upon right of setoff. See note, 17 L. R. A. 460.

Setoff Against Assigned Claim of debtor's demand against assignor. See note, 23 L. R. A. 306.

20 Cal. 518–520, PEOPLE v. MYERS.

Insanity as Defense in Criminal Action must be established by preponderance of evidence.

Approved in People v. Willard, 150 Cal. 552, 89 Pac. 128, following rule; State v. Shuff, 9 Idaho, 131, 92 Pac. 670, instruction "that, to establish defense of insanity, it must be clearly proved by defendant by preponderance of evidence given at trial," is erroneous.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 739, 740.

20 Cal. 525–529, PEOPLE v. CABANNES.

Bond Reciting Money Judgment Given on Appeal from judgment imposing fine is unauthorized and void.

Approved in Hoeg v. Pine, 143 Iowa, 248, 121 N. W. 1021, holding bond exacted by justice of peace of special constable to be without authority and void.

Judgment for Fine, or Imprisonment in Default, requires on appeal therefrom only bond for appeal from judgment of imprisonment.

Approved in People v. Barrett, 6 Cal. App. 580, 92 Pac. 647, holding bond on appeal from judgment of imprisonment and of fine too onerous, as requiring payment of fine in any event; San Francisco v. Hartnett, 1 Cal. App. 656, 82 Pac. 1066, holding void bond fixed by clerk having no authority to settle bonds.

20 Cal. 529–533, NAGLEE v. PACIFIC WHARF CO.

Assignment of Stock by Delivery of Certificate without transfer on books is invalid as against subsequent purchaser at execution sale against assignor, without notice of assignment.

Criticised in National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 577, 579, 108 Pac. 678, holding attaching creditor of assignor obtains only interest of assignor in stock sold but not transferred on books; Mapleton Bank v. Standrod, 8 Idaho, 749, 71 Pac. 121, 67 L. R. A. 656, holding written transfer, in good faith and for value, of stock as pledge for debt of assignor, but not entered on corporate books, is valid as against subsequent attachment thereof by creditor of assignor.

Compensation of Expert Witnesses. See note, 27 L. R. A. 669.

20 Cal. 534–586, LIN SING v. WASHBURN.

Act of April 26, 1862, to Discourage Chinese immigration is void, as taxing persons unequally.

Approved in Ex parte Woods, 52 Tex. Cr. 581, 124 Am. St. Rep. 1107, 108 S. W. 1174, 16 L. R. A. (n. s.) 450, holding void act of 1907 levying occupation tax on nonintoxicating malt liquors.

Constitutional Equality of Privileges, immunities and protection. See note, 14 L. R. A. 584.

20 Cal. 591–593, **PEOPLE ex rel. HALL v. SAN FRANCISCO.**

Right of Relator in Mandamus to attack constitutionality of statute relied upon. See note, 16 L. R. A. (n. s.) 268.

20 Cal. 593–595, **KELLER v. HYDE.**

Mandamus to Compel Payment of municipal debt. See note, 14 L. R. A. 780.

20 Cal. 602–615, 81 Am. Dec. 132, **BLEN v. BEAR RIVER ETC. WATER & MIN. CO.**

Ratification Supposes a Knowledge of the thing ratified.

Approved in Munroe v. Fette, 1 Cal. App. 334, 82 Pac. 207, and Russell v. Erie R. R. Co., 70 N. J. L. 816, 59 Atl. 153, 67 L. R. A. 433, both following rule; Tafft v. Presidio & Ferries R. Co. (Cal.), 22 Pac. 487, holding act of director in having transferred stock on books on his own account is not ratified by corporation, it being ignorant of his intention to misappropriate the stock.

Powers of President and Vice-president of corporation. See note, 14 L. R. A. 356.

20 Cal. 620–628, **MEEKS v. HAHN.**

At Common Law, Heir or Devisee had sole control of real estate, since it was not subject to payment of debts of decedent in any event.

Disapproved in Blakemore v. Roberts, 12 N. D. 400, 96 N. W. 1030, holding executor could bring suit to quiet title to real estate pending administration of estate.

To Authorize Sale of Realty of Estate by administrator, special proceeding commenced by petition showing statutory requisites is necessary.

Approved in Matter of Hughes, 159 Cal. 365, 113 Pac. 687, erroneous determination of superior court that petition for habeas corpus is sufficient is not reviewable by certiorari; McCarty v. Southern Pacific Co., 148 Cal. 217, 82 Pac. 620, holding petition of state board essential in proceeding to condemn swamp land for levee outside city limits.

Personal Representative has Sole Right to Possession until settlement and distribution.

Approved in Blair v. Hazzard, 158 Cal. 725, 112 Pac. 300, grantee of devisee of realty entering into possession pleading administration acquires no title against estate by adverse possession.

Ejectment by Executor or administrator. See note, 136 Am. St. Rep. 82, 83.

What Title or Interest will support ejectment. See note, 18 L. R. A. 790.

20 Cal. 634–636, **CLARKIN v. LEWIS.**

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 911.

Lease of Homestead by one spouse only. See note, 133 Am. St. Rep. 337.

Conveyance of Homestead by Husband after abandonment by wife. See note, 8 L. R. A. (n. s.) 565.

20 Cal. 637–643, 81 Am. Dec. 137, KENYON v. WELTY.

Parties Entering into Contract Under Supposition that law affecting it was in accord with previous decision of supreme court will not be relieved because such decision is later overruled.

Approved in Allen v. Allen (Cal.), 27 Pac. 33, and Crigler v. Shepler, 79 Kan. 840, 101 Pac. 621, 23 L. R. A. (n. s.) 500, both following rule; Lancaster v. Flowers, 208 Pa. 207, 57 Atl. 529, holding where one of several cotenants had full knowledge of condition of estate and receipted for many years for rent in certain amount, he could not claim he should have been paid larger amount because court declared certain deed to be mortgage under which he would be entitled to larger amount; Norris v. Crowe, 206 Pa. 449, 98 Am. St. Rep. 783, 55 Atl. 1129, holding bill did not lie in equity to cancel agreement to reduce ground rent in consideration that principal would not be paid off, when such contract was made in ignorance of supreme court decision that such rents were irredeemable.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 798.

20 Cal. 659–676, SPEAR v. WARD.

Where Body of Complaint Shows General Guardianship of plaintiff, designation in caption as guardian ad litem is of no importance.

Approved in Nisbet v. Clio Min. Co., 2 Cal. App. 443, 83 Pac. 1080, holding mistake in name of corporation sued may be corrected when it plainly appears in body of complaint what was intended.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 21 CALIFORNIA.

21 Cal. 11–24, SMITH v. OWENS.

Note Given in Consideration of Antecedent Debt does not discharge the debt, but suspends the remedy until the maturity of the note.

Approved in Otto v. Griffin, 54 Wash. 508, 103 Pac. 790, following rule.

Effect of Giving Creditor secret advantage in composition. See note, 27 L. R. A. 37.

21 Cal. 24–33, 81 Am. Dec. 140, FALLON v. BUTLER.

Action Lies Against Executor to Foreclose mortgage on real estate of decedent, although debt secured has been presented as claim against estate, the mortgage not being a claim against the estate.

Approved in First National Bank v. Glenn, 10 Idaho, 237, 238, 109 Am. St. Rep. 204, 77 Pac. 627, following rule; Wadleigh v. Phelps, 149 Cal. 640, 87 Pac. 99, holding plaintiff in action to foreclose mortgage could testify as to facts occurring in decedent's lifetime.

A "Claim" Against Estate of Deceased Person within meaning of statute requiring their presentation to executor is demand of pecuniary nature which might have been enforced against deceased in his lifetime.

Approved in Knutsen v. Krook, 111 Minn. 357, 127 N. W. 13, following rule; Estate of Finch, 3 Cof. Prob. 296, claim of undertaker for funeral expenses need not be presented for allowance against estate of decedent; Kline v. Gingery, 25 S. D. 18, 124 N. W. 959, demand for rescission of sale of horse and return of purchase notes is not "claim" required to be presented to administrator of decedent's estate; Houtz v. Commissioners of Uinta Co., 11 Wyo. 171, 70 Pac. 843, "claims and demands" against county required to be presented for audit refer to money claims.

21 Cal. 34–43, WHITE v. MOSES.

Defendant in Ejectment Who has not Entered under color of title adversely to plaintiff and in good faith is not entitled to have value of improvements placed by him on the land deducted from plaintiff's damages.

Distinguished in Hawaiian Commercial Sugar Co. v. Waikapu Sugar Co., 9 Haw. 422, holding partition suit is proceeding in equity and equities of parties must be considered.

21 Cal. 45–47, **SHAVER v. OCEAN MINING CO.**

Note of Corporation Considered and Held to show upon face that signers were not personally bound.

Approved in Germania Nat. Bank v. Mariner, 129 Wis. 547, 109 N. W. 575, following rule.

Personal Liability of Officers on note made for corporation. See note, 19 L. R. A. 676.

Liability of Principal on Negotiable Paper executed by agent. See note, 21 L. R. A. (n. s.) 1049, 1061.

21 Cal. 47–51, **COLES v. SOULSBY.**

Accord and Satisfaction must be Specially Pleaded to serve as defense in action for recovery of money.

Approved in Grunwald v. Freese (Cal.), 34 Pac. 75, Hogan v. Burns (Cal.), 33 Pac. 632, and Harvey v. Denver etc. R. R. Co., 44 Colo. 263, 130 Am. St. Rep. 120, 99 Pac. 33, all following rule.

Parol Evidence as to Consideration of deed. See note, 20 L. R. A. 103.

21 Cal. 51–55, **HAYES v. SHATTUCK.**

In Action of Ejectment Brought by Purchaser at foreclosure sale against lessee of mortgagee, decree foreclosing mortgage is conclusive as to due execution of mortgage.

Approved in Shelby v. Crighton, 65 Neb. 493, 101 Am. St. Rep. 630, 91 N. W. 372, where judgment is based on certain premises, such premises are equally conclusive, in subsequent action between same parties, as judgment itself.

Voluntary Appearance by Defendant Gives Jurisdiction of person without service of summons.

Approved in First Nat. Bank of Weiser v. Washington Co., 17 Idaho, 317, 105 Pac. 1056, person appearing before board of equalization and opposing change in valuation of his property thereby waives notice of such hearing.

Effect of Judgment Obtained upon Unauthorized appearance by attorney. See note, 21 L. R. A. 848.

21 Cal. 56–60, **SAN FRANCISCO v. PIXLEY.**

Sale En Masse Under Writ of Execution of several distinct parcels of land at price much below actual value is not void, but voidable on application of judgment debtor.

Approved in Bechtel v. Wier, 152 Cal. 447, 93 Pac. 77, 15 L. R. A. (n. s.) 459, following rule.

21 Cal. 60–71, **TEWKSBURY v. O'CONNELL.**

Contract Containing Mutual Covenants between several parties is not valid unless signed by all parties.

Cited in State v. Jackson, 128 Iowa, 557, 104 N. W. 1142, contract for sale of land considered and held to vest no title in purchaser, but merely option to purchase; Clint v. Eureka Crude Oil Co., 3 Cal. App. 466, 86 Pac. 818, arguendo.

Distinguished in Kyle v. Hamilton (Cal.), 68 Pac. 485, holding where deed and contract requiring return of deed on payment of debt were made at same time, and control imposes no obligation on grantor, and delivery is not conditioned on his signing it, it is not invalid for lack of his signature.

Effect of Deed in Partition, as distinguished from ordinary deeds. See note, 57 L. R. A. 340.

21 Cal. 71–75, FRISCH v. CALER.

Plea of Payment in Action upon Promissory Note operates as traverse and not as averment of new matter.

Approved in Schecter v. White, 41 Colo. 220, 92 Pac. 700, in action on account, where defendant denied amount was due, and alleged purchase was on unexpired credit, answer was denial only, and not affirmative matter requiring reply.

Allegation of Nonpayment is essential in complaint on promissory note.

Approved in Yancey v. Northern Pac. Ry. Co., 42 Mont. 348, 112 Pac. 535, applying rule in action on implied contract for goods sold; Cunningham v. Springer, 13 N. M. 285, 82 Pac. 238, holding in action upon contract payment could be proven under general issue; Conkling v. Weatherwax, 181 N. Y. 264, 73 N. E. 1030, discussing necessity of pleading nonpayment in actions on written obligations.

21 Cal. 76–77, PECHAUD v. RINQUET.

Deficiency Judgment cannot be Entered against administrator after application to debt of proceeds of sale on foreclosure of mortgaged property of estate.

Approved in First Nat. Bank v. Glenn, 10 Idaho, 238, 109 Am. St. Rep. 204, 77 Pac. 627, reaffirming rule.

21 Cal. 77–80, GORDON v. WANSEY.

Assignment of Note to Joint Maker for consideration constitutes payment.

Approved in Deavenport v. Green River Dep. Bank, 138 Ky. 356, 137 Am. St. Rep. 386, 128 S. W. 89, holding where joint note was assigned to comaker, court would allow him, in suit brought by him upon note, to enforce contribution.

Payment of Note by Surety Extinguished obligation of note and surety's recovery from principal is on assumpsit.

Approved in Crystal v. Hutton, 1 Cal. App. 254, 81 Pac. 1116, following rule.

Assignment of Joint and Several Negotiable Note by payee to one maker before maturity is payment, and no action thereon lies against makers by assignment to third person after maturity.

Approved in Crystal v. Hutton, 1 Cal. App. 256, 81 Pac. 1116, holding assignment of note to surety, who is comaker, after he has paid note does not give him right of action on note against his principal; Yule v. Bishop (Cal.), 62 Pac. 70, holding surety on corporation note who paid same and took assignment thereof could not recover on statutory liability of stockholders.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 781.

Distinguished in Enscoe v. Fletcher, 1 Cal. App. 663, 82 Pac. 1076, holding note distributed to one joint maker as heir after death of

payee is extinguished only as to equitable share of liability of such joint maker, who may enforce contribution in right of payee against comakers.

21 Cal. 87–92, **BURTON v. LIES.**

Writ of Assistance can Only Issue against defendants in foreclosure suit and parties holding under them who are bound by the decree.

Approved in Fox v. Stubenrauch, 2 Cal. App. 93, 83 Pac. 84, and Harding v. Harker, 17 Idaho, 346, 134 Am. St. Rep. 259, 105 Pac. 790, both following rule; dissenting opinion in Anderson v. Thompson, 3 Ariz. 69, 20 Pac. 805, majority holding writ of assistance proper remedy upon foreclosure against party who disclaimed right under deed of mortgagor.

Jurisdiction of Equity to Put Party in possession in aid of decree. See note, 93 Am. St. Rep. 163.

When Title of Purchaser at Foreclosure Sale fails by reason of defect of parties he can seek relief in equity.

Approved in Investment Securities Co. v. Adams, 37 Wash. 217, 79 Pac. 627, holding where children of deceased mortgagor were not joined in foreclosure suit, purchaser at foreclosure sale, in ignorance of such fact, could move to set aside proceedings and have filed amended complaint joining such children.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 50.

Liability of Community Property for debts. See note, 19 L. R. A. 235.

21 Cal. 92–102, **HIDDEN v. JORDAN.**

A Trust must be Enforced according to its terms.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, denying equitable relief inconsistent with terms of trust.

Where Part of Purchase Price of Land is paid by one other than grantee, a trust results in his favor in proportion to the part of purchase price paid to whole.

Approved in Moultrie v. Wright, 154 Cal. 523, 98 Pac. 259, Gerety v. O'Sheehan, 9 Cal. App. 449, 99 Pac. 546, and Levey v. Ryland, 32 Nev. 466, 468, 109 Pac. 907, 908, all following rule.

Parol Evidence is Admissible, despite statute of frauds, to show fraud.

Approved in Teske v. Dittberner, 70 Neb. 548, 113 Am. St. Rep. 802, 98 N. W. 58, following rule.

21 Cal. 103–107, 81 Am. Dec. 146, **MONTGOMERY v. MIDDLEMISS.**

Decree on Foreclosure of Mortgage Concludes rights of all parties to action, and sale passes estate as of date of mortgage.

Approved in Dixon v. Eikenberry, 161 Ind. 317, 67 N. E. 917, 68 L. R. A. 323, where mortgagee failed on foreclosure to set up tax claims held as lien, he lost all right to any claims thereunder as against parties to suit.

Decree of Foreclosure. See note, 95 Am. St. Rep. 752.

21 Cal. 113–115, 81 Am. Dec. 151, **SHERBOURNE v. YUBA COUNTY.**

County is not Liable for Injuries to patient in county hospital caused by unskillful treatment by resident physician.

Approved in Twyman's Admr. v. Board of Council, 117 Ky. 521, 78 S. W. 446, 64 L. R. A. 572, holding city not liable for negligence in management of authorized public pesthouse; Nicholson v. Detroit, 129 Mich. 252, 88 N. W. 697, 56 L. R. A. 601, holding city not liable for death from smallpox of one in city's employ infected while tearing down infected building on city land formerly used as a pesthouse; Haggerty v. St. Louis etc. Ry. Co., 100 Mo. App. 443, 74 S. W. 461, holding railroad relief department supported by deductions from employees' wages not a charity so as to relieve department from negligence in selecting physicians to treat injured employee; James v. Trustees of Wellston Twp., 18 Okl. 66, 90 Pac. 103, holding township not liable for injury caused by defect in highway; Cunningham v. Seattle, 42 Wash. 140, 84 Pac. 643, holding city not liable for negligence in allowing horse used in fire department to trespass on private property.

Liabilities of Counties for Torts and negligence. See note, 39 L. R. A. 63.

Liability of Charitable Institution for negligence. See note, 23 L. R. A. 201.

21 Cal. 115–120, CREIGHTON v. PRAGG.

Rights Acquired Under Contract made in pursuance of statute are not affected by its repeal.

Approved in May v. Cass County, 12 N. D. 143, 96 N. W. 294, following rule; James v. Oakland Traction Co., 10 Cal. App. 797, 103 Pac. 1087, holding change in law regulating speed of street-cars did not affect right to recover for injury caused by excessive speed under old law.

21 Cal. 120–122, HOFF v. BOUIN.

Where Tenant was Notified to Quit at end of term, and later was offered premises at increased rent, from which offer he did not dissent, but held over, it will be deemed he held over by consent of landlord at new rental.

Approved in Moore v. Harter, 67 Ohio St. 254, 65 N. E. 884, and Williams v. Foss-Armstrong Hardware Co., 135 Wis. 284, 115 N. W. 804, both holding where tenant was notified to quit at end of term, and that rental would be increased, his holding over was agreement to pay increased rent, the other term of lease remaining unchanged.

21 Cal. 122–129, PIERSON v. McCAHILL.

Omission of Material Clause in Contract by mistake necessitates reformation of contract before party can avail himself of contract.

Approved in Reynolds v. Pennsylvania Oil Co., 150 Cal. 634, 89 Pac. 612, contract offered as bar to plaintiff's action considered and held insufficient.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 877, 895.

Right of One Whose Property is taken for public use without consent or condemnation to maintain action for compensation or permanent damages. See note, 28 L. R. A. (n. s.) 978.

21 Cal. 129–134, HUMISTON v. SMITH.

Writ of Scire Facias is Abolished, and judgment may be enforced after five years by civil action.

Approved in De Baca v. Wilcox, 11 N. M. 352, 68 Pac. 923, following rule; Weldon v. Rogers, 151 Cal. 435, 90 Pac. 1063, holding section

685 of Code of Civil Procedure applies to all judgments not barred by limitation at time of passage of act; Collin County Nat. Bank v. Hughes, 155 Fed. 393, 83 C. C. A. 661, holding rule as to abolition of scire facias does not apply to federal courts; In re Rebman, 150 Fed. 760, 80 C. C. A. 594, holding that remedies on dormant judgment are action on judgment in five years, and motion for leave to issue execution under section 685, Code of Civil Procedure; Kapp v. District Court, 32 Nev. 267, 107 Pac. 95, petition reciting order for alimony pendente lite, its nonpayment, amount accrued and unpaid, and defendant's refusal to pay, and praying for execution against defendant's property, is improper practice; Perkins v. Bangs, 206 Mass. 414, 92 N. E. 625, writ of scire facias is independent suit at law although issued on judgment.

Scire Facias. See note, 122 Am. St. Rep. 73.

Accord and Satisfaction by part payment. See note, 20 L. R. A. 802.

21 Cal. 135–140, SHORES v. SCOTT RIVER CO.

Decree Foreclosing Mortgage cuts off all rights of such subsequent purchasers or encumbrancers as are parties to action.

Approved in Dixon v. Eikenberry, 161 Ind. 318, 67 N. E. 917, 68 L. R. A. 323, failure of mortgagee on foreclosure to set up tax claim barred such claim as against all parties to suit.

21 Cal. 151–164, LEESE v. SHERWOOD.

Dismissal of Action is Final, as against all claims made by it, though not final determination of rights of parties as they may be presented in another suit.

Approved in Lyon v. Barnes, 133 Iowa, 720, 111 N. W. 10, reaffirming rule.

21 Cal. 166–170, MILIKEN v. HUBER.

Certiorari will not Issue to Review appealable order or decision because time for appeal has passed.

Approved in Hall v. Justice's Court, 5 Cal. App. 139, 89 Pac. 872, refusing certiorari to review default judgment in justice's court.

Exceptions to Rule That Certiorari will not lie where there is an appeal. See note, 50 L. R. A. 788.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 34, 36.

21 Cal. 172–178, 81 Am. Dec. 153, BAUM v. GRIGSBY.

Vendor of Real Property has Lien for unpaid purchase money, but such lien does not pass by transfer of claim for purchase money.

Approved in Coos Bay Wagon Co. v. Crocker, 4 Fed. 583, 6 Saw. 574, following rule.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 188, 200.

21 Cal. 178–191, LEWIS v. COVILLAND.

Person for Whose Benefit a Contract was made, though not a party, may sue thereon.

Approved in Northup v. Altadena etc. Syndicate, 6 Cal. App. 102, 91 Pac. 422, holding where business of maker of note was transferred to corporation, which assumed liabilities of maker including note,

payee may sue corporation on note, promise of transferee being for his benefit.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 203.

21 Cal. 215–219, **WELLS v. McPIKE.**

Answer to Verified Complaint Denying Indebtedness without denying grounds is denial of conclusion of law only and raises no issue.

Approved in Brandt v. Krogh, 14 Cal. App. 57, 111 Pac. 283, holding fact alleged in cross-complaint admitted by failure to deny.

Admission of Evidence to Prove Fact admitted in pleadings is not ground for new trial.

Approved in Thornton-Thomas Co. v. Bretherton Co., 32 Mont. 93, 80 Pac. 13, following rule.

21 Cal. 225–227, **HICKMAN v. ALPAUGH.**

Law of Another State, in Absence of all proof, is presumed to be same as in this state.

Approved in Lilly-Brackett Co. v. Sonnemann, 157 Cal. 198, 106 Pac. 717, applying rule in regard to statute of limitations; O'Sullivan v. Griffith, 153 Cal. 507, 95 Pac. 875, applying rule in regard to transfer of street railway franchise; Maloney v. Winston Bros. Co., 18 Idaho, 763, 111 Pac. 1088, applying rule in regard to recovery for injuries.

Presumption as to Law of other states. See note, 21 L. R. A. 468.

How Case Determined when proper foreign law not proved. See note, 67 L. R. A. 43.

Oral Proof of Foreign Laws. See note, 25 L. R. A. 449.

21 Cal. 229–233, **PLAYTER v. CUNNINGHAM.**

Landlord's Duty to Put Tenant in possession. See note, 134 Am. St. Rep. 920, 922.

21 Cal. 237–254, **FALL v. SUTTER COUNTY.**

Rights and Duties of Toll-bridge proprietors. See note, 58 L. R. A. 165.

21 Cal. 261–268, **PEOPLE v. GRAHAM.**

In Action for Assault on Child where witness could not testify because of incompetency, proof of statements by her cannot be received.

Approved in State v. Wheeler, 116 Iowa, 214, 93 Am. St. Rep. 236, 89 N. W. 979, following rule.

Admissibility of Declarations of Infant too young to be sworn as witness. See note, 65 L. R. A. 317.

Miscellaneous.—Cited in People v. Elster (Cal.), 3 Pac. 888, to point that court must not in its charge directly or indirectly imply the guilt of the accused.

21 Cal. 274–280, **MILLS v. GLEASON.**

Elements of Damages Recoverable on replevin bond. See note, 30 L. R. A. (n. s.) 369.

21 Cal. 280–289, 81 Am. Dec. 157, **SPEYER v. IHMELS.**

Subsequent Attaching Creditor may Intervene in action in which attachment has been issued to contest validity of first attachment.

Approved in Farley v. St. Paul Inves. & Sav. Soc., 110 Minn. 317, 125 N. W. 678, and Potlatch Lumber Co. v. Runkel, 16 Idaho, 196, 101 Pac. 397, 23 L. R. A. (n. s.) 536, both holding claimant of property attached could intervene in main action to protect his interest.

Right of Other Claimants of Property to intervene in attachment. See note, 23 L. R. A. (n. s.) 537.

Right of Creditors to Question validity of attachment. See note, 35 L. R. A. 766, 767.

21 Cal. 291–305, 82 Am. Dec. 738, KEANE v. CANNOVAN.

Payment of Taxes by Grantee in Tax Deed during time of his possession under the deed is not of itself evidence of owner's abandonment.

Approved in Houghton v. Kern Valley Bank, 157 Cal. 293, 107 Pac. 114, holding as immaterial evidence of payment of taxes by intervener claiming title under tax deed.

Description of Property in Tax Deed must be certain in itself, and not require evidence aliunde to make it certain.

Approved in Baird v. Monroe, 150 Cal. 573, 89 Pac. 357, holding tax deed using abbreviations and referring to map sufficiently clear to identify land; Commercial Nat. Bank v. Schlitz, 6 Cal. App. 182, 91 Pac. 753, holding tax title invalid because of uncertainty of description in deed; Stough v. Reeves, 42 Colo. 439, 95 Pac. 960, holding description of land in tax proceedings as portion of entire larger tract simply by number and block without reference to maps is insufficient; Gouaux v. Beaullieu, 123 La. 691, 49 So. 287, upholding description in tax deed.

Descriptions in Tax Proceedings. See note, 111 Am. St. Rep. 159.

Abandonment Depends upon intention to abandon.

Approved in Patterson v. Mills (Cal.), 68 Pac. 1036, holding evidence did not show abandonment of right to use joint ditch; Chicago etc. R. R. Co. v. Clapp, 201 Ill. 426, 427, 66 N. E. 225, holding railroad right of way abandoned by nonuser accompanied by acts evidencing intent to abandon; Sowles v. Minot, 82 Vt. 355, 137 Am. St. Rep. 1010, 73 Atl. 1029, holding abandonment would not be inferred from nonpayment of taxes.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 891, 903, 908.

Action of Ejectment Lies Only Against Occupant of premises, and to him plaintiff must look for compensation for its use.

Approved in Chicago etc. R. R. Co. v. Clapp, 201 Ill. 431, 66 N. E. 227, holding lessor of land recovered in ejectment bound by judgment though not party to suit.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 177.

21 Cal. 305–308, REESE v. MAHONEY.

Where Plaintiff Stipulates Default may be set aside, undue delay in using right forfeits it.

Approved in McWhirter v. Donaldson, 36 Utah, 304, 104 Pac. 735, holding right to file answer after statutory time under stipulation forfeited by delay.

21 Cal. 309–317, WHEELOCK v. WARSCHAUER.

Tenant may Show That His Landlord's Title has terminated, although estopped to question the right under which he holds.

Approved in Teich v. Arms, 5 Cal. App. 479, 90 Pac. 964, following rule.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 99, 100.

Effect of Acquisition of Adverse Title by tenant. See note, 120 Am. St. Rep. 58.

21 Cal. 326–330, 82 Am. Dec. 747, BLOCKLEY v. FOWLER.

Purchase by Mortgagee at Sale Under Power of Sale in mortgage passes legal title, but is voidable in equity.

Approved in Tafft v. Presidio & Ferries R. Co. (Cal.), 22 Pac. 488, holding transfer of stock to himself by one holding power of attorney from owner of stock authorizing transfer of stocks generally is only notice of purchase of such stock to corporation on whose books transfer was made, and such corporation is not liable for conversion when in ignorance of fraudulent intent of attorney.

Sales Under Powers in Mortgages and trust deeds. See note, 92 Am. St. Rep. 578.

21 Cal. 337–342, PEOPLE v. BRANNIGAN.

Separation of Jury During Deliberation without permission of court is ground for setting aside verdict, unless affirmatively shown that defendant was not prejudiced thereby.

Approved in People v. Cord, 157 Cal. 571, 108 Pac. 515, holding separation of jurors during recess is not ground for objection when all were kept inaccessible to approach on the case.

Effect of Separation of Jury. See note, 103 Am. St. Rep. 164.

Permitting Separation of Jury in capital case. See note, 24 L. R. A. (n. s.) 779.

21 Cal. 342–344, VAN WINKLE v. HINCKLE.

Action to Quiet Title cannot be Maintained as against one in possession who denies tenancy and claims to hold adversely.

Approved in Hebden v. Bina, 17 N. D. 242, 138 Am. St. Rep. 700, 116 N. W. 87, in action to determine adverse claim to real property, party in possession making adverse claim not estopped to deny plaintiff's title when plaintiff claims title in fee.

Effect of Legal Remedy upon Equitable Jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 71.

Right of Tenant to Dispute Landlord's Title in latter's action to establish. See note, 29 L. R. A. (n. s.) 86.

21 Cal. 344–345, PEOPLE v. VICE.

Indictment for Robbery must Allege that property taken was property of some person other than defendant.

Approved in People v. Cleary, 1 Cal. App. 53, 81 Pac. 754, following rule; Triplett v. Commonwealth, 122 Ky. 43, 91 S. W. 283, where owner took his own property from possession of court's receiver, he was not guilty of larceny in absence of proof of felonious intent; Jones v. State, 95 Miss. 123, 48 So. 408, indictment for robbery for taking property from person defective in not alleg-

ing intent to steal; State v. Ham, 21 S. D. 601, 114 N. W. 715, proof that another than those charged in indictment for larceny as owners of stolen cattle was part owner constitutes fatal variance; Glenn v. State, 49 Tex. Cr. 351, 92 S. W. 806, holding evidence insufficient to support conviction for robbery because not showing defendant did not believe property taken to be his own; McGinnis v. State, 16 Wyo. 77, 91 Pac. 937, holding indictment failed to allege ownership of money taken.

Nature and Elements of Crime of robbery. See note, 135 Am. St. Rep. 485.

Robbery by Taking from One Property belonging to another. See note, 67 L. R. A. 344.

Distinguished in In re Myrtle, 2 Cal. App. 389, 84 Pac. 338, holding indictment not stating property taken belonging to another than accused was aided by plea of guilty, and habeas corpus does not lie.

What Force Sufficient to constitute robbery. See note, 57 L. R. A. 443.

21 Cal. 346–348, HART v. ROBERTSON.

Tenant in Common is Entitled to Possession as against all the world except cotenants, and may maintain action for recovery of estate in common against strangers to title.

Approved in Griswold v. Minneapolis etc. R. R., 12 N. D. 439, 102 Am. St. Rep. 572, 97 N. W. 539, following rule.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 713.

What is Community Property. See notes, 126 Am. St. Rep. 108; 4 Cof. Prob. 45.

21 Cal. 349–351, CANFIELD v. TOBIAS.

Plaintiff is not Required to Anticipate in complaint any defense that defendant may make.

Approved in Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 144, 95 Pac. 1031, holding plaintiff in trover, on usual averments, may prove fraud of third party in acquiring property and transfer to defendant without consideration, and with notice of fraud.

21 Cal. 351–368, PIMENTAL v. SAN FRANCISCO.

Majority of All Elected Members of City Council is necessary to pass valid ordinance.

Approved in Wood v. Gordon, 58 W. Va. 324, 52 S. E. 262, following rule; Pollasky v. Schmid, 128 Mich. 700, 92 Am. St. Rep. 560, 87 N. W. 1031, 55 L. R. A. 614, holding two-thirds vote of all elected aldermen necessary to pass ordinance over veto.

Sale of City Property Void for Want of authority was not ratified by appropriation of proceeds.

Approved in Chenowith v. State, 50 Tex. Cr. 244, 96 S. W. 22, holding publication of order declaring local option in effect made contrary to judge's express order was not ratified by judge's later act certifying adoption of local option based in part on such publication.

Where Person or City Obtains Money of another by mistake, or without authority of law, it is its duty to refund.

Approved in Union Nat. Bank of Kansas City v. Lyons, 220 Mo. 564, 119 S. W. 547, holding bank liable on note, consideration for which it had received although executed by cashier without authority; Ward v. City of Lincoln, 87 Neb. 667, 128 N. W. 26, where city contract work was to be paid for by special assessment, failure of city to collect assessment did not relieve it of liability to contractor; Rogers v. City of Omaha, 82 Neb. 123, 117 N. W. 120, where city had issued warrants against certain fund in payment for street work and warrants were accepted by contractor, failure of such fund did not relieve city from liability.

Where Power of City can Only be Exercised by direct ordinance, no other mode can be adopted in its stead.

Approved in State v. Board of Commrs. of Newton Co., 165 Ind. 270, 74 N. E. 1903, holding void issuance of bonds by county upon motion and order of county council when statute provided for such issuance only by ordinance.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 157.

21 Cal. 368–373, PEOPLE v. LAWRENCE.

Indictment Need not be Indorsed "a true bill."

Approved in Shivers v. Territory of Oklahoma, 13 Okl. 473, 475, 74 Pac. 901, 902, following rule.

Dying Declarations are Open to contradiction by showing other statements made by deceased.

Approved in Seifert v. State, 160 Ind. 470, 98 Am. St. Rep. 340, 67 N. E. 102, State v. Mayo, 42 Wash. 546, 85 Pac. 253, and State v. Fuller, 52 Or. 53, 96 Pac. 460, all following rule.

Dying Declarations as Evidence. See note, 56 L. R. A. 442.

21 Cal. 374–385, McKINNEY v. SMITH.

Right of Prior Appropriation of Water. See note, 30 L. R. A. 674, 675.

Miscellaneous.—Cited in Lux v. Haggin (Cal.), 4 Pac. 933, to point that system of mining rules which grew up among mining population by voluntary assent are recognized rights independent of legislation.

21 Cal. 385–386, PEOPLE v. BECK.

Indictment for Robbery must State Property was taken from person of another.

Approved in O'Donnell v. People, 224 Ill. 225, 79 N. E. 642, where accused assaulted watchman in order to steal money in safe, he was guilty of assault with intent to rob.

21 Cal. 389–392, VIDEON v. GRIFFIN.

Parol Acknowledgment of Sufficiency of agent's authority to execute deed to land does not remove the insufficiency.

Approved in Murphy v. Brown, 12 Ariz. 276, 100 Pac. 804, holding lease signed by one party to be charged and by agent of another not authorized in writing is invalid as lease but enforceable as contract to lease; People's Mining etc. Co. v. Central Consolidated

Mines Corp., 20 Colo. App. 563, 80 Pac. 479, holding ratification of contract of sale of mines could be shown only by writing; Hickox v. Bacon, 17 S. D. 567, 97 N. W. 848, where defendant's daughter wrote letters authorizing sale of real estate, but not at dictation of nor in presence of defendant, defendant was not bound thereby; dissenting opinion in Brandon v. Pritchett, 126 Ga. 296, 55 S. E. 245, majority holding authority to make written memorandum required by statute of frauds need not be in writing.

21 Cal. 400–403, **PEOPLE v. VANCE.**

To Authorize Appellate Court to Set Aside Verdict in criminal case, there must be such overwhelming evidence against verdict as to justify inference of passion, prejudice, or bias in its rendition.

Approved in Williams v. Alaska Commercial Co., 2 Alaska, 51, holding verdict did not show prejudice.

Indictment for Murder is not vitiated by designation of offense as "murder in first degree."

Approved in State v. Noah, 20 N. D. 292, 124 N. W. 1126, following rule; State v. Gibbons, 142 Iowa, 99, 120 N. W. 475, holding indictment sufficiently alleged murder in second degree though not in form of statute.

21 Cal. 403–413, **COOPER v. PENA.**

Equity will not Specifically Enforce Contract that is not just and reasonable.

Approved in Marsh v. Lott, 8 Cal. App. 392, 97 Pac. 166, refusing specific performance of contract as unjust consisting of option to purchase; Jolliffe v. Steele, 9 Cal. App. 214, 98 Pac. 545, and Pacific etc. Ry. Co. v. Campbell-Johnston, 153 Cal. 112, 94 Pac. 626, both refusing specific performance for lack of mutuality of remedy between parties.

To Compel Specific Performance of Contract, remedy as well as obligation must be mutual.

Approved in Tombigbee Valley R. R. Co. v. Fairford Lumber Co., 155 Ala. 589, 47 So. 93, refusing specific performance of contract imposing mutual obligations which could not be enforced in entirety; Dimmick v. Stokes, 151 Ala. 156, 43 So. 856, refusing specific performance of contract for employment for want of mutuality; Wadick v. Mace, 191 N. Y. 5, 83 N. E. 572, refusing specific performance of contract for sale of land which provided vendor could not sue for specific performance or damages in any event, but placed no restriction upon vendee.

Distinguished in Turley v. Thomas, 31 Nev. 203, 135 Am. St. Rep. 667, 101 Pac. 577, holding contract for delivery of corporate stock in consideration of services to be rendered could be specifically enforced after services were rendered.

Equity will not Enforce Specifically Contract for personal services.

Approved in Roquemore v. Mitchell Bros., 167 Ala. 480, 52 So. 425, following rule; Deity v. Stephenson, 51 Or. 607, 95 Pac. 808, refusing specific performance for services of husband and wife.

Rights Conferred by a "Refusal" or "option." See note, 21 L. R. A. 132.

21 Cal. 413–415, OULLAHAN v. STARBUCK.

Where Record on Appeal from Grant of new trial shows motion made on several grounds without showing on which ruling was based, order will not be reversed if it could have been made on any of them.

Approved in Austin v. Gagan (Cal.), 30 Pac. 790, following rule.

21 Cal. 415–419, MATTER OF OLIVEREZ.

Constitutional Amendment of 1861 relating to judiciary continued existing courts until new courts were organized.

Approved in Ex parte Prindle (Cal. App.), 94 Pac. 873, holding amendment to article IV, section 25½, Constitution, respecting fish and game districts, prevails over earlier conflicting parts of Constitution, but existing laws continue in force until new legislation under amendment becomes effective; Kingsbury v. Nye, 9 Cal. App. 578, 99 Pac. 987, holding constitutional amendment of 1908 fixing salaries went into effect at once.

21 Cal. 419–423, RHODES v. CRAIG.

Validity of Patent from State cannot be attacked by one not claiming under state.

Approved in dissenting opinion in Williams v. San Pedro, 153 Cal. 51, 94 Pac. 237, majority holding title under grant from state may be collaterally attacked as without authority under section 3488, Political Code.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 892.

21 Cal. 425–426, HESTRES v. CLEMENTS.

Acceptance by Plaintiffs' Attorney of Service of demurrer, filed by defendant after entry of his default, is waiver of the default.

Distinguished in Cutler v. Haycock, 32 Utah, 361, 90 Pac. 900, holding default properly taken when demurrer was served on last day by leaving it with wife of plaintiffs' attorney at his residence, he being absent from office and county, and demurrer not being filed with clerk.

Judgment cannot be Entered Against Defendant with disposing of demurrer interposed by him.

Approved in In re Thompkins McIntire Estate, 1 Alaska, 77, following rule.

21 Cal. 426–430, HUFFMAN v. SAN JOAQUIN COUNTY.

County is not Liable for Injuries resulting from negligence of its officers.

Approved in Healdsburg Electric etc. Co. v. Healdsburg, 5 Cal. App. 561, 90 Pac. 956, holding torts ultra vires municipal corporation do not admit of recovery from corporation.

Liabilities of Counties for Torts and negligence. See note, 39 L. R. A. 35.

Personal Liability of Highway Officers for negligence. See note, 22 L. R. A. 831.

21 Cal. 430–438, GODDARD v. FULTON.

Where Allegations of Answer, Though Stated in affirmative form, in effect only deny allegations of complaint, they are not new matter.

Approved in Schecter v. White, 41 Colo. 220, 92 Pac. 700, holding in action on account, answer denying amount was due and alleging unexpired credit does not set up new matter requiring reply.

In Action on Note It may be Shown, under general denial, that cause of action never existed.

Approved in Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 212, 117 N. W. 1000, applying rule to action upon insurance policy.

21 Cal. 438–442, DUTEL v. PACHECO.

In Action Against Sheriff, his indemnifier has such interest he may intervene.

Approved in Faricy v. St. Paul Inves. & Sav. Soc., 110 Minn. 317, 125 N. W. 678, holding third party claiming ownership of bonds sued for could intervene in suit.

21 Cal. 443–448, GREGORY v. HAYNES.

Where Motion to Set Aside Judgment is Granted "on payment of all costs," judgment remains in force until costs are paid.

Distinguished in State v. District Court, 42 Mont. 504, 113 Pac. 474, order setting aside default upon payment of costs considered and held not to make payment of unascertained costs within five days condition precedent to its taking effect.

Validity and Effect of Judgment for or against deceased person. See note, 126 Am. St. Rep. 628.

21 Cal. 448–452, 82 Am. Dec. 751, WOODWARD v. LAZAR.

Equity will Protect Name Established by hotel as trademark in which proprietor has valuable interest.

Approved in Benevolent Elks v. Improved etc. Elks, 122 Tenn. 146, 118 S. W. 390, enjoining fraternal association from using name substantially same as that of existing organizations of same character.

What Words or Phrases may constitute a valid trademark. See note, 85 Am. St. Rep. 114.

Right of Members to Protection in Use of organization name which their efforts have made valuable. See note, 28 L. R. A. (n. s.) 459.

Relief Against Infringement of Trade Name not used in connection with manufactured article. See note, 15 L. R. A. (n. s.) 628.

Name of Leased Hotel is not Part of property leased.

Approved in Seward v. Deneshaud, 120 La. 725, 45 So. 563, following rule.

Name of Business Establishment as part of goodwill. See note, 15 L. R. A. 462.

21 Cal. 455–494, NIETO v. CARPENTER.

Rule That Previous Ruling of Appellate Court is law on same point in later appeals does not apply when materially different facts are presented on later appeal.

Approved in Adams v. Thornton, 5 Cal. App. 458, 90 Pac. 714, and Estate of Jessup, 2 Cof. Prob. 478, both following rule.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 345.

Right of Permissive Possessor to acquire title by adverse possession. See note, 12 L. R. A. (n. s.) 1144.

21 Cal. 495–504, 82 Am. Dec. 754, McCARTHY v. WHITE.

Where Fraud is Alleged for Purpose of depriving party of a right, it must be clearly made out.

Approved in Ley v. Metropolitan Life Ins. Co., 120 Iowa, 209, 94 N. W. 570, approving instruction in regard to proof necessary to make out fraud.

Mortgage Securing Note is Barred by limitations when note is barred.

Approved in Allen v. Allen (Cal.), 27 Pac. 32, and Lilly-Brackett Co. v. Sonnemann, 157 Cal. 200, 106 Pac. 718, both holding bar by limitations to action on note in foreign state bars action on mortgage in this state; Newhall v. Hatch (Cal.), 64 Pac. 252, holding judgment dismissing action of foreclosure because barred by limitation is bar to action on new promise made before debt was barred; Hopkins v. Clyde, 71 Ohio St. 149, 104 Am. St. Rep. 737, 72 N. E. 848, holding successor of heirs of mortgagor could plead limitations to action to foreclose mortgage, although all heirs are parties and neglect or refuse to interpose plea.

Bar of Remedy on Mortgage where note secured is barred. See notes, 88 Am. St. Rep. 228; 90 Am. St. Rep. 765; 21 L. R. A. 558.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 683, 689.

Effect of Payment or Acknowledgment by mortgagor to toll limitations as against person holding through him. See note, 28 L. R. A. (n. s.) 171.

Effect of Bar of Statute of limitations. See note, 95 Am. St. Rep. 657, 666.

21 Cal. 504–511, RICO v. SPENCE.

Effect of Legal Remedy upon Equitable Jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 71.

21 Cal. 544–547, PEOPLE v. BELENCIA.

Drunkenness of Accused is admissible to show whether murder was premeditated, but not in excuse of murder.

Approved in Brennan v. People, 37 Colo. 262, 86 Pac. 81, and State v. Johnny, 29 Nev. 223, 87 Pac. 9, both following rule.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 474.

21 Cal. 548–552, TABLE MOUNTAIN TUNNEL CO. v. STRANAHAN.

Where Supreme Court Considers and passes upon point of law with view to new trial, ruling on such point becomes law in case for all future stages.

Approved in Westerfeld v. New York Life Ins. Co., 157 Cal. 345, 107 Pac. 701, following rule; People's Lumber Co. v. Gillard, 5 Cal. App. 438, 90 Pac. 557, holding decision on former appeal that a bond was valid as common-law bond is law of case on second appeal where voluntary issue of bond was not in issue.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 327.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 773.

21 Cal. 552–584, MAHONEY v. VAN WINKLE.

No Action of Portion of Several Tenants in common can impair rights of their cotenants.

Approved in Moore v. Moore (Cal.), 34 Pac. 92, holding tenant in common could not as against cotenant give license to third person to enter on land held in common.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 713.

Tenant in Common can Maintain Ejectment for entire tract as against all except his cotenants.

Approved in Griswold v. Minneapolis St. P. etc. R. R., 12 N. D. 439, 102 Am. St. Rep. 572, 97 N. W. 539, following rule.

21 Cal. 585–589, 82 Am. Dec. 758, PEOPLE v. HARTLEY.

Bond in Form of Joint Obligation of principal and sureties, and not joint and several, and not signed by principal, but only by sureties, is invalid.

Approved in Novak v. Pitlick, 120 Iowa, 291, 98 Am. St. Rep. 360, 94 N. W. 918, holding void bond joint in form but signed by surety only.

Distinguished in Stimson Mill Co. v. Riley (Cal.), 42 Pac. 1074, holding valid joint and several bond though not signed by all obligors named therein; Pima County v. Snyder, 5 Ariz. 49, 44 Pac. 298, holding where name of principal in official bond of county treasurer is in body of bond and he subscribed to oath of office indorsed on bond, his failure to sign bond did not exonerate sureties; Deer Lodge Co. v. United States F. & G. Co., 42 Mont. 324, 112 Pac. 1062, holding joint and several official bond not signed by principal binding upon surety.

Effect of Delivery of Bond unsigned by principal obligor. See note, 12 L. R. A. (n. s.) 1107, 1116.

21 Cal. 609-629, 82 Am. Dec. 765, DUTTON v. WARSCHAUER.

Interest of Mortgagee is not Enlarged or Affected by fact that he is in possession of mortgaged premises.

Approved in Murdock v. Clarke (Cal.), 24 Pac. 274, holding conveyance of land to secure payment of money, though grantee is put in possession pending accounting is only a mortgage.

Effect of Possession of Real Property as notice. See notes, 104 Am. St. Rep. 349; 13 L. R. A. (n. s.) 100.

Possession of Land as Notice of title. See note, 13 L. R. A. (n. s.) 100.

Action of Ejectment must be Brought against actual tenant, if there is one, but if he be tenant of another landlord, may appear and be substituted as defendant.

Approved in Reay v. Butler (Cal.), 7 Pac. 672, following rule.

Where Possession is Taken by Mortgagee after condition broken by consent of mortgagor, it is presumed mortgagee is to receive rents and profits and apply them to debt secured.

Approved in Felino v. Newcomb Lumber Co., 64 Neb. 338, 97 Am. St. Rep. 646, 89 N. W. 756, holding mortgagee in possession will be held to account for rents and profits in action to foreclose mortgage.

Mortgage is Mere Security for Debt operating on property as lien or encumbrance, and not a conveyance vesting any estate in mortgagee either before or after condition broken.

Approved in Stearns-Roger Co. v. Aztec Co., 14 N. M. 332, 93 Pac. 714, holding interest of mortgagee in mortgaged property is not such

as to require him to post notice of nonliability under mechanic's lien law.

Effect of Judgment Against Tenant as res judicata. See note, 112 Am. St. Rep. 29.

21 Cal. 633–636, ROWE v. BACIGALLUPPI.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 713.

21 Cal. 642–668, OAKLAND v. CARPENTIER.

Obiter in Former Decision is not binding on later appeal.

Approved in Millsap v. Balfour, 158 Cal. 714, 112 Pac. 451, applying rule in action on street assessment; Southern Pac. Co. v. Western Pac. Ry. Co., 144 Fed. 179, holding decision in principal case is not res adjudicata as to question of title of defendant in citing case.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 22 CALIFORNIA.

22 Cal. 23–28, BLANC v. BOWMAN.

Judgment of Appellate Court will not be Set Aside because one judge participating in the decision did not hear the oral argument, such being agreed to by parties.

Approved in Philbrook v. Newman, 148 Cal. 175, 82 Pac. 773, refusing to set aside order of appellate court made nine years before on ground that it was against facts and law.

22 Cal. 28–34, ALLEN v. CITIZENS' STEAM NAVIGATION CO.

Authority of Agent of Private Corporation may be inferred from proof of character of agency, of acts of agent, and knowledge of officers of his habit to make similar contracts and their acquiescence therein, and receipt of benefits thereof by corporation.

Approved in Judell v. Goldfield Realty Co., 32 Nev. 357, 108 Pac. 458, where corporation took over business of another who was indebted to third persons, and held out its secretary as possessing power to make settlements with such creditors and accepted benefits of such settlements, creditor could enforce note executed by secretary in corporation's name in payment of claim.

22 Cal. 34–38, PEOPLE ex rel. FLAGLEY v. HUBBARD.

Action of Court on Application for Change of Venue cannot be reviewed on mandamus.

Approved in State v. Superior Court, 40 Wash. 558, 111 Am. St. Rep. 925, 82 Pac. 878, 2 L. R. A. (n. s.) 395, Winfrey v. Benton, 25 Okl. 447, 106 Pac. 854, and Lyle v. Cass Circuit Judge, 157 Mich. 40, 121 N. W. 308, all following rule.

Mandamus to Prevent Change of Venue from court having exclusive jurisdiction. See note, 2 L. R. A. (n. s.) 569.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 897.

Duties, Performance of Which may be Compelled by mandamus. See note, 125 Am. St. Rep. 502.

22 Cal. 38–42, BENNET v. CREDITORS.

Filing Petition and Publication of Notice are essential to jurisdiction in insolvency proceedings.

Approved in Newlove v. Mercantile Trust Co., 156 Cal. 665, 105 Pac. 975, holding failure of insolvent to include in inventory attached to petition certain assets did not deprive court of jurisdiction.

22 Cal. 51–71, 83 Am. Dec. 49, MATTER OF WARFIELD.

Contents of Destroyed Records may be proved by oral evidence.

Approved in Hibernia Savings and Loan Soc. v. Boyd, 155 Cal. 200, 100 Pac. 242, holding contents of burned judgment provable by parol; Estate of Heywood, 154 Cal. 315, 97 Pac. 826, allowing parol proof of burned probate orders; Seaboard National Bank v. Ackerman, 16 Cal. App. 57, 116 Pac. 92, admitting secondary evidence to establish existence of original action and all proceedings therein where record in such action burned.

Failure to Make Order Admitting Will to probate on day specified in notice or to fix by adjournment subsequent day for order is merely irregularity not affecting jurisdiction.

Approved in Estate of Davis, 151 Cal. 324, 121 Am. St. Rep. 105, 86 Pac. 185, following rule.

Judgment Probating Will Made on Petition stating necessary facts after publication of legal notice cannot be set aside by collateral attack.

Distinguished in Estate of Clark, 148 Cal. 115, 116, 113 Am. St. Rep. 197, 82 Pac. 763, 1 L. R. A. (n. s.) 996, 7 Ann. Cas. 306, approving rule but holding ancillary probate may be refused will probated in foreign state when testator was resident of this state.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 541.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 681, 682.

22 Cal. 71–73, ROGERS v. KING.

Judgment Admitting Will to Probate not void upon face is valid as against collateral attack.

Approved in Stull v. Veatch, 236 Ill. 213, 86 N. E. 229, holding authenticated copy of will proved in sister state and recorded in Illinois good as against collateral attack.

Distinguished in Estate of Dunsmuir, 2 Cof. Prob. 65, court of forum of domicile cannot admit to probate will of one domiciled in this state upon mere production of duly authenticated copy of will and record of its admission to probate in foreign country.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 681.

22 Cal. 73–81, PEOPLE v. MORRISON.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 294.

22 Cal. 82–83, QUINN v. KENYON.

Power to Grant New Trials is One of legal discretion, and appellate court will only interfere when such discretion is not abused.

Approved in Morgan v. Los Angeles Pacific Co., 13 Cal. App. 14, 108 Pac. 737, sustaining order granting new trial.

22 Cal. 86–95, **MATHEWSON v. FITCH.**

Offense of Maintenance is unknown under laws of this state.

Approved in Smits v. Hogan, 35 Wash. 293, 77 Pac. 391, following rule; Mossman v. Hawaiian Government, 10 Haw. 436, holding valid transfer of title by disseisee as against disseisor in ejectment when objected to on ground of maintenance.

22 Cal. 95–99, **CULLERTON v. MEAD.**

Statement of Claims Against Estates of decedents. See notes, 130 Am. St. Rep. 319; 5 Cof. Prob. 305.

22 Cal. 100–103, **HEINLIN v. CASTRO.**

Plaintiff cannot Dismiss Action After Trial and submission, nor can court enter order of dismissal without consent of defendant.

Distinguished in Hibernia Savings etc. Soc. v. Porteuer, 139 Cal. 93, 72 Pac. 716, holding plaintiff could dismiss action without prejudice after default judgment was entered and set aside on motion.

When Action on Note is Barred by Limitations, action on mortgage securing same is also barred.

Approved in Allen v. Allen (Cal.), 27 Pac. 32, and Lilly-Brackett Co. v. Sonnemann, 157 Cal. 199, 106 Pac. 718, both holding bar to action on note in foreign state bars foreclosure of mortgage in this state.

Effect of Statutory Bar of Principal Debt on right to foreclosure or deed of trust. See note, 21 L. R. A. 554.

22 Cal. 105–112, **PIOCHE v. PAUL.**

No Well-considered Decision of the Supreme Court should be overruled unless it clearly violates some established rule of law.

Approved in Hollywood Lumber Co. v. Love, 155 Cal. 274, 100 Pac. 700, deed of trust of land to secure owner's debt does not create interest in land within Code of Civil Procedure, section 1192, so as to require trustee to give notice; Schoonover v. Birnbaum, 148 Cal. 550, 83 Pac. 1000, holding as settled law that homestead cannot be claimed in lands held in joint tenancy or tenancy in common.

22 Cal. 131–135, **RUSSELL v. MANN.**

In Pleading Tax Title, Compliance with every essential fact and with all statutory requisites must be shown.

Approved in Metteer v. Smith, 156 Cal. 575, 105 Pac. 736, following rule; Kinley v. Thelen, 158 Cal. 184, 110 Pac. 517, complaint to hold trustee for negligent loss of land by his failure to pay taxes must specifically aver divestiture of title by want of payment.

22 Cal. 135–139, **PEOPLE v. FORBES.**

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 195.

Cumulative Sentences. See note, 7 L. R. A. (n. s.) 125, 127.

22 Cal. 142–150, **FOGARTY v. SPARKS.**

Person in Possession of Premises, Who is not Made Party to ejectment suit, and all claiming under him are not affected by judgment therein.

Approved in Noyes v. Crawford, 18 Iowa, 18, 96 Am. St. Rep. 363, 91 N. W. 800, rule that purchasers of land in litigation take subject thereto affects only those who deal with party to suit.

Effect of Judgment in Ejectment against tenant upon landlord not a party, or vice versa. See note, 26 L. R. A. (n. s.) 598.

Effect of Judgment Against Tenant as res judicata. See note, 112 Am. St. Rep. 26.

22 Cal. 160–163, **KLOCKENBAUM v. PIERSON.**

Error cannot Arise from Immaterial Finding.

Approved in Collins v. Gray, 154 Cal. 135, 97 Pac. 144, holding immaterial a finding outside the issues.

New Trial will not be Granted on Ground of newly discovered evidence when party moving for same learned of such evidence during trial and failed to ask continuance.

Approved in Weinburg v. Somps (Cal.), 33 Pac. 342, refusing new trial where applicant failed to show due diligence in securing new evidence first learned of during trial.

Unexpected Admission of Witness on Trial, when party had been advised by attorney that witness was incompetent, does not authorize new trial on ground of surprise.

Approved in Porter v. Anderson, 14 Cal. App. 726, 113 Pac. 350, holding unexpected change of view of court as to sufficiency of pleading not such surprise as to warrant setting aside judgment.

22 Cal. 164–169, **WOODWORTH v. KNOWLTON.**

General Denial That Property was Wrongfully and unlawfully taken in same terms as allegation admits the taking.

Approved in Dondero v. O'Hara, 3 Cal. App. 639, 86 Pac. 987, holding in ejectment defendants' denial of plaintiffs' title and right of possession is admission of ouster by them.

22 Cal. 173–178, **LAWRENCE v. MARTIN.**

Assignability of Cause of Action for personal tort. See notes, 44 L. R. A. 177, 179, 181; 14 L. R. A. 514.

22 Cal. 178–184, **IN RE CORRYELL.**

On Habeas Corpus Court may Consider whether indictment charges any offense known to law, and if not, prisoner is entitled to discharge.

Approved in Ex parte Show, 4 Okl. Cr. 422, 113 Pac. 1065, and Ex parte Rickey, 31 Nev. 89, 135 Am. St. Rep. 651, 100 Pac. 136, both holding indictment stated no offense.

Prisoner's Right to Discharge on Habeas Corpus after commitment and before trial. See note, 100 Am. St. Rep. 36.

22 Cal. 179–184, **MATTER OF CORRYELL.**

Habeas Corpus Lies if Facts Alleged in indictment do not constitute public offense.

Approved in Ex parte Goldman (Cal. App.), 88 Pac. 820, granting habeas corpus on ground that indictment did not charge public offense.

22 Cal. 187–190, 83 Am. Dec. 59, **McLAREN v. HUTCHINSON.**

Party for Whose Benefit Contract has been made has right of action thereon.

Approved in Northup v. Altadena etc. Syndicate, 6 Cal. App. 102, 91 Pac. 422, holding where business of maker of note was transferred to corporation, which assumed his liabilities including note, promise of transferee was for benefit of payee, and payee could sue thereon; West Loan etc. Co. v. Silver Bow etc. Co., 31 Mont. 450, 107 Am. St. Rep. 435, 78 Pac. 775, holding abstract company liable for injury resulting to loan company from defective abstract of title furnished for information of loan company, when abstract company had contracted to furnish loan company such abstract, to be paid for by borrowers.

22 Cal. 194–200, BURPEE v. BUNN.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 494.

22 Cal. 200–211, SAMPSON v. OHLEYER.

Person in Possession Where Writ of Restitution is served is presumed to hold under defendant, and to avoid dispossession must show affirmatively that he holds by independent paramount right.

Approved in Baum v. Roper, 1 Cal. App. 439, 82 Pac. 392, holding person not party to ejectment suit entering on premises pending suit was properly dispossessed on judgment against defendant, in absence of showing of independent paramount right; King v. Davis, 137 Fed. 221, holding landlord could have default judgment against tenant reopened when landlord had no knowledge of suit.

Necessity of Request to Defend in order to bind covenantor by decree against grantee. See note, 13 L. R. A. (n. s.) 734.

Effect of Judgment in Ejectment against tenant upon landlord not a party, or vice versa. See note, 26 L. R. A. (n. s.) 596, 597.

Purchaser or Encumbrancer of Property is charged with notice of lis pendens filed with recorder of county where the land is situated.

Approved in Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 653, 95 Pac. 670, holding omission to file lis pendens in quiet title suit does not affect jurisdiction, and party voluntarily appearing cannot complain.

Actual Notice of Pending Action affecting real estate has same effect as constructive notice through lis pendens.

Approved in Martin v. Abbott, 72 Neb. 91, 100 N. W. 142, holding purchaser of real estate with actual notice of claim of dower took subject to such claim.

Purchaser of Realty Need Only Examine Lis Pendens filed in office of recorder of county where land lies and he is bound only by constructive notice of what may there appear.

Approved in Brandt v. Scribner, 13 Ariz. 175, 108 Pac. 493, lis pendens in partition suit dates from complaint, though it is thereafter amended so as to include necessary allegation of value of property.

Effect of Judgment against tenant as res judicata. See note, 112 Am. St. Rep. 25.

22 Cal. 211–224, McLAUGHLIN v. KELLY.

Miscellaneous.—Cited in McMahon v. Hetch-hetchy Ry. Co., 2 Cal. App. 402, 84 Pac. 351, to point that verdict in favor of defendants will not admit of judgment being entered in favor of one defendant only.

22 Cal. 224–229, 83 Am. Dec. 61, DODGE v. WALLEY.

Deeds must be Construed Most Strongly against grantor when uncertain or ambiguous in terms.

Approved in Smith v. Williams (Cal.), 55 Pac. 602, holding deed conveyed all grantor's right to certain water rights, despite limitation that would prevent full enjoyment.

Where Deed Conveys "All Right, Title and Interest" of grantor, "being a leasehold unexpired," and grantor owned the fee, the fee passes under the deed.

Approved in Murphy v. Murphy, 132 N. C. 363, 43 S. E. 923, holding deed of grantor which purported to convey all his right, title and interest in certain tract, and that such interest was undivided sixth, conveyed also a fifth or another sixth which he had inherited.

Effect of Other Language in Deed to cut down estate conveyed by granting clause. See note, 12 L. R. A. (n. s.) 964.

22 Cal. 231–239, 83 Am. Dec. 64, WILKINS v. STIDGER.

Common Counts may be Used in pleading.

Approved in Castagnino v. Balletta (Cal.), 21 Pac. 1098, holding action properly brought in form of assumpsit to recover balance due on special contract.

Distinguished in Truro v. Passmore, 38 Mont. 550, 100 Pac. 968, holding count for money had and received, not alleging facts of indebtedness, insufficient to state cause of action for fraud.

Promise to Pay in Assumpsit Need not be alleged under code.

Approved in Brown v. Crown Gold Milling Co., 150 Cal. 382, 89 Pac. 89, and Wo Sing & Co. v. Kwong Chong Wai Co., 16 Haw. 19, both following rule; Bates v. Capital State Bank, 18 Idaho, 435, 110 Pac. 279, holding allegation that plaintiff was entitled to possession of bonds sued for not essential when it would be mere conclusion of law.

Admissions of Fact by Counsel in One Action are not admissible in evidence against client in another action.

Approved in Hicks v. Manufacturing Co., 138 N. C. 324, 50 S. E. 705, following rule.

Admission of Counsel as evidence. See note, 82 Am. St. Rep. 791.

Party to Action is not Bound by Statements of witness during trial, because he does not contradict them at time.

Approved in Patty v. Salem Flouring Mill Co., 53 Or. 355, 96 Pac. 1108, following rule; Sizer v. Melton, 129 Ga. 150, 58 S. E. 1058, mere fact that corporation sued out interrogatories for its vice-president in one case does not of itself render his answers admissible in another case as admissions of company; Miller v. United States, 133 Fed. 351, 66 C. C. A. 399, holding statement in attorney's argument in one case not competent evidence against client in another case against another party involving other issues; Merriweather v. Commonwealth, 118 Ky. 881, 82 S. W. 596, holding inadmissible in murder trial evidence of statements made by one of several accused persons and not excepted to at the time by another against whom his silence was sought to be introduced; State v. Butler, 51 N. C. 674, 65 S. E. 994, 25 L. R. A. (n. s.) 169, holding admissions of defendant's counsel at preliminary hearing, to avoid continuance asked by state in order to get certain documents, not to be admissible at trial.

Distinguished in People v. Manasse, 153 Cal. 13, 94 Pac. 94, holding failure of defendant to mention threats made against his life might allow jury to infer nonexistence of such threats.

Where Trial is had upon Theory that pleading raised certain issues, it is too late to first object on appeal that pleadings did not raise such issues.

Approved in Rutz v. Obear, 15 Cal. App. 437, 115 Pac. 68, defendant could not for first time on appeal raise objection that complaint did not state cause of action.

22 Cal. 240–251, MILLS v. BARNEY.

Liability of One Receiving Payment of check through forged indorsement. See note, 94 Am. St. Rep. 642.

22 Cal. 255–263, KIDD v. TEEPLE.

Where Judgment is Sustained by the Record, it will be affirmed regardless of grounds of decision in lower court.

Approved in Stanley v. McElrath (Cal.), 22 Pac. 674, following rule.

22 Cal. 263–265, ASKEW v. EBBERTS.

In Action to Enforce Statutory Penalty or forfeiture, claim must be strictly construed.

Approved in Independent School Dist. v. Collins, 15 Idaho, 541, 128 Am. St. Rep. 76, 98 Pac. 859, following rule.

22 Cal. 266–279, HALLECK v. MOSS.

Action on Written Agreement to Pay Money on demand is maintainable without previous demand.

Approved in Hewett v. Dean (Cal.), 25 Pac. 755, and Ex parte Howitz, 2 Cal. App. 754, 84 Pac. 230, both holding bringing of suit sufficient demand in action on agreement to pay money on demand.

Probate Proceedings cannot be Impeached in collateral suit.

Approved in Goldtree v. McAlister (Cal.), 23 Pac. 209, denying right to collaterally attack regularity of foreign probate of will where court has found it to have been duly probated.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 681.

22 Cal. 279–283, DOLLREQUY v. TABOR.

Where, Pending Appeal to Commissioner of General Land Office, a third person, with notice of appellant's rights, procures certificate to land in question, he holds certificate in trust for former applicant in whose favor appeal is decided.

Distinguished in Cragie v. Roberts, 6 Cal. App. 317, 92 Pac. 101, refusing to declare trust in favor of claimant of land as agricultural against claimant under patentee of same land as mineral land, on ground that it was not mineral and patent as such was fraudulent.

22 Cal. 283–289, ADAMS v. KNOWLTON.

Burden is on Wife to Show That Property Deeded to her after marriage is her separate property.

Distinguished in Estate of Pepper, 158 Cal. 622, 112 Pac. 64, degree of proof producing conviction in unprejudiced mind is sufficient

to prove separate character of property acquired by spouse during marriage.

What is Community Property. See notes, 126 Am. St. Rep. 121; 4 Cof. Prob. 63.

Liability of Community Property for debts. See note, 19 L. R. A. 235.

22 Cal. 293–330, COHEN v. WRIGHT.

Various Provisions of the Constitution are to be harmonized so as to give some effect to every part.

Approved in Wheeler v. Herbert, 152 Cal. 236, 92 Pac. 358, upholding act of 1907, changing boundary between Fresno and King counties.

Only in Clear Cases will a Statute be declared unconstitutional.

Approved in Wheeler v. Herbert, 152 Cal. 236, 92 Pac. 358, upholding act of 1907, changing boundary between Fresno and Kings counties; Gaffney v. Jones, 44 Wash. 165, 87 Pac. 117, upholding act taking away right to revive dormant judgment as applying to judgment given before and affirmed on appeal after passage of act.

Attorney at Law is not a Public Officer.

Approved in Maxey v. Wright, 3 Ind. Ter. 254, 54 S. W. 811, following rule; Fleming v. Hance, 153 Cal. 167, 94 Pac. 621, holding prosecuting attorney provided for Los Angeles police court not an officer whose salary could be charged upon city treasury.

Who are Public Officers. See note, 17 L. R. A. 245.

Legislature has Power to Impose such conditions and qualifications upon exercise of privilege of practicing before courts as it may deem proper.

Approved in dissenting opinion in License to Practice Law, 67 W. Va. 240, 67 S. E. 609, majority refusing to issue license to practice law upon certificate from county court, when bad moral character of applicant was shown.

Power of Legislature to Prescribe qualifications of attorneys. See note, 10 L. R. A. (n. s.) 291.

Right to Practice Law is Subject to condition that attorney shall possess blameless moral character.

Approved in In re Smith, 73 Kan. 749, 85 Pac. 586, disbarring attorney for gross misconduct showing unfitness for exercise of privilege; License to Practice Law, 67 W. Va. 223, 67 S. E. 601, refusing license to practice law on ground applicant's character was bad.

Disbarment for Criminal Acts prior to conviction therefor. See note, 114 Am. St Rep. 842.

Miscellaneous.—Cited in In re Branch, 70 N. J. L. 548, 57 Atl. 431, to point that power to admit attorneys to practice is subject to statutory control.

22 Cal. 330–336, DAUBENSPECK v. PLATT.

Possession of Land as Notice of title. See note, 13 L. R. A. (n. s.) 116.

22 Cal. 336–343, 83 Am. Dec. 69, SPENCE v. HARVEY.

Contracts Against Public Policy are illegal and void.

Approved in Pike's Peak Paint Co. v. Masury, 19 Cal. App. 290, 74 Pac. 797, upholding contract as not being against public policy when performance would in no way have tendency to injure public.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 519.

Contract as to Location of public buildings. See note, 4 L. R. A. (n. s.) 590.

Who are Public Officers. See note, 17 L. R. A. 249.

22 Cal. 343–348, PARSONS v. FAIRBANKS.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 799, 800.

22 Cal. 348–356, PEOPLE v. SYMONDS.

Mere Fact That Jury in Criminal Case separate without permission of court does not acquire new trial to be granted.

Approved in People v. Cord, 157 Cal. 571, 108 Pac. 515, holding juror properly allowed to visit sick wife with officer during recess; People v. Emmons, 7 Cal. App. 695, 95 Pac. 1037, holding separation of jury for innocent purpose did not necessitate new trial.

Effect of Separation of Jury. See note, 103 Am. St. Rep. 162.

Misconduct of Jurors Other Than Their Separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1041.

Permitting Separation of Jury in capital case. See note, 24 L. R. A. (n. s.) 779.

22 Cal. 356–358, GILMAN v. COSGROVE.

Complaint is Defective Which Gives only name of copartnership firm as plaintiff.

Approved in Doll v. Hennessy Mercantile Co., 33 Mont. 86, 81 Pac. 626, following rule.

As to Whether Partnership may Sue or be sued in firm name. See note, 29 L. R. A. (n. s.) 285.

22 Cal. 358–361, POWELSON v. POWELSON.

Conduct Sufficiently Aggravated to Produce ill-health or bodily pain, though operating primarily on the mind, is legal cruelty.

Approved in Haley v. Haley (Cal.), 14 Pac. 95, holding false and malicious accusation of immorality of wife ground for divorce; Benfield v. Benfield, 44 Or. 96, 74 Pac. 495, holding abusive language and improper conduct to be such cruel and inhuman treatment as to justify divorce.

Profanity and Obscenity as ground for divorce. See note, 12 L. R. A. (n. s.) 822.

Charging Adultery as extreme cruelty. See note, 18 L. R. A. (n. s.) 307.

22 Cal. 362, GAGLIARDO v. CRIPPEN.

Affidavits Filed by Defendant in Injunction Suit are part of record.

Approved in McInerney v. United States, 143 Fed. 735, 74 C. C. A. 655, holding original application of alien for naturalization with the affidavits part of record of court.

22 Cal. 363–373, HIGH v. SHOEMAKER.

Constitutional Provision for Equity and Uniformity in taxation applies only to direct tax on property.

Approved in Los Angeles v. Los Angeles Ind. Gas. Co., 152 Cal. 767, 93 Pac. 1007, holding Los Angeles charter provision for license

taxes allowed imposition of equal tax on all in same business regardless of amount of business; State v. Great Northern Ry. Co., 106 Minn. 336, 119 N. W. 211, upholding act increasing gross earnings tax on railroads to four per cent.

Payment of Penal Sum Imposed upon Failure to pay tax is as obligatory as payment of tax itself.

Approved in State v. Chicago & Northwestern Ry. Co., 128 Wis. 498, 108 N. W. 607, reaffirming rule.

22 Cal. 373–379, 83 Am. Dec. 74, MILLS v. TUKEY.

Cotenants' Right to Acquire and enforce tax titles. See note, 116 Am. St. Rep. 367.

22 Cal. 379–395, ROBINSON v. BIDWELL.

Legislature may Pass Law to Become Effective only upon approval by majority of electors of given locality.

Approved in Wheeler v. Herbert, 152 Cal. 234, 92 Pac. 357, holding valid law transferring territory from one county to another on approval of majority of electors in territory transferred.

Constitutionality of Local Option Laws. See note, 114 Am. St. Rep. 317, 318.

Creditors of Corporation can Waive all claim upon stockholders' liability.

Approved in Carnahan v. Campbell, 158 Ind. 232, 63 N. E. 386, following rule.

Public Purposes for Which Money may be Appropriated or raised by taxation. See note, 14 L. R. A. 479.

22 Cal. 395–398, MATTER OF HOWARD.

Petition is not Necessary as Foundation of proceeding to probate will.

Overruled in Estate of Edwards, 154 Cal. 93, 97 Pac. 24, holding under section 1229, Code of Civil Procedure, petition to probate will is necessary to jurisdiction of court.

22 Cal. 398–430, CALIFORNIA ETC. TEL. CO. v. ALTA TEL. CO.

Power of States to Control or Impose Burdens upon interstate telegraph and telephone companies. See note, 24 L. R. A. 164.

Right of Private Persons to contest power of corporation to take or hold property. See note, 32 L. R. A. 294.

22 Cal. 430–433, 83 Am. Dec. 76, PORTER v. LISCOM.

Assignee of Judgment for Value and Without Notice takes it subject to right of setoff existing at time of assignment.

Approved in Northwestern etc. Bank v. Rauch, 8 Idaho, 52, 66 Pac. 807, applying rule to assignee of cost bill.

Setting Off One Judgment against another. See note, 109 Am. St. Rep. 140.

22 Cal. 434–444, SPRING VALLEY WATERWORKS v. SAN FRANCISCO.

Corporation may Condemn Land for Public Purpose although it has not strictly complied with general law in incorporating.

Approved in Morrison v. Indianapolis & Western Ry. Co., 166 Ind. 527, 76 N. E. 966, holding de facto corporation could maintain condemnation suit.

Irregularity in Organization of Corporation cannot be considered except in action brought by state for that purpose.

Approved in Whipple v. Tuxworth, 81 Ark. 401, 99 S. W. 90, holding decree obtained by corporation de facto could not be attacked in subsequent suit on ground there was no such corporation.

In Condemnation Proceedings, Commissioners are not required to determine questions of title.

Approved in Pinney v. Borough of Winsted, 79 Conn. 615, 66 Atl. 340, following rule.

22 Cal. 444–456, ROGERS v. SOGGS.

Right to Use of Growing Timber on public mineral lands as between claims of miners and agriculturalists is governed by priority of application.

Approved in McQuillan v. Tanana Electric Co., 3 Alaska, 120, holding locator of placer mine may recover damages against trespasser cutting timber thereon.

Right to Cut Timber on public land. See note, 70 L. R. A. 891, 909.

22 Cal. 457–463, 83 Am. Dec. 78, KELLER v. HICKS.

County Warrants are not Such Negotiable Instruments that recovery may be had thereon against indorser.

Approved in Morrison v. Austin State Bank, 213 Ill. 486, 104 Am. St. Rep. 225, 72 N. E. 1114, holding municipal warrant not negotiable, although negotiable in form; Swanson v. City of Ottumwa, 131 Iowa, 548, 106 N. W. 12, 5 L. R. A. (n. s.) 860, no action for any purpose can be maintained on negotiable bonds void for want of power.

Liability of Indorser of non-negotiable instrument. See note, 97 Am. St. Rep. 988.

22 Cal. 468–471, GLUCKAUF v. REED.

Abandonment of Possessory Right diverts title as fully as conveyance.

Approved in Northern Assur. Co. v. Stout, 16 Cal. App. 557, 117 Pac. 621, reaffirming rule; Missouri Pac. Ry. Co. v. Bradbury, 106 Mo. App. 458, 79 S. W. 968, holding abandonment of railroad track devested title to rails left in place.

Gain or Loss of Title by abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 898, 910.

22 Cal. 473–478, URIDIAS v. MORRILL.

The Term "Municipal Courts" has Legal Meaning and includes mayors' and recorders' courts.

Approved in In re Baxter, 3 Cal. App. 722, 86 Pac. 1000, holding "police court" synonymous with "recorder's court."

Legislature may Declare Mayor of City to be ex officio justice of peace.

Approved in Baltimore etc. R. R. Co. v. Town of Whiting, 161 Ind. 234, 236, 68 N. E. 268, 269, holding legislature could invest town clerk with functions of justice of peace.

As to Whether Judges of Municipal or police courts may be vested or burdened with powers or duties of nonjudicial character. See note, 19 L. R. A. (n. s.) 616.

22 Cal. 482–484, **HILBORN v. ALFORD.**

Signature by Mark. See note, 22 L. R. A. 373.

22 Cal. 484–492, **KITTLE v. PFEIFFER.**

Homestead Claim to Land Dedicated as street is barred by foreclosure sale of land on which the mortgage was given after dedication of the strip claimed exempt.

Approved in Petitpierre v. Maguire, 155 Cal. 250, 251, 100 Pac. 693, 694, following rule.

When Lots are Sold as Fronting on Space designated as street, the use of such space as street passes as appurtenant to the lots.

Approved in Danielson v. Sykes, 157 Cal. 689, 109 Pac. 88, holding purchaser of lot sold by reference to map showing adjacent alley entitled to injunction to prevent closing of alley; Petitpierre v. Maguire, 155 Cal. 247, 248, 250, 251, 100 Pac. 692, 693, 694, following rule.

22 Cal. 508–511, **MOULIN v. COLUMBET.**

Presumption That Person Enjoying Benefit of services rendered is bound to pay reasonable worth may be rebutted by proof of special agreement of fixed amount or that they were gratuitously rendered.

Approved in Crane v. Derrick, 157 Cal. 671, 109 Pac. 32, holding claim for care of aged parent by son properly disallowed under the evidence; Dallman v. Frank, 1 Cal. App. 546, 82 Pac. 566, holding finding as to value of services immaterial when rendered gratuitously.

Distinguished in Estate of Rohrer, 160 Cal. 576, 117 Pac. 673, holding evidence showed implied promise of testator to pay nephew's wife for caring for him during last illness.

Services Rendered to Host by Guest are not basis for claim for compensation.

Distinguished in Williams v. Williams, 114 Wis. 84, 89 N. W. 836, holding implied contract arose to pay for services rendered to one of two married brothers by other in superintending erection of houses for him, though he lived with brother part of time and in one of his houses the remainder.

22 Cal. 513–516, **MOORE v. TICE.**

Plaintiff must Show Right of Possession or title existing at commencement of ejection suit.

Distinguished in Merryman v. Kirby, 13 Cal. App. 345, 109 Pac. 636, holding allegations of complaint as to ownership and possession sufficient in action of ejectment.

Defendant in Ejectment may Defeat Action by showing title and right of possession in third person.

Approved in Rogers v. Clark Iron Co., 104 Minn. 209, 116 N. W. 743, following rule.

22 Cal. 516–519, **STANWOOD v. SAGE.**

Money in Hands of Administrator which is not part of estate may be recovered by owner without presenting claim to estate.

Approved in In re Williams' Estate (Cal.), 32 Pac. 242, following rule.

Complaint in Old Form for Money had and received is proper when recovery is sought of money which defendant has received and refused to pay on demand to plaintiff entitled thereto.

Approved in Richardson v. Moffitt-West Drug Co., 92 Mo. App. 532, following rule.

22 Cal. 519–522, COWELL v. WASHBURN.

Tax Lien Continues till tax is paid.

Approved in Estate of Johnson, 4 Cof. Prob. 509, where executor makes sale of propety on which taxes are lien, it is his duty toward purchaser to remove lien.

When Taxes on Land Become a Lien or encumbrance thereon. See note, 15 L. R. A. 238.

22 Cal. 537–538, JENKINS v. CALIFORNIA STAGE CO.

Principal Place of Business of Corporation is its residence for purpose of determining place of trial.

Approved in Bloom v. Michigan Salmon Min. Co., 11 Cal. App. 124, 104 Pac. 325, and Waechter v. Atchison etc. Ry. Co., 10 Cal. App. 73, 101 Pac. 42, both following rule; Robinson v. Missouri Pac. Ry. Co., 67 Kan. 283, 72 Pac. 856, holding railroad not resident of city by reason of maintaining depot there.

22 Cal. 556–562, ROSBOROUGH v. SHASTA RIVER CANAL CO.

Right of Officers of Corporations to compensation for services rendered. See note, 136 Am. St. Rep. 917.

22 Cal. 563–565, 83 Am. Dec. 84, JANSEN v. McCAHILL.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 563.

Signing by Proxy. See note, 22 L. R. A. 297.

22 Cal. 566–571, BOWEN v. AUDREY.

Subcontractor is Bound by Terms of written contract between owner and contractor where he had notice of such contract.

Approved in George B. Swift Co. v. Dolle, 29 Ind. App. 660, 80 N. E. 680, holding subcontractor bound by contract between owner and contractor to keep premises free of merchanics' liens.

Distinguished in Shanks v. Michael, 4 Cal. App. 555, 88 Pac. 597, holding contract for exchange of lands entered into by husband as agent for wife without written authority or ratification not binding on wife.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

22 Cal. 575–580, BAYLES v. BAXTER.

Resulting Trust may be Established by parol evidence.

Approved in Mallagh v. Mallagh (Cal.), 16 Pac. 537, following rule.

That Parties Agree Verbally to Do What Law implies from their acts does not affect character of transaction in making it express rather than implied.

Approved in Gerety v. O'Sheehan, 9 Cal. App. 450, 99 Pac. 546, holding oral agreement of one purchasing land in his own name with money of another does not create an express trust; Breitenbucher v. Oppenheim, 160 Cal. 102, 116 Pac. 67, fact that original complaint alleged agreement for purchase of land by which undivided interests were to be assigned in same proportions as afterward fixed by court

in findings in favor of resulting trust does not affect plaintiff's recovery.

22 Cal. 580–595, SIMSON v. ECKSTEIN.

Adverse Possession of Land for Statutory Period vests occupant with absolute title thereto.

Approved in Boe v. Arnold, 54 Or. 65, 102 Pac. 294, holding one in adverse possession for ten years as against all except United States may assert such possession as against a person claiming to be owner under prior grant.

22 Cal. 607–620, WILLIS v. WOZENCRAFT.

Mere Equitable Title to Land, Such as Entitles Holder to possession, is sufficient defense in action for possession brought by holder of legal title.

Approved in Doherty v. Courtney, 150 Cal. 608, 89 Pac. 435, holding defendant in ejectment could set up claim as tenant under administrator and urge any defense administrator could have urged against one claiming under deeds of decedent.

What Title or Interest will support ejectment. See note, 18 L. R. A. 782.

Plaintiff in Ejectment must Rely on his own title.

Approved in Roberts v. Ward, 3 Cal. App. 103, 84 Pac. 431, denying recovery on legal title when defendant had been in undisputed possession for forty years.

22 Cal. 620–632, UNION WATER CO. v. MURPHY'S FLAT CO.

Contract of Corporation not upon Its Face necessarily beyond scope of authority will be presumed valid, in absence of proof.

Approved in In re Castle Braid Co., 145 Fed. 234, holding contract between corporation and its directors as trustees not void on face merely because of fiduciary relation appearing therein; dissenting opinion in Chicago etc. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 259, 70 N. E. 852, majority holding void contract between competing railroads to prevent competition to be prima facie illegal.

Corporation, Unless Expressly Prohibited by law or its charter, has power to make all contracts necessary and usual in course of its business.

Approved in Laidlaw v. Pacific Bank (Cal.), 67 Pac. 899, discussing powers of savings banks to become indebted to directors.

Mortgage upon Flume Includes All Improvements which may be put thereon, flume being realty.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 724, 93 Pac. 862, 15 L. R. A. (n. s.) 359, holding water right acquired after execution of mortgage, and appurtenant to land mortgaged, passes with land in foreclosure sale.

As to Whether Water Right Used in connection with land mortgaged prior to its acquirement passes on foreclosure. See note, 15 L. R. A. (n. s.) 360.

Effect of Statutory Bar of principal debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 555.

22 Cal. 633–635, GIMMY v. GIMMY.

Objection That Complaint in Divorce is uncertain in not stating facts showing property alleged therein as common to be common property must be taken by demurrer.

Approved in Mini v. Mini (Cal.), 45 Pac. 1044, holding objection to description of common property waived by failure to demur.

Miscellaneous.—Cited in Gimmy v. Doane, 22 Cal. 639.

22 Cal. 635–639, GIMMY v. DOANE.

Effect of Divorce on homestead rights. See note, 23 L. R. A. 240.

Partition of Homestead. See note, 4 L. R. A. (n. s.) 786.

22 Cal. 639–641, RICHTER v. RILEY.

Certificates of Purchase and Location are prima facie proof of legal title in holder.

Approved in Southern Cross etc. Min. Co. v. Sexton, 147 Cal. 760, 82 Pac. 424, holding certificate of purchase of mining land proof of title and claim not subject to relocation while certificate remains uncanceled.

22 Cal. 647–650, STOUT v. MACY.

Statute Limiting Time for Execution of judgment to five years after entry applies to judgments in suits to foreclose mortgages.

Approved in Killen v. Nebraska Loan & Trust Co., 70 Kan. 84, 78 Pac. 159, holding judgment decreeing sale of specific real property to pay debts lapsed in five years.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 142.

22 Cal. 650–660, TOWDY v. ELLIS.

Admission of Service on Notice of Appeal is not waiver of objection that time for such service has expired.

Approved in Estate of Brewer, 156 Cal. 90, 103 Pac. 487, following rule.

Statement on Motion for New Trial duly certified by court becomes part of the record and may be used on appeal in lieu of statement on appeal or bill of exceptions.

Approved in Williams v. Southern Pac. R. Co. (Cal.), 9 Pac. 154, holding statement duly settled on motion for new trial may be used on appeal regardless of whether it was used on the motion.

Denial That Property Sued for is of exact value stated in complaint is admission of any lesser value.

Approved in Preston v. Central Cal. etc. Irr. Co., 11 Cal. App. 197, 104 Pac. 465, following rule.

22 Cal. 661–667, KELLY v. LYNCH.

Rights and Liabilities of Assignee of bill of lading with draft attached as against consignee, who does not get goods or finds them defective. See note, 49 L. R. A. 681.

22 Cal. 667–669, 83 Am. Dec. 86, McKEON v. McDERMOTT.

Fact That Defendant in an Action for recovery of money has been garnished by creditor of plaintiff is no defense to the action.

Approved in Barnsdall v. Waltemeyer, 142 Fed. 418, 73 C. C. A. 515, following rule.

22 Cal. 671–682, BELL v. BROWN.

Inconsistent Defenses may, Under Proper Circumstances, be set up in the same verified answer.

Approved in Murphy v. Russell, 8 Idaho, 148, 67 Pac. 426, and Rudd v. Dewey, 121 Iowa, 459, 96 N. W. 975, both following rule; Eaton v. Metz (Cal.) 40 Pac. 948, holding demand of plaintiff's title in claim and delivery properly joined with plea of fraudulent sale; Leavenworth Light Co. v. Waller, 65 Kan. 520, 70 Pac. 367, holding answer in action for negligence could deny generally, and also plead plaintiff's contributory negligence.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 23 CALIFORNIA.

23 Cal. 11–15, **KELLY v. TAYLOR.**

General Rules of Law Relating to Estoppel in pais apply to mining ground.

Approved in Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 674, 93 Pac. 1029, in action to determine riparian rights, the fact that defendants expended money in sinking wells on their own land, with knowledge of plaintiff, created no estoppel.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 773.

23 Cal. 16–39, **GRATTAN v. WIGGINS.**

Administrator has Sole Right to Maintain Action to collect debt due intestate.

Approved in Miller v. Ash, 156 Cal. 547, 556, 105 Pac. 601, 604, upon death of ward, his personal representatives, and not his heirs, can sue guardian or his estate to recover money due the ward.

Right of Next of Kin to Maintain Action in interest of estate. See note, 22 L. R. A. (n. s.) 455.

Want of Administration Does not Suspend statute of limitations in favor of estate.

Approved in Sanford v. Bergin, 156 Cal. 55, 103 Pac. 337, reaffirming rule.

Who may Plead Statute of limitations. See note, 104 Am. St. Rep. 744, 754, 767.

Action may be Brought to foreclose mortgage securing installment note, when first installment is due and unpaid.

Approved in Bissell v. Forbes, 1 Cal. App. 607, 82 Pac. 699, statute of limitations begins to run against each installment from time action might have been brought on it.

Priority of Notes Falling Due at different times secured by same mortgage. See note, 24 L. R. A. 800, 803.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 737.

The Right to Foreclose and the Right to redeem are reciprocal.

Approved in Green v. Thornton, 8 Cal. App. 165, 96 Pac. 385, applying rule to mortgage by deed absolute made prior to enactment of

codes; Allen v. Allen (Cal.), 27 Pac. 32, where land in California was conveyed by deed absolute to secure loan in New York, right to redeem was barred when right to foreclose was barred in California.

Right to Plead Statute of Limitations is a privilege personal to debtor, or his successors in interest.

Approved in Evans v. Faircloth-Byrd Mer. Co., 165 Ala. 180, 51 So. 786, grantee of mortgagor is entitled to plead statute of limitations against mortgagee, whether or not such defense has been waived by original debtor; Tinsley v. Lombard, 46 Or. 11, 78 Pac. 895, in suit by first mortgagee to foreclose, where second mortgagee filed cross-complaint for foreclosure of his mortgage as a subsequent lien, plaintiff could not plead limitations as to latter's mortgage.

Mortgagee may, by Agreement, Fix the Rights of his assignees of notes secured by one mortgage to the mortgage security.

Approved in Preston v. Norsman, 75 Neb. 371, 106 N. W. 325, such agreement could be implied from the circumstances of the transfer.

Grantees of Mortgagor have a Right to contest liens against the property under foreclosure.

Approved in Stough v. Badger Lumber Co., 70 Kan. 717, 79 Pac. 738, fact that mortgagor conveyed property subject to mortgage did not estop his grantee from denying existence or validity of the mortgage.

Mortgagee Holding Several Liens cannot bring separate bills to foreclose.

Approved in Dixon v. Eikenberry, 161 Ind. 318, 67 N. E. 917, 68 L. R. A. 323, where plaintiff on foreclosure failed to set up tax claim held by him as lien on the premises, he and his assignee lost all right to assert it afterward.

23 Cal. 40–49, DONNER v. PALMER.

New Statutes Relating Merely to Matters of procedure apply to pending cases.

Approved in Voss v. Sylvester, 203 Mass. 237, 89 N. E. 242, express provision of statute that act shall not affect cases pending at time of enactment rendered act inapplicable to pending cases.

Verdict Which is not the Result of free, deliberate and unbiased judgment will be set aside.

Approved in Williams v. Pressler, 11 Okl. 126, 65 Pac. 935, applying rule where verdict was reached by three jurors favorable to defendant agreeing to vote for plaintiff if other nine signed statement that defendant testified to a lie.

23 Cal. 51, PEOPLE v. GASSAWAY.

Recent Possession of Stolen Property is not prima facie evidence possessor is guilty of larceny.

Approved in People v. Elster (Cal.), 3 Pac. 885, applying rule where there was no evidence tending to show inculpatory facts and circumstances.

23 Cal. 58–61, TEBBS v. WEATHERWAX.

Objection That Parol Evidence is Inadmissible to vary terms of writing, if waived in trial court, cannot be raised in supreme court.

Approved in Moore Lumber Corp. v. Walker, 110 Va. 778, 67 S. E. 375, applying rule where defendant waived statute of frauds

by putting in evidence writing by which he agreed to answer for debt of another, and attempting to explain it; Eaves v. Vial, 98 Va. 140, 34 S. E. 980, applying rule in action to set aside conveyance, where defendant permitted case to be heard on oral testimony taken to prove agreement.

23 Cal. 65–70, MARSHALL v. FERGUSON.

Supreme Court will not Reverse Judgment on account of variance where no objection was made to the evidence on that ground.

Distinguished in Johnson v. Moss, 45 Cal. 518, where plaintiff proved a different contract from that declared on, defendant was entitled to nonsuit though testimony was introduced without objection.

Whether Contract for Sale of Growing Crops or reservation thereof by a grantor must be in writing. See note, 23 L. R. A. (n. s.) 1219.

23 Cal. 75–78, CASTLE v. BADER.

Creditor Seeking to Set Aside Judgment against debtor on ground that it is fraudulent, and to reach property of debtor, must aver either he has lien on property or that execution on his judgment has been returned nulla bona.

Approved in Old Settlers' Investment Co. v. White, 158 Cal. 244, 110 Pac. 926, officer seizing property on execution must justify under judgment as against chattel mortgagee.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 28, 31.

23 Cal. 85–93, SEAVER v. FITZGERALD.

Errors in Spelling Which Do not Destroy identity of name are disregarded.

Approved in Brum v. Ivins, 154 Cal. 20, 129 Am. St. Rep. 137, 96 Pac. 877, applying rule where "Manuel S. Brum" was served in an action against "Manuel S. de Brum."

Idem Sonans. See note, 100 Am. St. Rep. 349.

Applicability of Doctrine of Idem Sonans to substituted or constructive service. See note, 30 L. R. A. (n. s.) 125.

23 Cal. 94–101, MULFORD v. ESTUDILLO.

Effect of Levy Under Void or voidable judgment. See note, 55 L. R. A. 281.

23 Cal. 111–117, GUY v. WASHBURN.

Where Property is About to be Sold for taxes illegally assessed, tax can be paid under protest and recovered back.

Approved in Decker v. Perry (Cal.), 35 Pac. 1019, holding complaint failed to show any intention to sell such as would make payment of tax involuntary.

23 Cal. 121–125, HATHAWAY v. BRADY.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 830, 877, 919.

23 Cal. 127–131, PEOPLE v. RAINS.

Vacation of Judgment for negligence or mistake of attorney. See notes, 96 Am. St. Rep. 108; 80 Am. St. Rep. 265; 27 L. R. A. (n. s.) 858.

23 Cal. 136–138, ZOLLER v. McDONALD.

Undertaking on Appeal will not be Dismissed if sufficient for purpose of rendering appeal effectual.

Approved in Pacific Window Glass Co. v. Smith, 8 Cal. App. 767, 97 Pac. 900, in absence of showing that deposit was made to stay execution, it will be presumed purpose was to make appeal effectual; Edminston v. Steele, 12 Idaho, 617, 87 Pac. 678, bond sufficient as an appeal bond will be held effectual though coupled with an insufficient stay bond; Smith v. West Virginia Cent. Gas Co., 65 W. Va. 217, 63 S. E. 1097, where a justice approved appeal bond in less than double amount of judgment, appeal should not be dismissed without first ordering new bond to be given under section 2121, Code of 1906.

23 Cal. 138–140, PEOPLE v. PARK.

A Debt is Properly Taxed at the Residence of the creditor.

Approved in Gilbertson v. Oliver, 129 Iowa, 572, 105 N. W. 1003, 4 L. R. A. (n. s.) 953, indebtedness to nonresident who held evidence of the debt was not liable to inheritance tax in state of deceased debtor.

23 Cal. 142–143, COSTER v. BROWN.

One Having Claim or Lien on Subject of Action has right to intervene.

Approved in Faricy v. St. Paul Inves. & Sav. Soc., 110 Minn. 317, 125 N. W. 678, in action to recover money judgment for bonds, where defendant asserted various defenses, receiver of loan association claiming ownership had right to intervene.

Right to Plead Limitations is a Privilege personal to the debtor and his successors in interest.

Approved in Evans v. Faircloth-Byrd Mer. Co., 165 Ala. 180, 51 So. 786, reaffirming rule; Tinsley v. Lombard, 46 Or. 11, 78 Pac. 895, in action by first mortgagee to foreclose, where second mortgagee filed cross-complaint for foreclosure of his mortgage as a subsequent lien, plaintiff could not plead limitations as to latter's mortgage; Graves v. Seifried, 31 Utah, 211, 87 Pac. 676, one who acquired equitable lien on mortgaged property under tax deed could invoke statute of limitations though waived by mortgagor.

23 Cal. 144–148, McNIEL v. BORLAND.

Mechanic's Lien is Created by Statute and can only be enforced by special proceeding.

Approved in Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 521, 97 Pac. 417, right to personal judgment for debt created by furnishing labor or materials is not dependent on lien law.

23 Cal. 152–156, NEELY v. NAGLEE.

When Legal Notice is Served by Mail, the distance it travels is to be determined by proof.

Overruled in Hegard v. California Ins. Co. (Cal.), 11 Pac. 596, courts will take judicial notice of legal distances from place to place as established by Political Code, sections 150–202, inclusive.

23 Cal. 156–158, PEOPLE v. GAUNT.

Action of Trial Court in not Allowing challenge for bias will not be reviewed unless injury is shown.

Approved in Melone v. Sierra Ry. Co., 151 Cal. 114, 91 Pac. 522, applying rule where record did not show defendant was forced to exercise a peremptory challenge, or had exhausted his peremptory challenges.

23 Cal. 158–160, PEOPLE v. EBNER.

Effect of Failure to Give Accused opportunity to plead. See note, 13 L. R. A. (n. s.) 814.

Appearance by Counsel on Charge of misdemeanor as satisfying condition of bail bond or recognizance. See note, 27 L. R. A. (n. s.) 944.

23 Cal. 161–164, PEOPLE v. LEET.

In an Assessment for Taxes, a description of a tract of land by name is sufficient.

Approved in Buckner v. Sugg, 79 Ark. 446, 96 S. W. 186, applying rule to land lying under waters of lake, not officially surveyed, and popularly known by description used.

Distinguished in Fox v. Townsend, 152 Cal. 58, 91 Pac. 1004, description in assessment as follows, "In Los Angeles County. In Electric Ry. Homestead Assn. Tr. Lot 17, Block 20," is prima facie insufficient to identify the land; Baird v. Monroe, 150 Cal. 571, 89 Pac. 356, evidence may be introduced in aid of description to show it was in fact sufficient to identify the land.

23 Cal. 173–178, FRANKLIN v. STATE BOARD OF EXAMINERS.

When Legislature Declares Necessity Exists for creation of state debt, its action is not subject to review by judicial department.

Approved in State v. Moore, 76 Ark. 203, 88 S. W. 883, 70 L. R. A. 671, determination of legislature that appropriation "to promote the efficiency of the state guard" was necessary, was conclusive on the courts, and was properly authorized by majority vote under Constitution, article V, section 31.

Consideration of Extrinsic Evidence to show unconstitutionality of statute. See note, 14 L. R. A. 459.

23 Cal. 181–184, PEOPLE v. TODD.

Allegation That Tax was Duly Assessed and levied for a certain year is sufficient.

Approved in City of Miami v. Miami Realty etc. Co., 57 Fla. 369, 49 So. 56, bill to enforce lien on real estate for unpaid taxes was defective in failing to state when taxes were assessed and levy made.

23 Cal. 185–193, 83 Am. Dec. 89, HAYES v. WELLS, FARGO & CO.

It is the Duty of a Carrier to Deliver Packages to consignee at his residence or place of business.

Approved in United States Express Co. v. State, 164 Ind. 203, 73 N. E. 103, Burns' Annotated Statutes of 1901, section 3312a, requiring companies to deliver express matter "to person to whom the same is directed," is not an attempt to regulate interstate commerce.

Liability of Carrier. See note, 110 Am. St. Rep. 614.

Delivery to Imposter by Carrier. See note, 37 L. R. A. 180.

Effect of Shipper's Misrepresentation as to character, quantity, or value, on right to recover for loss. See note, 23 L. R. A. (n. s.) 747, 750.

23 Cal. 196–198, McCARTY v. FREMONT.

Expulsion of Trespasser. See note, 93 Am. St. Rep. 256.

Whether Injuries Both to Person and property constitute but one, or more than one, cause of action. See note, 50 L. R. A. 165.

Power of Appellate Court over verdict for excessive damages. See note, 26 L. R. A. 391.

23 Cal. 198–208, 83 Am. Dec. 96, SKILLMAN v. LACHMAN.

A Mining Partnership Exists when two or more owners of a mine actually engage in working it.

Approved in Marks v. Gates, 2 Alaska, 523, reaffirming rule; Bentley v. Brossard, 33 Utah, 414, 94 Pac. 744, where several parties had an interest in the working of mining property, the employment by one of necessary labor was binding on all; Hartney v. Gosling, 10 Wyo. 357, 358, 98 Am. St. Rep. 1005, 68 Pac. 1121, 1122, an agreement under which certain parties furnished one of their number with funds, he to go to Alaska to prospect for a mine, the others to furnish his family a monthly allowance at home, did not confer upon prospecting partner power to bind the others for supplies furnished him; Blackman v. Williamson, 57 W. Va. 253, 50 S. E. 256, in action for dissolution of mining partnership, member thereof may sell his interest to whomsoever he may without knowledge or consent of his co-owners; Hartney v. Gosling, 10 Wyo. 357, 98 Am. St. Rep. 1005, 68 Pac. 1121, holding agreement to furnish party with funds to prospect and give his family monthly allowance during absence, and to divide mines does not make party furnishing money liable for debts incurred during prospect.

Mining Partnership. See note, 81 Am. St. Rep. 785.

23 Cal. 208–219, TIBBETTS v. MOORE.

Description of Property in Mechanic's Lien which identifies the property by reference to facts is sufficient.

Approved in Union Lumber Co. v. Simon, 150 Cal. 758, 89 Pac. 1079, holding imperfect description by metes and bounds was aided by further statement in notice.

Improvements Subsequently Attached to Mortgaged Land pass to purchaser at foreclosure sale.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 724, 93 Pac. 862, 15 L. R. A. (n. s.) 359, applying rule to water right attached to land as an appurtenance.

Fixtures Retaining by Agreement the character of personal property. See note, 84 Am. St. Rep. 890.

Efficacy of Chattel Mortgage on fixtures. See note, 15 L. R. A. 57.

Incorrect Naming of Original Contractors in notice of lien will not invalidate lien.

Approved in Cady Lumber Co. v. Conkling, 70 Neb. 811, 98 N. W. 44, applying rule to statement of lien of subcontractor showing material was furnished to one member of a partnership where contract of owner ran to partnership itself.

Materialman's Lien Accrues when he has materials ready for delivery at place of delivery.

Approved in McEwen v. Union Bank & Trust Co., 35 Mont. 476, 90 Pac. 361, under contract to deliver mill appliances f. o. b. cars Wellsville, to be shipped in "knocked down form" and at buyer's option to send men to put parts together, which option was never exercised, lien accrued when parts were delivered in knocked down form.

Right of Agent to Maintain Action for conversion of personalty. See note, 26 L. R. A. (n. s.) 840.

23 Cal. 225, EVERETT v. HYDRAULIC ETC. TUNNEL CO.

Proprietor Exercising Reasonable Care cannot be held liable for injuries from unforeseen causes.

Approved in Neumeister v. Goddard, 125 Wis. 92, 103 N. W. 244, applying rule in action for damages to plaintiff's land caused by diversion of waters of a stream by defendant.

Right of Land Owner to accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 726.

Liability for Escape of Dangerous Substance stored on premises. See note, 15 L. R. A. (n. s.) 543.

23 Cal. 226–227, 83 Am. Dec. 111, BOLES v. JOHNSTON.

Judgment can Only be Collaterally Attacked where court lacks jurisdiction of person or subject matter.

Approved in Baldwin v. Foster, 157 Cal. 649, 108 Pac. 717, validity of proceedings concerning sheriff's sale and deed cannot be questioned.

The Proper Remedy Where Sale is irregular is by motion in court where judgment is rendered.

Approved in In re Nichols' Estate (Cal.), 50 Pac. 1073, where personal property sold en masse would have brought more if sold in parcels, sale may be set aside on motion.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 39.

23 Cal. 227–232, SCHILLING v. HOLMES.

Tenant is Liable to Pay Rent until he has restored full and complete possession to landlord.

Approved in Ashton v. Golden Gate Lumber Co. (Cal.), 58 Pac. 3, where plaintiff having title under deed of trust executed valid lease for term of life of beneficiary, he was entitled to recover rent accruing after death of beneficiary.

Unlawful Detainer. See note, 120 Am. St. Rep. 46.

Effect of Partial Eviction upon liability for rent. See note, 17 L. R. A. 276.

23 Cal. 233–236, SWINFORD v. ROGERS.

Conveyance of Property Made with intent to defraud creditors is void.

Approved in Watkins v. Wilhoit (Cal.), 35 Pac. 649, applying rule in action by nonassenting creditor to set aside assignment for benefit of creditors.

23 Cal. 237–243, TUSTIN v. FAUGHT.

What is Community Property. See note, 126 Am. St. Rep. 104; 4 Cof. Prob. 46.

23 Cal. 245–249, COLMAN v. CLEMENTS.

Cotenants in Mines. See note, 91 Am. St. Rep. 861, 867, 868, 884.

23 Cal. 249–254, PIERSON v. McCAHILL.

Appeal from Order Refusing to Grant change of venue operates as a stay of proceedings in court below.

Approved in People v. Whitney, 47 Cal. 585, trial of case after taking of appeal from order denying change of venue does not authorize issuing of writ of prohibition.

23 Cal. 256–257, GOLDMAN v. DAVIS.

Written Contract cannot be Varied by parol evidence.

Approved in Peterson v. Chaix, 5 Cal. App. 534, 90 Pac. 951, applying rule in action on a contract for the sale of "about 250 tons of grapes, more or less."

23 Cal. 257–259, 83 Am. Dec. 112, LATHROP v. MIDDLETON.

Execution or Judicial Sale of Corporate Franchise or property necessary to its enjoyment. See note, 20 L. R. A. 739.

23 Cal. 259–267, ROBERTS v. CHAN TIN PEN.

When Owner of Land Fails to Do so, tax collector has right to designate portion of tract to be sold.

Approved in dissenting opinion in Jacobs v. Buckalew, 4 Ariz. 356, 42 Pac. 620, majority holding that tax collector at sale must first designate some particular portion of tract and offer it for sale.

23 Cal. 268–274, JACKSON v. SACRAMENTO VALLEY R. R. CO.

Burden of Proving Want of Care on part of warehouseman is upon bailor.

Approved in Taussig v. Bode (Cal.), 64 Pac. 109, applying rule in action to recover damages for loss through leakage from sixty-four barrels of spirits deposited in warehouse.

Carrier Claiming Loss Occurred Through Act of God has burden of proving goods were thus lost.

Approved in Chicago etc. P. Ry. Co. v. Logan, Snow & Co., 23 Okl. 715, 105 Pac. 345, where goods delivered for carriage were placed in sealed car and set on switch for transit, but were reached by unprecedented flood, carrier failed to make sufficient showing to excuse it from liability.

Burden of Proof as to Negligence of carrier holding as warehouseman. See note, 22 L. R. A. (n. s.) 979.

Burden of Proof When Defense in action for loss or injury to goods during carriage is act of God or vis major. See note, 29 L. R. A. (n. s.) 663.

When Goods Reach Destination, and are placed in warehouse of company, liability as carrier ceases.

Approved in Vaughn v. New York etc. R. R. Co., 27 R. I. 237, 61 Atl. 696, where goods had passed into possession and control of consignee, though left in company's cars on spur track, company was not liable for their destruction by fire.

Duty of Warehousemen in care of property. See note, 136 Am. St. Rep. 223.

As to When Liability of Railway Carrier of goods as such ceases. See note, 17 L. R. A. 693, 694.

23 Cal. 277-279, BARTHOLOMEW v. HOOK.

By Filing Declaration of Homestead After Judgment, wife may compel husband's personal property to be first exhausted.

Distinguished in Nolan v. Nolan, 155 Cal. 483, 486, 132 Am. St. Rep. 99, 101 Pac. 523, 524, where vendee mortgaged land which was subject to prior vendor's lien, and also land subsequently acquired, on which he procured a homestead, mortgaged homestead tract must be first sold to protect prior vendor's lien.

23 Cal. 280-281, PEOPLE v. SMITH.

. Bailee Who Takes Possession With Intent of stealing property is guilty of larceny.

Approved in Finlayson v. State, 46 Fla. 84, 35 So. 204, upholding rule where accused induced two negroes to deposit their money with him for safekeeping over night, intending to appropriate it; Flohr v. Territory of Oklahoma, 14 Okl. 489, 78 Pac. 569, where indictment charged property was taken by fraud and stealth, it was only necessary to show property was taken with felonious intent to convert to taker's own use.

Embezzlement. See note, 87 Am. St. Rep. 29.

Larceny by Bailee. See note, 88 Am. St. Rep. 578.

23 Cal. 285-286, MEEKER v. HARRIS.

If Improper Items are Included in bill of costs, remedy is by motion to retax.

Approved in Spriggs v. State, 161 Ind. 227, 66 N. E. 694, 67 N. E. 992, where, on proceedings under petition to establish drain, no objection was made to costs as taxed, in action on bond, principals could not raise question whether items were properly taxed.

23 Cal. 287-298, O'GRADY v. BARNHISEL.

General Recitation of Conclusions Resulting from Acts of officers is sufficient in tax deed.

Approved in Hayes v. Ducasse, 119 Cal. 684, 52 Pac. 121, tax deed reciting matters prescribed by sections 3776, 3785, and 3786 of Political Code is prima facie evidence property was sold according to law; Charland v. Home for Aged Women, 204 Mass. 568, 134 Am. St. Rep. 696, 91 N. E. 147, tax deed contained sufficient statement that tax in question was assessed by assessors, and they issued their warrant to collector to collect same.

Assessment to "Owners and Claimants Known and Unknown" binds the property irrespective of ownership.

Approved in Hadley v. Hadley, 114 Tenn. 171, 87 S. W. 254, upholding constitutionality of act under which lien for taxes assessed to life tenant attaches to interest of remainderman.

23 Cal. 299-302, GASSNER v. PATTERSON.

Chattel Mortgage Which Fails to Comply with provisions of law is of no validity except between parties thereto.

Distinguished in Bank of Ukiah v. Gibson (Cal.), 39 Pac. 1070, 1071, holding attempted chattel mortgage on sheep was valid against all persons except subsequent creditors of mortgagor and bona fide purchasers.

23 Cal. 302–303, **FALL v. PAINE.**

Rights and Duties of Toll-bridge proprietors. See note, 58 L. R. A. 165.

23 Cal. 306–312, **MAYE v. YAPPEN.**

Rules Relating to Doctrine of Estoppel with respect to title apply to mining ground.

Approved in Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 674, 93 Pac. 1029, fact that defendants expended money in sinking wells on their own land with knowledge of plaintiff creates no estoppel.

Measure of Damages for Wrongful Taking of gold-bearing earth is its value at time it is separated from surrounding soil.

Approved in Texas etc. Ry. Co. v. White, 25 Tex. Civ. App. 279, 62 S. W. 134, in action for damages for removal of sand, measure of damages is market value of sand so converted.

Party Having Means of Doing so is guilty of negligence in not ascertaining true boundary line.

Approved in Cottrell v. Pickering, 32 Utah, 72, 88 Pac. 700, 10 L. R. A. (n. s.) 404, where both parties had means of knowing true boundaries, and laches, if any, could be imputed to both, claim of estoppel could not be maintained.

23 Cal. 314–321, **SATTERLEE v. SAN FRANCISCO.**

Charter Provision Requiring Majority Vote to pass ordinance means majority of whole body elected.

Approved in In re Majority of Legislature, 8 Haw. 597, construing article of Constitution requiring vote of want of confidence in a cabinet to be "passed by a majority of all the elective members of the legislature"; Pollasky v. Schmid, 128 Mich. 701, 92 Am. St. Rep. 560, 87 N. W. 1031, 55 L. R. A. 614, where two places were vacant because of death and resignation, two-thirds vote of remaining aldermen was not sufficient to pass ordinance over mayor's veto.

De Facto Officers. See note, 140 Am. St. Rep. 195.

Mandamus to Compel Surrender of office. See note, 31 L. R. A. 350.

23 Cal. 321, **WENBORN v. BOSTON.**

No Appeal Lies from Order denying motion for leave to intervene.

Overruled in Dollenmayer v. Pryor, 150 Cal. 3, 87 Pac. 617, and Thorpe v. North Moneta etc. Water Co., 12 Cal. App. 188, 106 Pac. 1107, both holding contra.

23 Cal. 322–323, **WELCH v. ALLINGTON.**

New Security from Same Party upon same property does not merge or extinguish prior one.

Approved in Menzel v. Primm, 6 Cal. App. 211, 91 Pac. 757, where, after part payment of purchase price of mine, secured note was accepted in lieu of further payment of money, effect was to extend

time of payment of debt till maturity of note; Alferitz v. Ingalls, 83 Fed. 970, applying rule where holder of chattel mortgage took second mortgage on same property to secure same debt and further advances; dissenting opinion in Stuart v. Hauser, 9 Idaho, 79, 72 Pac. 728, majority holding, in suit to have deed absolute declared a mortgage to secure pre-existing debt, there was a substantial conflict in the evidence.

23 Cal. 323–331, CONTRA COSTA ETC. R. R. CO. v. MOSS.

Where Political Branch of Government has recognized necessity for public use, courts will not investigate that question.

Distinguished in Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 674, 677, 87 Pac. 29, 31, in action for condemnation for right of way, question whether uses are in fact public is a judicial question to be determined by the court.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 28, 95, 119, 131, 132.

Land Located by One Railroad Company in good faith cannot be taken from it and appropriated by another.

Approved in Southern Ind. R. R. Co. v. Indianapolis, Cincinnati etc. R. R. Co., 168 Ind. 371, 81 N. E. 68, 13 L. R. A. (n. s.) 197, simply running preliminary line and purchasing land over which its survey extended was not such a legal location as to prevent appropriation by another company; Minneapolis etc. Ry. Co. v. Chicago etc. Ry. Co., 116 Iowa, 689, 88 N. W. 1084, railroad company which had purchased land for right of way and was in possession was not affected by condemnation proceedings against its grantor by another company.

23 Cal. 331–335, 83 Am. Dec. 114, GALLAGHER v. WILLIAMSON.

Where Court Instructs on What State of Facts verdict must be returned, such instruction must include all material facts.

Approved in Reynolds v. Hart, 42 Colo. 155, 94 Pac. 16, instruction in action for breach of contract of employment omitted material facts.

23 Cal. 338–339, NELSON v. MURRAY.

Denials of Legal Conclusions raise no issue.

Approved in Wolf Co. v. Northwestern Dairy Co., 55 Wash. 670, 104 Pac. 1125, effect of denials as to indebtedness and compliance with contract was destroyed by admitted terms of contract, admitted acceptance of plant and failure to plead payment, and no issue was raised by answer.

23 Cal. 339–347, VERZAN v. McGREGOR.

Execution, Authenticity or Delivery of Written Instrument may be proved by parol.

Approved in Castor v. Bernstein, 26 Cal. App. 712, 84 Pac. 248, genuineness of signature may be proved by comparison of handwriting.

In Absence of Technical Words and Phrases, office of interpretation belongs to court.

Approved in Bullock v. Consumer's Lumber Co. (Cal.), 31 Pac. 369, where technical words were used in contract for sawlogs sold

and delivered, testimony of one who made the contract as to what he understood by its terms was inadmissible.

23 Cal. 352–354, DE UPREY v. DE UPREY.

Miscellaneous.—Miscited in Emeric v. Alvarado, 64 Cal. 629, 2 Pac. 487, for 27 Cal. 329.

23 Cal. 354–359, FLANDREAU v. DOWNEY.

Estoppel by Deed or Matter of Record must be pleaded if there is opportunity to plead it.

Approved in Ahlers v. Smiley, 11 Cal. App. 347, 104 Pac. 998, where record in former case could have no place in complaint, it was not necessary to plead former recovery; Nolan v. Fidelity & Deposit Co., 2 Cal. App. 4, 82 Pac. 1120, in action on stay bond, sureties cannot claim plaintiff is estopped because writ of execution was issued on judgment after giving of bond, without pleading facts.

23 Cal. 359–362, 83 Am. Dec. 118, SARGENT v. STURM.

Where Property is Acquired by Tort, no demand is necessary.

Approved in Daggett v. Gray (Cal.), 40 Pac. 961, in action for conversion of property, where original possession was lawful, complaint must allege demand; McNally v. Connolly (Cal.), 9 Pac. 170, in action to recover personal property lawfully in possession of defendant, demand and refusal must be shown; Havird v. Lung, 19 Idaho, 794, 115 Pac. 931, applying rule in claim and delivery.

Purchaser from Fraudulent Vendee, who is not a purchaser in good faith, acquires no right.

Approved in Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 414, 95 Pac. 1031, in action of trover for conversion of lumber, where defendant claims by virtue of a valid sale, plaintiff may prove fraud without pleading it.

When Replevin or Claim and delivery is sustainable. See note, 80 Am. St. Rep. 754.

23 Cal. 362–363, IN RE HIDDEN'S ESTATE.

Query, Whether Allowance and Approval of Claim against estate of decedent binds another creditor of estate who is not party to allowance.

Cited in Haub v. Leggett, 160 Cal. 494, 117 Pac. 557, allowance and approval in part of claim against estate of decedent is no bar to action for whole claim.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 683.

23 Cal. 365–370, DUDLEY v. THOMAS.

Tender of Release as Provided by Award is not condition precedent to right to bring action.

Approved in Macdonald v. Bond, 195 Ill. 127, 62 N. E. 883, holding agreement to submission, and award, offered in evidence, admissible under common counts.

23 Cal. 370–372, AMYX v. TABER.

Summary Proceedings to Impound and sell animals. See note, 90 Am. St. Rep. 216,

23 Cal. 375–379, **WATSON v. WHITNEY.**

Strict Regard to Form is not Necessary to pleadings in justice's court.

Approved in Ex parte Luening, 3 Cal. App. 78, 84 Pac. 446, complaint filed with justice of the peace charging violation of county ordinance need not plead ordinance by reference to title and date.

Right to Civil Action for Forcible Entry and detainer. See note, 121 Am. St. Rep. 394.

Counsel's Right to Examine Juror on his own voir dire to determine whether to exercise right of peremptory challenge. See note, 109 Am. St. Rep. 566.

23 Cal. 379–381, **MERRILL v. FORBES.**

Mere Trespass Does not Constitute forcible entry.

Approved in Bell v. Haun, 9 Cal. App. 44, 97 Pac. 1127, complaint in forcible entry and detainer must allege detention of premises.

Right to Civil Action for Forcible Entry and detainer. See note, 121 Am. St. Rep. 393.

23 Cal. 381–385, **MITCHELL v. DAVIS.**

Error of Court in Admitting Evidence is waived by refusal to consent to its withdrawal.

Approved in Salmon v. Rathjens, 152 Cal. 301, 92 Pac. 739, reaffirming rule.

Not Even Owner has Right to forcibly take real estate from peaceable possession of another.

Approved in Wilson v. Campbell, 75 Kan. 163, 88 Pac. 549, where building containing furniture and other goods was invaded by a number of men acting for owner during temporary absence of party in peaceable possession, this was forcible entry.

Forcible Entry and Detainer Against One forcibly dispossessing peaceable possessor in asserting lawful right to possession. See note, 8 L. R. A. (n. s.) 427, 429.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 345.

23 Cal. 385–388, **HERRITER v. PORTER.**

One Cause of Action cannot be Divided into different suits.

Approved in Hesser v. Johnson, 13 Okl. 60, 74 Pac. 322, where sheriff made wrongful levy upon several articles of property at different places of person not named in execution, such party could not divide his cause of action into two suits so as to give justice court jurisdiction.

23 Cal. 390–393, **TREASURER v. COMMERCIAL MIN. CO.**

Courts of Equity will Decree Specific Performance of contracts for transfer of stock.

Approved in Wait v. Kern River Mining etc. Co., 157 Cal. 24, 106 Pac. 101, holding complaint sufficiently shows inadequacy of legal remedy when it alleges property consisted of mining claims of unknown value; Sherwood v. Wallin, 1 Cal. App. 537, 82 Pac. 568, averments in complaint as to value of mining stock were sufficient to show inadequate remedy at law; Schmidt v. Pritchard, 135 Iowa,

248, 112 N. W. 804, upholding rule where stock had no market value, and could not be bought in open market and was withheld to keep control of corporation; Wood v. Kansas City Home Telephone Co., 223 Mo. 550, 123 S. W. 10, evidence that stock was unlisted on the market and held in a pooling trust, so it could not well be purchased, justified granting of relief; Turley v. Thomas, 31 Nev. 200, 135 Am. St. Rep. 667, 101 Pac. 576, upholding decree directing specific performance of agreement to transfer stock where action for damages for breach would be inadequate.

Specific Performance of Contracts for sale of corporate stock. See notes, 135 Am. St. Rep. 694; 50 L. R. A. 504.

23 Cal. 401–404, **ROWLEY v. HOWARD.**

Every Fact Necessary to Jurisdiction of justice's court must be affirmatively shown.

Approved in Ferguson v. Basin Consolidated Mines, 152 Cal. 715, 93 Pac. 869, in order to sustain judgment by default upon service of summons out of county, showing must be made that certificate of county clerk was attached.

Acts of Deputies must be Done in the name of their principals.

Approved in People v. Le Doux, 155 Cal. 544, 102 Pac. 520, where order directing summoning of jury panel was directed to disqualified sheriff, his deputy could not execute it.

Persons in Whose Name deputy should act. See notes, 106 Am. St. Rep. 826, 827, 828; 19 L. R. A. 180.

Miscellaneous.—Cited in Spring Valley Water Works v. Bryant, 52 Cal. 135.

23 Cal. 413–415, **HUSSEY v. McDERMOTT.**

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 387.

23 Cal. 415–418, **IN RE ESTATE OF JAMES.**

Rights of Children in Homestead of parent. See note, 56 L. R. A. 44.

Partition of Homestead. See note, 4 L. R. A. (n. s.) 791.

23 Cal. 421–426, **MOSS v. MAYO.**

Proceedings Against Unknown Owners. See note, 87 Am. St. Rep. 364, 367.

Personal Liability to Pay Assessment for local improvement. See note, 35 L. R. A. 61.

23 Cal. 427–431, **RIGGS v. CLARK.**

Surviving Partner is not Entitled to Pay for services rendered in winding up affairs of concern.

Approved in Ruggles v. Buckley, 175 Fed. 59, 99 C. C. A. 73, 27 L. R. A. (n. s.) 541, on dissolution of firm, managing partner was not entitled to compensation for managing trust lands from assets of firm.

Surviving Partner's Right to compensation. See notes, 112 Am. St. Rep. 843, 844; 1 L. R. A. (n. s.) 644, 646; 17 L. R. A. (n. s.) 387, 404.

Surviving Partner is Entitled to Compensation where business of firm is continued for sake of profit.

Approved in Painter v. Painter (Cal.) 36 Pac. 869, surviving partner who conducted business for six years to advantage of all concerned was entitled to compensation for his services; Condon v. Callahan, 115 Tenn. 293, 112 Am. St. Rep. 833, 89 S. W. 402, 1 L. R. A. (n. s.) 643, upholding rule where on death of one partner survivor continued and completed valuable railroad construction contract with consent of deceased partner's executrix; Rowell v. Rowell, 122 Wis. 25, 99 N. W. 481, where in suit in equity beneficiaries of deceased partner elected to demand not only fair value of interest, but share in profits earned by use of whole property after deceased partner's death, compensation of conducting business was properly deducted.

23 Cal. 431–444, KILE v. TUBBS.

One not Claiming Title cannot Attack prima facie title of another.

Approved in dissenting opinion in Williams v. San Pedro, 153 Cal. 51, 94 Pac. 237, majority holding, in action to quiet title to tide lands, defendants, though claiming no interest, may show certificate of purchase was void.

Recorded Conveyance of Whole Tract Followed by actual possession of part does not affect prior record owner in occupation of another part.

Approved in Walshe v. Wheelwright, 96 Me. 190, 52 Atl. 655, applying rule in action to recover one acre which owner had deeded to plaintiff and later deeded as part of one hundred acres to another party who claimed adverse possession of rest of tract extended over such acre.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1242, 1245.

23 Cal. 452–457, RUPLEY v. WELCH.

Waters Flowing Over Public Lands may be appropriated for purposes of agriculture, mining and other uses.

Approved in dissenting opinion in Lux v. Haggin (Cal.), 4 Pac. 933, majority holding state has no power to authorize the appropriation of water running through private lands.

Right of Prior Appropriation of water. See note, 30 L. R. A. 671.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 770, 771.

23 Cal. 462–464, PARSONS v. SAN FRANCISCO.

Municipal Charter may Exempt Corporation from liability for failure to keep highways in repair.

Approved in Batdorff v. Oregon City, 53 Or. 407, 100 Pac. 939, charter of Oregon City exempting city from accountability and limiting recovery for gross negligence against its officers is void and leaves liability as at common law; Updike v. Omaha, 87 Neb. 246, 127 N. W. 236, statute requiring notice of defect to be filed five days before injury does not apply to defect caused by negligent construction of sewer.

Liability of Municipality for Defects or obstructions in streets. See note, 20 L. R. A. (n. s.) 526, 554.

23 Cal. 464–468, CREANOR v. NELSON.

Injunctive Relief as to Fences or gates. See note, 7 L. R. A. (n. s.) 60.

23 Cal. 472–475, IRVINE v. McKEON.

Statutes Creating a Forfeiture or Imposing a penalty are to be strictly construed.

Approved in Savage v. Shaw, 195 Mass. 574, 122 Am. St. Rep. 272, 81 N. E. 304, applying rule in action seeking to hold directors liable for judgment against street railway company obtained in action for tort for injuries to passenger.

Parol Evidence as to Consideration of deed. See note, 20 L. R. A. 111.

23 Cal. 476–481, ESTATE OF PACHECO.

Letters of Administration Granted to Any Other than surviving wife or child may be revoked on application.

Distinguished in In re Li Po Tai's Estate (Cal.), 39 Pac. 31, rule does not apply to letters of administration with will annexed.

The Word "Competent" Does not Mean disinterested in all cases.

Approved in In re Cranberry Creek Drainage Dist., 128 Wis. 100, 107 N. W. 26, under statute providing court shall appoint three competent persons as drainage commissioners, owners of land within district are qualified to act.

Fact of Great Age or Inability to read or write does not show want of understanding so as to render one incompetent to be an administrator.

Approved in Estate of Piercy, 3 Cof. Prob. 480, want of understanding as disqualification to act as administrator refers merely to want of common intelligence amounting to defect of intellect.

Miscellaneous.—Cited in State v. Reddish, 148 Mo. App. 721, 129 S. W. 55, as to right to appeal from refusal of probate court to grant letters of administration to applicant.

23 Cal. 481–488, PHOENIX WATER CO. v. FLETCHER.

Finding in Special Verdict must Cover all material facts in issue in the pleadings.

Approved in Ward v. Gradin, 15 N. D. 657, 109 N. W. 60, evidence cannot be resorted to to support judgment based upon defective special verdict.

What Special Verdict must Contain. See note, 24 L. R. A. (n. s.) 6, 48.

Prior Appropriator of Stream has Right to have water flow down from its source without interruption.

Approved in Cole v. Richards Irr. Co., 27 Utah, 209, 101 Am. St. Rep. 962, 75 Pac. 378, reaffirming rule.

Right of Prior Appropriator of water. See note, 30 L. R. A. 672.

23 Cal. 489–490, McDERMOTT v. HIGBY.

If General and Special Verdicts are inconsistent, special verdict must prevail.

Approved in Awde v. Cole, 99 Minn. 360, 109 N. W. 813, discussing whether in action to recover damages for negligence of

physicians, special verdict was irreconcilably inconsistent with general verdict.

Distinguished in Wiencke v. Bibby, 15 Cal. App. 55, 114 Pac. 878, court properly submitted special issues to the jury.

23 Cal. 490–492, NATOMA WATER ETC. CO. v. McCOY.

Prior Appropriator of Water of Stream is entitled to have it flow from its source without interruption.

Approved in Cole v. Richards Irr. Co., 27 Utah, 209, 101 Am. St. Rep. 962, 75 Pac. 378, reaffirming rule; Lone Tree Ditch Co. v. Rapid City E. & G. L. Co., 16 S. D. 462, 93 N. W. 652, where it was the custom of owner of dam to hold the water during the day and let it down in large quantities at night, a restraining of the practice was justified.

Right of Prior Appropriator of water. See note, 30 L. R. A. 672.

23 Cal. 492–495, MURRAY v. MARIPOSA COUNTY.

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 528.

23 Cal. 495–501, 83 Am. Dec. 130, BULLOCK v. HUBBARD.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 410.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 494.

23 Cal. 501–508, HUGHES v. DEVLIN.

Mining Claim Owned and Possessed by several as joint tenants may be partitioned.

Cited in Pellow v. Arctic Mining Co., 164 Mich. 106, 128 N. W. 925, arguendo.

Mining Claims are Subject to the Rules governing the quieting of title as between equitable and legal owners.

Approved in Buchner v. Malloy, 155 Cal. 255, 100 Pac. 688, holding plaintiff's remedy was not to quiet title, but to enforce a trust.

Persons in Possession of Mining Claims have vested right of property founded on possession.

Approved in White Star Mining Co. v. Hultberg, 220 Ill. 598, 77 N. E. 334, holding, though title was in United States, freehold was involved and appeal was properly perfected; McConnell v. Pierce, 210 Ill. 635, 71 N. E. 625, mining claims are subject to partition; Cobban v. Meagher, 42 Mont. 408, 113 Pac. 292, surface ground of an unpatented mining claim, when used for other than mining purposes, and having separate value for such purposes, is subject to taxation.

Cotenancy in Mines. See note, 91 Am. St. Rep. 857, 885, 886, 888.

Discovery of Mineral in Mining Claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 158.

Descent of Unpatented Mining Claim. See note, 4 L. R. A. (n. s.) 920.

23 Cal. 511–513, HALE v. BRENNAN.

Partnership Books of Account as evidence. See note, 52 L. R. A. 835, 842, 846.

23 Cal. 519–522, **HENDERSON v. ALLEN.**

Relation of Landlord and Tenant is essential to action for unlawful detainer.

Approved in Garber v. Gianella (Cal.), 30 Pac. 842, whether agreement was a sublease or a cropping contract, creating tenancy in common in the crop, is questioned; Richmond v. Superior Court, 9 Cal. App. 64, 98 Pac. 58, answer by defendant that he had subsisting contract to buy the property does not affect jurisdiction of justice's court.

23 Cal. 522–526, **McCREA v. CRAIG.**

Mechanic's Lien Attaches When Claimant begins to furnish materials.

Approved in Farnham v. California etc. Trust Co., 8 Cal. App. 271, 96 Pac. 790, lien for work and materials has priority over deed of trust executed and recorded a year after work was commenced and materials furnished.

23 Cal. 528–537, **DYSON v. BRADSHAW.**

Where One not in Possession Claims Title, evidence tending to show title in third person is admissible.

Approved in Rogers v. Clark Iron Co., 104 Minn. 209, 116 N. W. 743, following rule in action to quiet title against defendants in adverse possession under various claims of title.

Where Deed is Placed in Hands of third person as escrow, grantee is not entitled to delivery of deed until he has strictly complied with conditions.

Cited in Bartley v. Fraser, 16 Cal. App. 565, 117 Pac. 685, arguendo.

Nature and Elements of escrows. See note, 130 Am. St. Rep. 943, 958, 959.

23 Cal. 540–554, 83 Am. Dec. 135, **WALDEN v. MURDOCK.**

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 335.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 45.

23 Cal. 570–574, **FOGARTY v. SAWYER.**

Trustee has Right to Employ an auctioneer to cry a sale.

Approved in Stockwell v. Barnum, 7 Cal. App. 418, 94 Pac. 402, where corporation was trustee, it had right to conclude sale made by an authorized agent acting as auctioneer.

Sales Under Powers in Mortgages and trust deeds. See note, 92 Am. St. Rep. 596.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 554.

23 Cal. 585–592, **IN RE ROMAINE.**

Issuance of Warrant of Arrest must be based upon an affidavit.

Approved in State v. Bates, 101 Minn. 307, 112 N. W. 262, upholding warrant under which fugitive was arrested, reciting that relator stands charged upon "complaint" with crime of forgery instead of by "affidavit."

Papers Necessary to Obtain Surrender of fugitives from another state. See note, 28 L. R. A. 802.

23 Cal. 593–594, ENSMINGER v. McINTIRE.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 771.

23 Cal. 596–630, HOBBS v. DUFF.

Right to Setoff is not Lost by neglect to assert it.

Approved in Lopez v. McChesney, 10 Haw. 231, upholding right of plaintiff to bring separate action for demand he might have pleaded as setoff; Seiber v. Johnson Mercantile Co., 40 Tex. Civ. App. 603, 90 S. W. 517, applying rule in action on an account where party was ignorant certain credits had been paid until it was too late to plead them by way of setoff.

Equity will Allow Setoff of Judgments where different parties are nominal plaintiff and nominal defendant.

Approved in Collins v. Campbell, 97 Me. 26, 94 Am. St. Rep. 458, 53 Atl. 838, applying rule in proceedings seeking for a setoff of judgments to be recovered in cross-actions upon the foreign judgment.

Distinguished in See Hop & Co. v. Parke, 6 Haw. 689, where claim of setoff based on bankruptcy was made in previous case at law, equity will not interfere.

Setting Off One Judgment against another. See note, 109 Am. St. Rep. 138, 143, 144, 148.

Setoff Against Judgment in hands of assignee. See note, 23 L. R. A. 335.

Right of One in Reality, but not nominally, liable, to set off indebtedness against claimant. See note, 18 L. R. A. (n. s.) 512.

Injunctions Against Judgments for Defenses existing prior to rendition. See note, 31 L. R. A. 766.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 324.

Enjoining Judgments Against or in Favor of sureties. See note, 31 L. R. A. 65.

23 Cal. 631–633, PEOPLE v. COLMERE.

Qualification of Grand Jurors. See note, 28 L. R. A. 200.

23 Cal. 636–650, RICKETSON v. TORRES.

An Appeal is a Matter of Right.

Approved in Estate of Sharp, 10 Cal. App. 3, 100 Pac. 1071, where there is no challenge to jurisdiction of appellate court or failure to comply with rules regulating appeals, motion to dismiss must be denied.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 745, 750.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 180.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 24 CALIFORNIA.

24 Cal. 14–17, PEOPLE v. MAXWELL.

No Man can be Guilty as Principal, of a crime, who has no knowledge of it until it is fully consummated.

Approved in People v. Disperati, 11 Cal. App. 480, 105 Pac. 621, condemning instruction which confused "grand larceny" with "receiving stolen property."

24 Cal. 17–30, PEOPLE v. SANCHEZ.

Except as Provided by Enabling Statute, term lapses unless court begins on day fixed by law therefor.

Approved in Forbus v. State, 158 Ala. 43, 48 So. 593, under Code of 1896, section 922, on failure of judge to attend, court stood adjourned for the term after third day; Webster v. State, 49 Fla. 134, 38 So. 515, where, under remedial statute, in absence of judge, court stands adjourned until next day, order of court prematurely entered on record adjourning court to third day did not cause term to lapse; Wilson v. State, 3 Okl. Cr. 716, 109 Pac. 290, journal entry showing opening of court on subsequent day is not alone sufficient to prove court did not convene on day fixed by law; Scott v. State, 43 Tex. Cr. 596, 68 S. W. 178, under statute permitting lawyers present to select special judge if regular judge fails to appear on day appointed for a term, where he appears on second day and opens court, term will not lapse.

Murder Committed in the Perpetration of a Felony is murder in the first degree.

Approved in People v. Schleiman, 197 N. Y. 388, 90 N. E. 952, 27 L. R. A. (n. s.) 1075, power of jury to convict of lesser crime could not be exercised in prosecution of one for murder who had killed in committing burglary.

Homicide in Commission of unlawful act. See note, 63 L. R. A. 359, 404.

If the Killing is Willful, deliberate and premeditated, it is murder in the first degree.

Approved in Eytinge v. Territory, 12 Ariz. 141, 100 Pac. 446, while "murder" by poison is murder in the first degree, a "killing" by means of poison must be shown to have been willful, deliberate and premedi-

tated; In re Fraley, 3 Okl. Cr. 722, 139 Am. St. Rep. 988, 109 Pac. 297, discussing rule in application for habeas corpus by prisoner who had deliberately shot one who had killed his boy nine or ten months before.

No Instruction Should be Given which is not based on some theory warranted by the evidence.

Approved in People v. Maughs, 149 Cal. 261, 86 Pac. 191, where there was no evidence of any pursuit by defendant to kill deceased or of any struggle or combat in which either party sought to retreat, abstractly correct instructions relating thereto are erroneous; People v. Elster (Cal.), 3 Pac. 888, applying rule in prosecution for larceny where evidence failed to disclose inculpatory circumstances in connection with defendant's possession of stolen property; People v. Roberts, 1 Cal. App. 450, 82 Pac. 626, where there was only an unsuccessful attempt to obtain money, an instruction on larceny committed by "fraud, trick and device" was prejudicial error.

Attendant Circumstances may be Considered in determining whether dying declarations were made under belief of impending death.

Approved in People v. Abbott (Cal.), 4 Pac. 771, physical and mental condition of wounded man justified inference that he was conscious of impending death; People v. Shehadey, 12 Cal. App. 653, 108 Pac. 148, seriousness of wound inflicted upon declarant may be considered in determining whether such belief existed.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 638, 644, 645, 652, 655, 658, 659; 56 L. R. A. 402, 412.

Premeditation and Deliberation, Though as Instantaneous as successive thoughts, are sufficient to constitute murder in first degree.

Approved in People v. Machuca, 158 Cal. 64, 109 Pac. 887, deliberation preceding killing need not exist for any given length of time to constitute murder in first degree.

Consent as Justification for assault. See note, 15 L. R. A. 854.

Conviction of Lower or Different Degree in prosecution for homicide. See note, 21 L. R. A. (n. s.) 10.

24 Cal. 31–40, PEOPLE v. WILLIAMS.

Bias or Prejudice of Judge Constitutes no legal incapacity to sit on trial of a cause.

Approved in McDowell v. Levy (Cal.), 8 Pac. 857, following rule; Hutchinson v. Manchester St. Ry., 73 N. H. 275, 60 Atl. 1013, discussing rule on motion for continuance on ground that defendant feared he could not have fair trial before judge because of statement he had made to counsel.

Distinguished in Day v. Day, 12 Idaho, 563, 565, 86 Pac. 533, 534, under section 4125, Revised Statutes of 1887, and Constitution of Idaho, prejudice of judge is ground of disqualification.

The Legal Presumption is That Jurors Perform their duty in accordance with the oath they have taken.

Approved in People v. Lyle (Cal.), 4 Pac. 978, where trial lasted over thirty days, improper or indiscreet acts of jurors from which no injury is shown to have resulted will not warrant disturbing the verdict.

Misconduct of Jurors, other than their separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1050.

24 Cal. 41–51, PEOPLE v. BRUZZO.

Power of Public Prosecutor to dismiss prosecution. See note, 35 L. R. A. 710.

Effect of Agreement for Immunity of accomplice testifying for prosecution. See note, 24 L. R. A. (n. s.) 445.

24 Cal. 52–60, ROWLAND v. KREYENHAGEN.

Supreme Court Loses Jurisdiction of Cause when remittitur has been sent to and filed in court below.

Approved in Ott v. Boring, 131 Wis. 492, 111 N. W. 835, applying rule where proceedings were regularly had; Jackson v. Barrett, 12 Idaho, 466, 86 Pac. 271, where supreme court dismissed appeal without prejudice to another appeal, second appeal could be perfected without regard to whether remittitur had been filed in lower court.

If Fraud or Imposition has Been Practiced appellate court will recall mandate dismissing appeal and assert jurisdiction.

Approved in Livesly v. Johnston, 47 Or. 196, 82 Pac. 855, applying rule where counsel was led to sign stipulation for dismissal of appeal as to one of the parties on false statement that he had made settlement.

Miscellaneous.—Cited in Philbrook v. Newman, 148 Cal. 175, 82 Pac. 773, discussing conclusiveness of judgments.

24 Cal. 73–78, PEOPLE v. DE LA GUERRA.

A Court cannot Dispense With Formal Proof of its judgment in another cause.

Approved in Stanley v. McElrath (Cal.), 22 Pac. 674, section 1875, subdivision 3 of Code of Civil Procedure, does not apply to such judicial acts as might be in judgments.

Disqualified Judge has No Power to make order dismissing action.

Approved in Johnson v. German American Ins. Co., 150 Cal. 338, 339, 88 Pac. 986, an order extending time to prepare and serve bill of exceptions to be used on motion for new trial, made by disqualified judge, is void; Carr v. Duhme, 167 Ind. 82, 78 N. E. 324, in proceedings for establishment of drain, where one of county commissioners who served was disqualified by interest, proceedings were voidable only in absence of prohibitory legislation.

Distinguished in Gage v. Downey (Cal.), 19 Pac. 119, judgment of court to which case was transferred cannot be collaterally attacked on ground his county was not nearest one to which case might have been transferred.

Judicial Notice. See note, 4 L. R. A. 35.

24 Cal. 78–84, PEOPLE ex rel. MENINGER v. SEXTON.

Mandamus will not Lie to Compel Court to proceed with trial after order changing place of trial.

Approved in State v. Superior Ct., 40 Wash. 558, 111 Am. St. Rep. 925, 82 Pac. 878, 2 L. R. A. (n. s.) 395, applying rule in application for prohibition to restrain court from proceeding further in cause in which change of venue had been denied.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 897.

Mandamus to Prevent Change of Venue from court having exclusive jurisdiction. See note, 2 L. R. A. (n. s.) 569.

24 Cal. 89-94, **HOPE v. JONES.**

Matter of Account of Administrators belongs exclusively to the probate court.

Approved in In re Burton, 5 Cof. Prob. 238, following rule; Elizalde v. Murphy, 4 Cal. App. 118, 87 Pac. 247, superior court sitting in probate has power to require an accounting from administrator of a deceased administrator.

The Share of Commissions to Which Coexecutors are respectively entitled is governed by principles of equity.

Approved in In re Coursen's Estate (Cal.), 65 Pac. 968, reaffirming rule. See note, 2 Cof. Prob. 369.

24 Cal. 94-98, **BUFFENDEAU v. EDMONDSON.**

Service of Notice of Appeal must Precede or be contemporaneous with filing.

Approved in State v. District Court, 34 Mont. 115, 115 Am. St. Rep. 522, 85 Pac. 872, and State v. District Court, 32 Utah, 422, 91 Pac. 135, both reaffirming rule; People v. Schmitz, 7 Cal. App. 343, 94 Pac. 409, order in which notice of appeal is filed and served is immaterial, if filed and served on same day.

Failure to Perform Acts Necessary to give court jurisdiction cannot be excused.

Approved in Newman v. Maldonado (Cal.), 30 Pac. 835, waiver of undertaking on appeal need not be filed but must be made before time for filing undertaking expires.

Distinguished in Coleman v. Coleman, 5 Haw. 301, counsel had right to waive act affecting jurisdiction of court as to persons, but not as to subject matter.

24 Cal. 98-104, 85 Am. Dec. 49, **LEWIS v. JOHNS.**

What is Community Property. See notes, 126 Am. St. Rep. 112; 4 Cof. Prob. 54.

Constitutionality of Statutes Affecting Rights based on pre-existing marriage. See note, 84 Am. St. Rep. 443.

Right of Husband or Wife to Compensation for services rendered the other. See note, 15 L. R. A. 215.

Rights of Creditors in Personal Services of debtor. See note, 21 L. R. A. 630.

24 Cal. 104-113, **SCHENK v. EVOY.**

Where Deed Conveying Part of larger tract fails to locate quantity, grantee takes as tenant in common.

Approved in Adams v. Hopkins (Cal.), 69 Pac. 235, deed granting one and a half square miles of land known as the "Sobrante" conveyed undivided interest in the Sobrante; Fisher v. Wailehua, 16 Haw. 157, 2 Ann. Cas. 916, applying rule to deed conveying fifty acres out of larger tract without attempting to locate parcel.

Distinguished in Adams v. Hopkins (Cal.), 69 Pac. 234, 235, where deed purported to convey part of Sobrante tract, and land described fell entirely outside of that tract, no title was conveyed; Crozier v. White, 9 Cal. App. 620, 100 Pac. 134, parol evidence is admissible to explain ambiguity in deed containing indefinite description of land.

24 Cal. 114–124, DOWNER v. SMITH.

Repeal of Statute Without Saving Clause on which jurisdiction depends takes away all power to proceed.

Approved in Zintsmaster v. Aiken, 173 Ind. 276, 90 N. E. 83, where drainage law was repealed without saving clause, pending appeal from board of commissioners in drainage proceedings, proceedings were properly dismissed.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 543.

24 Cal. 127–147, BLUM v. ROBERTSON.

Acts Claimed to Constitute Part Performance of oral contract must clearly appear to have been done.

Approved in Pearsall v. Henry, 153 Cal. 327, 95 Pac. 158, conveyance by one party on faith of oral contract for exchange of land constituted such part performance as to take the whole case out of statute of frauds; Kirkpatrick v. Pettis, 127 Iowa, 612, 103 N. W. 957, specific performance of oral contract to convey land could not be decreed for want of definite description of land.

Equitable Defense must be Both Alleged and proved.

Approved in Fritz v. Mills, 12 Cal. App. 117, 106 Pac. 727, party who has an opportunity to plead an estoppel upon which cause of action or defense depends must do so.

Rules Governing Construction of Written Instruments generally, apply to powers of attorney.

Approved in White v. Furgeson, 29 Ind. App. 150, 65 N. E. 51, construing powers of attorney signed by legal voters conferring upon attorney in fact authority to remonstrate against granting to "any applicant" license to sell intoxicating liquor.

Unlawful Detainer When Holding is by tenancy at will. See note, 120 Am. St. Rep. 43.

24 Cal. 147–153, CLARY v. ROLLAND.

Where a Return of Property is adjudged and no judgment entered for its value, sureties on replevin bond are not liable.

Distinguished in Donovan v. Aetna Indemnity Co., 10 Cal. App. 731, 103 Pac. 367, 368, in action on replevin bond, defendant surety was not released from liability because judgment against his principal was not entered in the alternative or did not direct return of property taken on replevin bond.

24 Cal. 154–156, QUIRAQUE v. DENNIS.

Under Mortgage Covering After-acquired Property, mortgagee may rightfully take possession of such property.

Approved in Burrill v. Whitcomb, 100 Me. 298, 109 Am. St. Rep. 498, 61 Atl. 682, 1 L. R. A. (n. s.) 451, where mortgagee took possession of after-acquired stock of mortgagor under terms of chattel mortgage, his lien thereon was superior to that of attaching creditor.

Mortgage of Property to be subsequently acquired. See note, 109 Am. St. Rep. 523.

Sale or Mortgage of future crops. See note, 23 L. R. A. 454, 473.

24 Cal. 171–179, OWEN v. FRINK.

Unconnected Parties may Join in Bringing a bill in equity where there is one connected interest among them all.

Approved in Toomey v. Knobloch, 8 Cal. App. 587, 97 Pac. 530, in action to cancel street assessment liens and have entire record of warrant, assessment, etc., canceled, owners in severalty of separate lots may be joined as plaintiffs.

24 Cal. 182–190, 85 Am. Dec. 58, ESTATE OF HARLAN.

Change of County Boundaries Does not Affect jurisdiction of probate court of old county over matters pending.

Approved in Linge v. Alaska Treadwell Co., 3 Alaska, 25, 26, where, after administration was begun in probate court of Douglas precinct, that court was abolished, and records transferred to Juneau precinct, probate court of Juneau precinct was without jurisdiction to remove administrator.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 549.

24 Cal. 195–217, HASTINGS v. DOLLARHIDE.

Contract of Minor may be Avoided by any act disclosing an intent to repudiate it.

Approved in Spencer v. Collins, 156 Cal. 303, 104 Pac. 322, where act of repudiation is public and unequivocal, it is questionable whether express notice of disaffirmance to adverse party is required.

Valid Ratification of Deed of Infant cannot be disaffirmed.

Approved in Luce v. Jestrab, 12 N. D. 553, 97 N. W. 850, applying rule in action on promissory note given by minor as purchase price of team of horses, which team he had retained and used nine months after attaining majority, and then offered to return.

24 Cal. 218–228, LONG v. DOLLARHIDE.

Rule That Subsequent Purchaser Whose Deed is first recorded will hold as against prior purchaser only applies where both parties claim under same grantor.

Approved in Bothin v. California Title Ins. Co., 153 Cal. 724, 96 Pac. 503, no notice whatever is conveyed by recording deed from one not connected with the title of record.

Burden of Proving He is Purchaser in good faith is on one claiming under second deed first recorded.

Approved in Austin v. Pulschen (Cal.), 39 Pac. 800, mortgagee, who failed to ascertain rights of party in possession had burden of proving he took mortgage without notice of lien for unpaid purchase price; Hendricks v. Calloway, 211 Mo. 562, 111 S. W. 67, where plaintiff charged purchaser with notice of outstanding equities but introduced no evidence of notice, slight proof by defendant was sufficient to sustain finding in his favor.

23 Cal. 228–230, WARNER v. HALMAN.

Filing of Notice of Appeal must Precede or be contemporaneous with service.

Approved in State v. District Court, 34 Mont. 115, 115 Am. St. Rep. 522, 85 Pac. 872, reaffirming rule.

Judgment Rendered in Action Tried to the court will not be reversed for defective findings of fact unless exceptions are taken below to defective findings.

Overruled in Cargnani v. Cargnani, 16 Cal. App. 99, 116 Pac. 308, objections that findings do not support judgment can be made for first time on appeal.

24 Cal. 230–237, PEOPLE v. COFFMAN.

Defense of Insanity Involves Only the Issue of defendant's mental condition at very time of committing crime.

Approved in People v. Kirby, 15 Cal. App. 271, 114 Pac. 797, upholding trial court's modification of requested instruction that jury acquit if evidence warranted finding defendant was insane at time of trial.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 740, 741.

Where Facts are Known, Objection to competency of juror cannot be made after verdict.

Approved in State v. Morrison, 67 Kan. 170, 72 Pac. 562, on motion for new trial on ground jurors had expressed opinions of guilt prior to trial, it was not sufficiently shown defendant was not aware of such statements at time jury was impaneled; Queenan v. Territory, 11 Okl. 272, 71 Pac. 221, 61 L. R. A. 324, objection to disqualification of juror who had been convicted of a felony in another state was waived.

24 Cal. 237–241, COOK v. DE LA GUERRA.

Judgment will not be Reversed for want of findings unless exception be made therefor in lower court.

Overruled in Cargnani v. Cargnani, 16 Cal. App. 99, 116 Pac. 308, objections that findings do not support judgment can be made for first time on appeal.

24 Cal. 241–245, 85 Am. Dec. 62, EX PARTE YALE.

The Legislature has Power to Control the admission of attorneys and counselors to practice.

Approved in In re Applicants for License, 143 N. C. 9, 55 S. E. 638, 10 L. R. A. (n. s.) 288, upholding constitutionality of Revisal of 1905, sections 207, 208, relating to admission of attorneys, in case where protest was made to admission of applicants on ground they did not have good moral character; In re Branch, 70 N. J. L. 548, 57 Atl. 431, such power is not inherent in the courts but is subject to statutory regulation; dissenting opinion in License to Practice Law, 67 W. Va. 240, 67 S. E. 609, majority holding under statute providing court "may" grant license on production of order of county court, application will be denied on showing applicant has not good moral character.

Attorneys. See note, 94 Am. St. Rep. 863.

Power of Legislature to Prescribe Qualifications of attorneys. See note, 10 L. R. A. (n. s.) 291.

An Attorney at Law is not an "Officer" nor does he hold a public trust.

Approved in Maxey v. Wright, 3 Ind. Ter. 254, 54 S. W. 811, by virtue of statute establishing United States courts in the Creek Nation, attorneys practicing therein are not public officers entitling them to be excepted from payment of occupation tax under Creek Indian treaty of 1856; State v. Monahan, 72 Kan. 501, 115 Am. St. Rep. 224, 84 Pac. 133, director of a drainage district is not a public officer.

Who are Public Officers. See note, 17 L. R. A. 245.

24 Cal. 245–259, DORAN v. CENTRAL PACIFIC R. R. CO.

A Naked Possessor of Public Lands is deemed in law the owner of same against all except the government.

Approved in Miller v. Imperial Water Co. No. 8, 156 Cal. 31, 103 Pac. 229, 24 L. R. A. (n. s.) 372, applying rule to stockholder in water company which was organized for the purpose of supplying water to its stockholders for use upon lands owned by them.

Distinguished in Southern California Ry. Co. v. O'Donnell, 3 Cal. App. 385, 85 Pac. 933, where locator of lode mining claim made location prior to filing and approval of map of location of railroad, his rights are prior to those of railway company.

Persons Acquiring Public Land Take Subject to right of way previously granted thereover.

Approved in Red Bluff v. Walbridge, 15 Cal. App. 781, 115 Pac. 81, applying rule in action by town to have encroachment on street declared to be highway removed; Oregon etc. R. R. Co. v. Quigley, 10 Idaho, 783, 80 Pac. 404, grant of right of way under act requiring filing of map of location with Secretary of Interior became fixed by actual construction of road as effectually as it would have been by filing of map.

Mandamus to Enforce Right of stockholder of water company to water. See note, 24 L. R. A. (n. s.) 374.

24 Cal. 260–266, SALMON v. SYMONDS.

Complaint in Ejectment Averring Seisin in fee and ouster on a day named is sufficient.

Approved in Allen v. Holt (Cal.), 7 Pac. 421, following rule.

24 Cal. 267–268, BUCKMAN v. WHITNEY.

Lost Records may be Supplied on application to the court below.

Approved in Territory of Hawaii v. Masagi, 16 Haw. 208, appellate court will not pass upon exceptions not presented by the papers in the case.

24 Cal. 289–308, RICHARDSON v. WILLIAMSON.

Adverse Possession of Land for Period prescribed by statute vests perfect title in adverse holder.

Distinguished in Goldman v. Sotelo, 8 Ariz. 91, 68 Pac. 560, under Arizona statute, defendant in ejectment was precluded from claiming title by adverse possession for statutory period, as against his own deed to plaintiff under which latter claimed.

24 Cal. 308–317, RUSH v. JACKSON.

Right to Erect Wharves. See note, 40 L. R. A. 640.

24 Cal. 322–329, 85 Am. Dec. 65, ASHLEY v. VISCHER.

A Mere Receipt in Writing acknowledging delivery of money is not a contract.

Approved in Warmack v. Askew, 97 Ark. 23, 132 S. W. 1014, following rule; Lewis v. Norris, 80 Kan. 622, 103 Pac. 135, written instrument sued on was a mere receipt for five hundred dollars barred by the statute of limitations in three years.

Acknowledgment of Any Fact in Writing which imparts an obligation to pay partakes of nature of a contract.

Approved in Fowlkes v. Lea, 84 Miss. 515, 36 So. 1037, 68 L. R. A. 925, recital in deed that grantor conveyed the land to grantee in consideration of four hundred dollars is sufficient statement of terms of contract to make statute of limitations relative to written promises the only one applicable.

24 Cal. 329–333, KEYES v. FENSTERMAKER.

Holder of Note Seeking to Charge Indorser must prove demand on maker within a reasonable time.

Approved in Merritt v. Jackson, 181 Mass. 71, 62 N. E. 989, where notes payable on demand were dated December 19th and January 5th, demand made on April 4th following was insufficient in absence of evidence of custom or usage.

Necessity of New Consideration to support waiver of failure to give notice of dishonor, or subsequent promise by indorser. See note, 29 L. R. A. 312.

24 Cal. 339–349, RICHARDSON v. McNULTY.

Abandonment of Property Takes Place when occupant deserts it without intention of repossessing it.

Approved in Farmers' Canal Co. v. Frank, 72 Neb. 155, 100 N. W. 292, nonuser of right to appropriation of water did not constitute abandonment where there was no relinquishment of possession or intention to abandon; St. Peter's Church v. Bragaw, 144 N. C. 130, 56 S. E. 690, 10 L. R. A. (n. s.) 633, a sale and conveyance of property is not an abandonment of it; Watts v. Spencer, 51 Or. 271, 94 Pac. 42, where one who sold his title and appurtenant water rights, surrendered possession and agreed to make proper conveyance, failed to execute deed, there was no abandonment of water rights.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 891, 892, 909.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 404, 405.

The Rule That Plaintiff must Recover on the strength of his own title does not apply to mining claims.

Approved in Jantzen v. Arizona Copper Co., 3 Ariz. 8, 20 Pac. 94, the real question involved is, which has better right to mine the land.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 768.

Necessity of Beneficiary's Knowledge of trust. See note, 10 L. R. A. (n. s.) 634.

24 Cal. 350–354, EX PARTE BURRILL.

The Method of Taxing Costs in the supreme court is governed by rules of the supreme court.

Approved in Candler v. Washoe Lake etc. Ditch Co., 28 Nev. 424, 82 Pac. 459, reaffirming rule.

Staying of Execution Otherwise than by statutory proceedings. See note, 127 Am. St. Rep. 710.

24 Cal. 354–358, BEAR RIVER ETC. MIN. CO. v. BOLES.

Making and Filing of Statement without giving notice of intention to move for new trial is ineffectual for any purpose.

Approved in Harris v. Careaga (Cal.), 2 Pac. 42, all proceedings relative to motion for new trial had before filing of decision and judgment of referee are wholly insufficient as a basis for the motion.

24 Cal. 359–364, BEAR RIVER ETC. MINING CO. v. BOLES.

Right of Prior Appropriation of water. See note, 30 L. R. A. 677.

Right to Store Appropriated Water. See note, 46 L. R. A. 323.

24 Cal. 364–366, FLATEAU v. LUBECK.

Statement Made, Filed and Settled cannot be made foundation of motion for new trial in absence of notice of intention to move.

Approved in Harris v. Careaga (Cal.), 2 Pac. 42, all proceedings relating to motion for new trial had before giving notice of intention to move are insufficient as basis for motion.

24 Cal. 367–373, 85 Am. Dec. 69, WIXON v. BEAR RIVER ETC. MIN. CO.

Settler on Public Land has Right to be protected against one entering upon same for mining purposes.

Approved in Lux v. Haggin (Cal.), 4 Pac. 926, right to water appropriated while state was owner of the land is superior to right of subsequent purchasers from the state; H. B. Bowling Coal Co. v. Ruffner, 117 Tenn. 192, 100 S. W. 120, 9 L. R. A. (n. s.) 923, where owner of mine by pumping water from mine into stream rendered it unfit for domestic and other uses, he was liable to farmer for damages caused thereby.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 771.

Right of Prior Appropriator of water. See note, 30 L. R. A. 670.

Pollution of Stream by Mining. See note, 24 L. R. A. 64.

24 Cal. 373–379, OWEN v. MORTON.

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 620.

24 Cal. 379–385, EASTMAN v. TURMAN.

"Protest" Includes All Steps necessary to charge an indorser.

Approved in Demelman v. Brazier, 198 Mass. 463, 84 N. E. 857, where declaration averred due protest, and defendant did not question proper presentment and notice of dishonor, he was not aggrieved by admission in evidence of amended notarial certificate of protest.

24 Cal. 403–411, CUNNINGHAM v. HAWKINS.

When Debt Secured is Barred by Statute of limitations, right to redeem is also barred.

Approved in Green v. Thornton, 8 Cal. App. 164, 165, 96 Pac. 384, 385, applying rule to a mortgage deed absolute made prior to enactment of section 430 of Code of Civil Procedure; Allen v. Allen (Cal.), 27 Pac. 32, where land in California was conveyed absolutely but as security for loan made in New York, when right to sue for the money loaned was barred in New York, suit to foreclose mortgage was barred in California.

Effect of Bar of Statute of limitations. See note, 95 Am. St. Rep. 669.

Who may Plead Statute of limitations. See note, 104 Am. St. Rep. 764.

24 Cal. 411–419, 85 Am. Dec. 78, DONAHUE v. McNULTY.

Plain and Unambiguous Deed. See note, 79 Am. St. Rep. 250.

24 Cal. 427–435, CURRAN v. SHATTUCK.

Provisions of Statute Relating to Condemnation of lands for road purposes must be strictly followed.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 216, 82 Pac. 619, holding void condemnation of lands for levees outside of city, by city in own name instead of by state board of swamp land commissioners.

Person Whose Land is to be Taken for Road purposes by condemnation proceedings must have notice of proceedings.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 215, 82 Pac. 619, though law relating to condemnation of land for levees does not specifically require notice, but order appointing appraisers directed them to give notice of hearing, which was done, there was due process of law.

Injunction or Ejectment as Proper Remedy where highway illegally opened. See note, 25 L. R. A. (n. s.) 514.

24 Cal. 435–446, VANCE v. FORE.

Map Referred to as Giving True Description of land constitutes a portion of deed.

Approved in Foss v. Johnstone, 158 Cal. 128, 110 Pac. 298, following rule; Metcalfe v. Merritt, 14 Cal. App. 248, 111 Pac. 506, land in petition for organization of reclamation district was sufficiently described by reference to a well-known ranch and a map; Snooks v. Wingfield, 52 W. Va. 445, 44 S. E. 278, where deed described real estate as known on plat of town as "Lot No. 30, Block 7," when identity of plat was shown by parol, it became part of deed.

If Deed Contains Conflicting Descriptions, that is to be adopted which is most stable and certain.

Approved in Wilson v. Chicago Lumber etc. Co., 143 Fed. 711, 74 C. C. A. 529, where description in deed which made reference to a map conflicted with that furnished by the map, the map must be regarded as controlling.

Location of Boundaries. See note, 129 Am. St. Rep. 1013.

Monumental Points Control Courses and distance.

Approved in Birk v. Hodgkins, 159 Cal. 579, 114 Pac. 824, following rule.

24 Cal. 447–449, ALLENDER v. FRITTS.

An Appeal Does not Lie from an order refusing to dissolve an attachment.

Approved in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 486, 114 Pac. 839, denying right to appeal from order denying motion to vacate order appointing receiver; Nail v. Superior Court, 11 Cal. App. 29, 103 Pac. 903, mandamus will not lie to compel superior court, on appeal taken from a justice's court, to review order of justice refusing to dissolve attachment.

Proceedings to Dissolve Attachment. See note, 123 Am. St. Rep. 1065.

24 Cal. 449–457, DORSEY v. BARRY.

Right of Individual to Contest an election is purely statutory.

Approved in Hertle v. Ball, 9 Idaho, 201, 72 Pac. 955, district court has jurisdiction to determine contest for position of director of an

irrigation district; Bradburn v. Wasco Co., 55 Or. 541, 106 Pac. 1019, construing local option law of 1905.

Upon Entry of Judgment in Election Contest, power of court over cause ceases and new trial cannot be granted.

Distinguished in People v. Bank of San Luis Obispo, 152 Cal. 270, 92 Pac. 485, bank against whom judgment is rendered in proceedings under bank commissioner's act of 1903, section 10, may move for new trial.

24 Cal. 457–458, CASGRAVE v. HOWLAND.

Right of an Individual to Contest an election is purely statutory.

Approved in Hertle v. Ball, 9 Idaho, 201, 72 Pac. 955, upholding jurisdiction of district court to determine contest for position of director of irrigation district.

24 Cal. 474–490, WOOD v. TRUCKEE TURNPIKE CO.

Franchises of a Corporation cannot be Transferred by forced sale.

Distinguished in Evans v. Krontinger, 9 Idaho, 158, 72 Pac. 884, ferry franchise may be voluntarily transferred subject to regulation by power granting the right.

Execution or Judicial Sale of Corporate Franchise or property necessary to its enjoyment. See note, 20 L. R. A. 737.

Deed of Right of Way Passes to grantee no right to possess the land on which it is imposed.

Approved in San Francisco v. Grote (Cal.), 47 Pac. 939, 940, city could not maintain ejectment for recovery of possession of a street dedicated to the public as such.

Property or Invasion of possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 574, 579.

What Title or Interest will Support ejectment. See note, 18 L. R. A. 786.

Right to Take Tolls without franchise. See note, 37 L. R. A. 716.

24 Cal. 490–502, WILLIS v. FARLEY.

Creditor of Deceased Person may Proceed to foreclose mortgage whether claim presented to administrator be allowed or rejected.

Approved in First Nat. Bank of Hailey v. Glenn, 10 Idaho, 237, 238, 109 Am. St. Rep. 204, 77 Pac. 627, upholding action in district court to foreclose mortgage, although claim for debt has been presented against estate of deceased mortgagor, and allowed, where mortgagee waives recourse against all other property than that covered by mortgage.

After Final Accounting and Discharge of administrator, he is no longer the representative of the estate.

Distinguished in Estate of Dalton, 2 Cof. Prob. 100, probate of will may be contested within one year after its admission to probate though executor has been discharged.

Authority of One of Several Executors or administrators. See notes, 127 Am. St. Rep. 381, 383, 385; 5 Cof. Prob. 377, 379, 381.

24 Cal. 513–518, ALDRICH v. PALMER.

A Verdict Attacked as Excessive will not be disturbed unless it is suggestive of passion, prejudice or corruption.

Approved in Hale v. San Bernardino etc. Traction Co., 156 Cal. 715, 106 Pac. 84, upholding verdict of twelve thousand dollars in favor of widow and infant child of a man killed at the age of twenty-six, and then earning seventy-five dollars a month; Kimic v. San Jose-Los Gatos etc. Ry. Co., 156 Cal. 277, 104 Pac. 314, upholding verdict for six thousand four hundred dollars in personal injury case where nervous system of man over sixty was permanently affected; Scally v. Garratt, 11 Cal. App. 147, 104 Pac. 329, upholding verdict for seven thousand five hundred dollars for damages to hand and arm of boy under twelve, injured through operating dangerous machine with improper surroundings; James v. Oakland Traction Co., 10 Cal. App. 799, 103 Pac. 1089, commending verdict for fifteen thousand dollars in action for injury to minor hurled from street-car through defendant's negligence, where injuries were serious; Lanigan v. Neely, 4 Cal. App. 772, 89 Pac. 446, verdict for eight thousand dollars in breach of promise suit, where that amount is not disproportionate to pecuniary condition of defendant, is not excessive; Bowen v. Sierra Lumber Co., 3 Cal. App. 317, 84 Pac. 1012, upholding verdict for five thousand dollars in favor of orphan child of brakeman killed through negligence of defendant when he was twenty-seven years old; Maloney v. Winston Bros. Co., 18 Idaho, 766, 111 Pac. 1089, where earning capacity of miner, twenty-nine years old, was reduced about fifty per cent by injury to his foot, judgment for fifteen thousand dollars was excessive and ten thousand dollars is fair; McLean v. City of Lewiston, 8 Idaho, 486, 69 Pac. 480, upholding verdict for twelve thousand dollars in action by husband and wife for damages to wife from defective sidewalk and cellar door opening therein; Yazoo & Miss. Valley R. R. Co. v. Williams, 87 Miss. 359, 39 So. 492, in action by passenger against carrier for assault by conductor, upholding instruction defining duty and power of jury with reference to punitory damages; Bunch v. Southern Pac. Co., 32 Nev. 106, 104 Pac. 229, upholding verdict for twenty thousand dollars where person thirty-seven years of age, earning one hundred dollars per month, had left leg and three toes of right foot cut off by being run over by train; Christensen v. Floriston Pulp etc. Co., 29 Nev. 573, 92 Pac. 218, verdict of ten thousand dollars for death of a laborer thirty years, in favor of his parents, was excessive under circumstances of case; Choctaw etc. R. R. Co. v. Burgess, 21 Okl. 675, 97 Pac. 280, approving verdict for five thousand five hundred dollars for injuries to wife and mother twenty-five years of age, injured while boarding train.

24 Cal. 518–560, FRENCH v. TESCHEMAKER.

All Laws of a General Nature shall have a uniform operation.

Approved in Picton v. Cass County, 13 N. D. 254, 100 N. W. 715, upholding act of 1903, providing for enforcement of payment by judicial proceedings of taxes on real property sold to the state.

Distinguished in State v. Dolan, 13 Idaho, 716, 92 Pac. 1002, 14 L. R. A. (n. s.) 1259, upholding Sunday law.

Instruments, Constitutions and Statutes must be Construed so as to harmonize the various sections and give effect to all.

Approved in Wheeler v. Herbert, 152 Cal. 236, 92 Pac. 358, following rule; People v. Nye, 9 Cal. App. 164, 98 Pac. 246, discussing rule in controversy over vacancy in office of controller caused by death

after election for second term but before qualification, where appointment was made for balance of unexpired term; People v. Bunkers, 2 Cal. App. 204, 84 Pac. 368, persons guilty of offering or giving a bribe under section 85 of the Penal Code cannot also be guilty as principals of the offense defined in section 86 of Penal Code; State v. Cochran, 55 Or. 192, 105 Pac. 892, construing constitutional provisions with reference to judiciary; dissenting opinion in State v. Plasters, 74 Neb. 665, 105 N. W. 1097, 3 L. R. A. (n. s.) 887, majority holding void act of 1905, providing for office of register of deeds.

When Statute is Ambiguous on Face, such construction as would declare it unconstitutional should be avoided when it can be fairly done.

Approved in Bacon v. Bacon, 150 Cal. 486, 89 Pac. 320, construing Code of Civil Procedure, section 1666, relative to conclusiveness of decrees of distribution; Griffin v. Rhoton, 85 Ark. 97, 107 S. W. 383, Constitution, article XIX, section 23, prohibiting state, county or city officers from receiving more than five thousand dollars per annum, is too indefinite to be self-executing and requires further legislation.

Self-executing Constitutional provisions. See note, 16 L. R. A. 285.

24 Cal. 561–562, **HARLAN v. RACKERBY.**

Writ of Assistance can Only Issue against defendants in the suit and parties bound by the decree.

Approved in Fox v. Stuenrauch, 2 Cal. App. 93, 83 Pac. 84, identity of defendant in possession whose name had been changed in judgment having been established, grantee of such defendant, who took pendente lite with knowledge of action, cannot defeat writ.

Jurisdiction of Equity to Put Party in possession in aid of decree. See note, 93 Am. St. Rep. 164.

24 Cal. 562–569, **AH YEN v. CHOATE.**

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 792, 794.

24 Cal. 585–608, **BRANHAM v. SAN JOSE.**

Allegation of Conclusion of Law renders no issue.

Approved in People v. Lanterman, 9 Cal. App. 681, 100 Pac. 722, indictment against coroner for presenting false claim against county, which failed to allege facts showing authority of board of supervisors to act on same, is insufficient; Smith v. Board of Commrs. of Rogers County, 26 Okl. 822, 110 Pac. 670, applying rule to petition to restrain board of county commissioners from letting contract for construction of bridge, which alleges (1) that board has advertised for bids, and (2) that advertisement has not been posted and published as required by law.

Sheriff's Deed Under Decree of Foreclosure transfers to purchaser whatever interest mortgage created.

Approved in Scaplen v. Blanchard, 187 Mass. 76, 72 N. E. 347, deed made to replace lost deed does not pass title to land acquired after execution of lost deed and before execution of confirmatory deed.

24 Cal. 609–630, 85 Am. Dec. 84, **TERRY v. MEGERLE.**

One not Claiming Right or Title to land cannot attack validity of title of another.

Approved in Williams v. San Pedro, 153 Cal. 51, 94 Pac. 237, where plaintiff showed no possession of the land in himself, defendants not in possession could show certificate of title under which plaintiff claimed was void.

24 Cal. 630–633, PEOPLE v. JACKSON.

A General Averment of Performance of conditions precedent is insufficient except in cases arising out of contract.

Approved in Estate of Renton, 3 Cof. Prob. 530, applying principle to contest of probate of will filed by alleged adopted children of testator.

Distinguished in Paden v. Goldbaum (Cal.), 37 Pac. 761, in action by claimant for wrongful seizure of property by sheriff, proof of service on sheriff of such claim is admissible though not pleaded.

In Absence of Error Judgment cannot be reversed for the sole purpose of granting leave to amend.

Approved in Harrison v. Magoon, 16 Haw. 488, reaffirming rule.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 25 CALIFORNIA.

25 Cal. 11–18, COPPER HILL MINING CO. v. SPENCER.

Appointment of Receiver Rests in sound discretion of court.

Approved in Whitley v. Bradley, 13 Cal. App. 725, 110 Pac. 598, holding trial court did not err in appointing receiver in action for dissolution and accounting in partnership.

25 Cal. 26–31, TYLER v. HOUGHTON.

Surveyor General is Bound to Hear Contests brought by any person touching right to sell state lands, or of applicant to purchase same, even though contestant does not seek to purchase.

Criticised in Dollenmayer v. Pryor, 150 Cal. 4, 5, 87 Pac. 617, holding person not settler on state land or applicant therefor cannot institute valid contest against one holding certificate of purchase.

Superintending Control and Supervisory jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 75.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 844, 853.

25 Cal. 31–37, URIDAS v. MORRELL.

Acquisition of Landlord's Title as defense to unlawful detainer. See note, 120 Am. St. Rep. 59.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 208, 209.

25 Cal. 38–48, 85 Am. Dec. 94, MOSS v. SHEAR.

Purchase at Tax Sale by One claiming land sold but failing to pay taxes thereon does not strengthen his title.

Approved in Crocker v. Dougherty, 139 Cal. 524, 73 Pac. 430, Smith v. Smith, 150 N. C. 83, 63 S. E. 178, and Brooks v. Garner, 20 Okl. 257, 94 Pac. 702, all following rule; Allen v. Evans, 7 Ariz. 361, 64 Pac. 413, refusing injunction to restrain issuance of tax deed to defendant, who took possession adversely to plaintiff and later purchased property at tax sale; Collins v. Hoffman, 62 Wash. 281, 113 Pac. 626, applying rule where manager of corporation purchased at delinquent

tax sale; Finch v. Noble, 49 Wash. 580, 126 Am. St. Rep. 880, 96 Pac. 4, holding vendee in possession under contract of sale, who had failed to pay taxes as agreed, could not acquire title from purchasers at tax sale against vendor; dissenting opinion in Shrigley v. Black, 66 Kan. 227, 71 Pac. 305, majority holding mortgagor of realty could not defeat mortgage by any lien growing out of taxes which he had allowed to become delinquent.

Distinguished in Younger v. Meadows, 63 W. Va. 280, 59 S. E. 1089, return of property by owner on blanks furnished by assessor as required by statute is not prerequisite to valid assessment.

Effect of Tax Sale on Land held by life tenant. See note, 32 L. R. A. 805, 807.

As to When Taxes on Land Become a Lien or encumbrance thereon. See note, 15 L. R. A. 238.

Provisions of Statutes must be Strictly Followed to impart validity to acts of assessor.

Defendant in Ejectment, to Set Off Improvements against mesne profits, must assert his right to do so in answer.

Approved in Carraway v. Moore, 75 Ark. 148, 86 S. W. 993, following rule.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 177.

Liability of Cotenants to Account for use and occupation and rents and profits. See note, 28 L. R. A. 857, 859.

Right of Tenant to acquire title not inconsistent with landlord's at commencement of tenancy. See note, 53 L. R. A. 940.

25 Cal. 49–54, De CASTRO v. RICHARDSON.

Court has Plenary Control over its judgments, orders, and decrees during term at which they were rendered.

Approved in Ex parte Monckros Von Vetsera, 7 Cal. App. 138, 93 Pac. 1037, holding court had power to vacate oral order discharging prisoner on habeas corpus.

25 Cal. 59–67, WALLS v. PRESTON.

Agreement for Cultivation of Land and delivery of portion of harvested crop to owner considered and held to be a lease and not contract of hiring.

Approved in Adams v. Thorton (Cal. App.), 82 Pac. 216, holding contract for management of orchard and division of crop between owner and farmer a cropping contract and not a lease; Rogers v. Lawton, 162 Fed. 207, holding farming contract by which owner provided one-half equipment, paid one-half repairs, and received one-half products, a lease and not a partnership; dissenting opinion in Moorshead v. United Rys. Co., 119 Mo. App. 622, 96 S. W. 287, majority holding contract between two street railroads not to establish agency or partnership, but to be a lease.

Statement on Motion for New Trial must show grounds on which it is asked.

Approved in Chase v. Alaska F. & L. Co., 2 Alaska, 84, holding motion did not sufficiently specify errors relied on.

25 Cal. 67–75, STREETER v. RUSH.

Contract of Sale of Butcher-shop, tools, etc., considered and held to include sale of goodwill of business.

Approved in Shafer v. Sloan, 3 Cal. App. 337, 85 Pac. 163, holding contract for sale of merchandise in store included goodwill of business.

Where Sum Named in Contract as Liquidated Damages is to secure damages uncertain and incapable of estimation, court will hold such to be liquidated damages and not penalty.

Approved in Mercia v. Burget, 36 Ind. App. 463, 75 N. E. 1087, stipulation of sum certain to be forfeited on condition vendor of bank should not start another bank in town is for liquidated damages; Canady v. Knox, 43 Wash. 572, 86 Pac. 932, stipulation for sum certain to be paid by vendor of business should he set up in same business in same town is for liquidated damages.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 60.

25 Cal. 76–82, **MIDDLETON v. FINDLA.**

One Selling Real Estate by Agent cannot avoid paying agent when purchaser refuses to consummate sale because of defect in title.

Approved in Dean v. Williams, 56 Wash. 621, 106 Pac. 133, Little v. Fleishman, 35 Utah, 569, 101 Pac. 985, and Kepner v. Ford, 16 N. D. 56, 111 N. W. 621, all following rule.

Real Estate Broker's Commissions as affected by negligence, fraud or default of principal, and defective title. See note, 43 L. R. A. 609, 611.

Performance by Real Estate Broker of contract to find purchaser or effect exchange. See note, 44 L. R. A. 596, 598, 605, 623.

Where Grantor's True Name Appears in Deed and acknowledgment, fact that he signs deed by wrong name does not vitiate it.

Approved in Close v. O'Brien & Co., 135 Iowa, 308, 112 N. W. 801, reaffirming rule; Woodward v. McCollum, 16 N. D. 46, 111 N. W. 625, where grantor's name appeared in body of deed, signature by initials was sufficient.

As to When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 530.

Acquisition and Use by an Individual of a name. See note, 14 L. R. A. 692.

25 Cal. 82–93, **BROWN v. MARTIN.**

Statute of Limitations cannot be Taken advantage of on general demurrer.

Approved in California Safe Deposit etc. Co. v. Sierra Valley Ry. Co., 158 Cal. 698, 112 Pac. 278, and Bliss v. Sneath, 119 Cal. 528, 51 Pac. 849, both following rule; Pryal v. Pryal (Cal.), 71 Pac. 804, holding question of limitation cannot be raised for first time on appeal.

General Demurrer That Complaint Does not State cause of action reaches any failure to state material fact.

Approved in Burke v. Maguire, 154 Cal. 462, 98 Pac. 24, following rule.

25 Cal. 93–99, **MILLER v. SUPERVISORS.**

Board of Supervisors Exercises Judicial Functions in passing upon official bonds.

Approved in Guiberson v. Argabrite, 3 Cal. App. 770, 87 Pac. 227, holding approval of bond by superior judge a judicial function and

presumption is that approval was warranted by competent evidence; Cahill v. Colgan (Cal.), 31 Pac. 617, act of board of examiners on claims against state within jurisdiction and in good faith are conclusive.

Superintending Control and Supervisory jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 75.

25 Cal. 100–108, JONES v. PARSONS.

Where Water Ditch is Owned and Used by several proprietors, they are regarded as tenants in common.

Approved in dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, majority holding majority of owners of ditch could change its course over protest of minority.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 451, 462, 468.

Rights of Partners Inter Se in partnership realty. See note, 28 L. R. A. 102.

Rights and Position of Creditors, purchasers, and other third parties in partnership realty. See note, 28 L. R. A. 164, 166.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 486, 495.

25 Cal. 117–121, TRINITY COUNTY v. McCAMMON.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 341.

25 Cal. 122–147, 85 Am. Dec. 103, HICKS v. COLEMAN.

Possession of Portion of Tract of Land under deed describing all extends to limits of tract described in deed.

Approved in Owsley v. Matson, 156 Cal. 404, 104 Pac. 984, following rule.

Possession of Part as possession of whole. See note, 125 Am. St. Rep. 304.

Grant of Land to Indian Tribe by Mexico is for benefit of tribe and individual Indian cannot alienate his holding.

Disapproved in Territory v. Delinquent Tax Payers, 12 N. M. 144, 76 Pac. 308, holding Indian could alienate land granted tribe by Mexico.

Where Stream is Named in Deed as Boundary, line follows meanders until required distance reduced to straight line is attained.

Approved in Haskell v. Friend, 196 Mass. 203, 81 N. E. 964, holding boundary line to extend parallel to shore for given distance to given point to be straight line to such point although shore was curved, when line parallel to shore would be longer than given distance; Currier v. Jones, 121 Iowa, 164, 96 N. W. 767, where monument and course in deed were both uncertain, the more certain of the two is looked to.

Effect of Bounding Grant on river or tide water. See note, 42 L. R. A. 502.

25 Cal. 147–154, LACKMAN v. WOOD.

Doctrine of Estoppel has No Application to infants.

Approved in Watson v. Ruderman, 79 Conn. 692, 66 Atl. 517, following rule.

Emancipation of Infants. See note, 113 Am. St. Rep. 113, 115, 120.
Liability of Infant for Torts. See note, 57 L. R. A. 684, 687.

25 Cal. 154–169, **CARPENTIER v. WILLIAMSON.**

Appeal from Judgment and from Order denying new trial may be combined.

Approved in Kenney v. Brotherhood of Am. Yeomen, 15 N. D. 27, 106 N. W. 46, following rule.

Every Error is Prima Facie an Injury to party against whom made, and other party must clearly show, not that probably no injury was done, but that none could have been or was done by the error.

Approved in Taggart v. Bosch (Cal.), 48 Pac. 1094, holding error in excluding cross-examination of witness prejudicial.

On Appeal from Judgment, Errors during progress of trial may be reviewed when exceptions are preserved by bill of exceptions or brought up in statement on appeal.

Reaffirmed in Carver v. San Joaquin Cigar Co., 16 Cal. App. 766, 118 Pac. 94.

Quitclaim Deeds as Passing grantor's title. See note, 105 Am. St. Rep. 856.

25 Cal. 169–174, **WILLSON v. McEVOY.**

In Action on Injunction Bond, fees of attorney employed to resist injunction cannot be recovered as damages unless they have been paid.

Reaffirmed in Hooper v. Patterson (Cal.), 32 Pac. 514.

Recovery on Injunction Bond of attorneys' fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 76.

25 Cal. 175–187, **MULLER v. BOGGS.**

Deputy County Recorder has Same Power as principal to take and certify acknowledgments of deeds.

Approved in Halbouer v. Cuenin, 45 Colo. 510, 101 Pac. 764, applying rule to deputy county clerk.

In Whose Name Deputy Officers should act. See note, 19 L. R. A. 177.

25 Cal. 189–197, **BROWN v. SCOTT.**

Assignment of Judgment Carries With It claim on which it is based.

Approved in King v. Miller, 53 Or. 59, 97 Pac. 544, following rule.

Where Allegations of Verified Complaint are presumptively within knowledge of defendant, denial in answer according to information and belief is evasive of issue.

Approved in Mendocino County v. Peters, 2 Cal. App. 28, 82 Pac. 1123, and Zany v. Rawhide Gold Min. Co., 15 Cal. App. 376, 114 Pac. 1027, both following rule.

As to When Denials on Information and belief are permissible. See notes, 133 Am. St. Rep. 110; 30 L. R. A. (n. s.) 781.

25 Cal. 197–202, **CAHOON v. MARSHALL.**

Actual Change in Possession of Personal Property, as distinguished from that which by mere intendment of law follows transfer or title, is an open visible change, rendering evident that possession of vendor has wholly ceased.

Approved in Byxbee v. Dewey (Cal.), 47 Pac. 53, holding that writing purchaser's name on raisin trays left in vendor's shed did not constitute actual change of possession; Dorman v. Soto (Cal.), 36 Pac. 590, holding that giving bill of sale to stock on ranch which remained there and were used by assignor did not constitute change of possession; Reynolds v. Beck, 108 Mo. App. 201, 83 S. W. 296, holding sale of carriage to party, who later returned it for keeping to seller, not void as against subsequent mortgagee from seller.

25 Cal. 214–225, 85 Am. Dec. 125, IRWIN v. BACKUS.

In Action on Administrator's Bond for Nonpayment under decree of court, merits of matter on which decree was issued cannot be entered into.

Reaffirmed in Tucker v. Stewart, 147 Iowa, 300, 126 N. W. 185.

Effect Against Surety of Judgment against officer. See note, 52 L. R. A. 168, 188.

25 Cal. 230–242, WISEMAN v. McNULTY.

Deed Made to Company which has no legal existence is void.

Approved in Rixford v. Zeigler, 150 Cal. 438, 119 Am. St. Rep. 229, 88 Pac. 1093, holding void deed to unincorporated "church community" under which no possession was taken.

Cotenancy in Mines. See note, 91 Am. St. Rep. 883.

Miscellaneous.—Cited in United States v. Tom Wah, 160 Fed. 212, to point that deportation of alien Chinese is not a proceeding involving a forfeiture.

25 Cal. 242–252, PEOPLE v. STRATTON.

Patent to State Lands can be Attacked only by state or some one in privity with state.

Approved in Oregon v. Warner Stock Co., 48 Or. 386, 86 Pac. 783, following rule; Ewbank v. Mikel, 6 Cal. App. 143, 91 Pac. 674, holding claimant of state land on ground of residence with intention to purchase cannot attack state patent to said land more than sixty days after order for reference of patent to attorney general, his privity with state having then ceased.

Distinguished in Williams v. San Pedro, 153 Cal. 51, 94 Pac. 237, holding certificate of sale of tide lands in San Pedro could be collaterally attacked by one not claiming under state, the state having no right to sell lands in question.

Information Filed by Attorney General to annul land patent is in nature of bill in equity and may or may not name a relator.

Approved in State v. Vandalia, 119 Mo. App. 419, 94 S. W. 1012, holding information by attorney general to abate nuisance to be in nature of bill in equity; State v. Franklin, 133 Mo. App. 493, 113 S. W. 653, and State v. Vandalia, 119 Mo. App. 421, 94 S. W. 1013, both holding suit by attorney general to abate nuisance could be conducted without naming relator.

Attorney General may Exercise Common-law Powers in addition to those of the statute.

Distinguished in State v. Huston, 21 Okl. 808, 97 Pac. 992, attorney general cannot bring or prosecute suit in name of state in any civil or criminal cause in which state may be interested except upon request of governor or either branch of legislature.

25 Cal. 252–262, HIGGINS v. HOUGHTON.

Mere Dwellers on State School Land making no claim thereto may protest against patent being issued to another.

Criticised in Dollenmayer v. Pryor, 150 Cal. 4, 87 Pac. 617, holding person not settler upon nor applicant for purchase of state land cannot contest certificate of purchase issued to another.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 339.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 794.

25 Cal. 262–265, TEWKSBURY v. O'CONNELL.

Court Should Treble Damages Found in forcible entry and detainer, although not prayed for in complaint, which contains proper averment of damages sustained.

Approved in Carpenter v. Chicago R. R. Co., 119 Mo. App. 207, 95 S. W. 986, holding court properly entered verdict for double damages found by jury for negligent killing of horse by railroad.

25 Cal. 266–283, GRAY v. DOUGHERTY.

Final Judgment is Conclusive not Only as to matters judicially determined, but also as to every matter that might have been properly litigated in that action.

Approved in Estate of Bell, 153 Cal. 340, 95 Pac. 376, refusing to relitigate subject matter in probate in subsequent proceedings on ground of newly discovered evidence; Philbrook v. Newman, 148 Cal. 175, 82 Pac. 773, refusing to set aside on motion order made by appellate court nine years before on ground it was wrong as to facts and law.

For Purpose of Determining Whether Issues passed in former action are same as in new action between same parties, resort may be had to judgment-roll.

Approved in Page v. Garver, 5 Cal. App. 386, 90 Pac. 483, resorting to judgment-roll of former action when later suit was between one party and privy of other; Lillis v. People's Ditch Co. (Cal.), 29 Pac. 783, admitting parol evidence in later action on same matter to construe judgment in former action.

By Demand and Refusal Party Liable makes himself liable also for costs.

Approved in Koyer v. Willmon, 150 Cal. 788, 90 Pac. 136, holding fact of previous tender of payment is important only on question of costs.

Demand by Vendee for Deed from vendor is necessary before suit can be brought to enforce performance of contract to convey land.

Approved in Claude v. Richardson, 127 Iowa, 625, 103 N. W. 991, following rule.

Miscellaneous.—Cited in Hibernia Savings etc. Soc. v. Portener, 139 Cal. 93, 72 Pac. 716, to point that action may not be dismissed by plaintiff after trial and submission.

25 Cal. 283–291, BARTRAM v. CENTRAL TURNPIKE CO.

Public Land Grants are to be Strictly Construed, and nothing passes to grantee by implication.

Approved in Mitchell v. Tulsa Water L. H. & Power Co., 21 Okl. 254, 95 Pac. 965, where language of ordinance granting waterworks

franchise was ambiguous, construction more favorable to public should be adopted.

Right to Take Tolls without franchise. See note, 37 L. R. A. 716.

25 Cal. 296–300, BOSWORTH v. DANZIEN.

Tax Deed is not Necessarily Void because of insertion of false call in description.

Approved in Seymour v. Deisher, 33 Colo. 352, 80 Pac. 1039, upholding tax deed to mining claim although wrong number of survey was inserted.

Distinguished in Palomares Land Co. v. Los Angeles County, 146 Cal. 536, 80 Pac. 934, holding void assessment of land by false metes and bounds without other description sufficient to identify it.

Term "Northerly," Used in Grant, unless controlled by monuments mentioned in description, means due north.

Approved in State v. Huff, 105 Mo. App. 362, 79 S. W. 1012, holding "westerly" meant due west.

25 Cal. 313–316, CROWELL v. SONOMA COUNTY.

County is not Liable for Injuries caused by tortious acts of public officers.

Approved in James v. Trustees of Wellston Township, 18 Okl. 66, 90 Pac. 103, township not liable for injuries caused by defective highways.

Distinguished in McPherson v. San Joaquin County (Cal.), 56 Pac. 804, county liable under its contract to furnish suitable well casings for well being bored for it when officers neglected duty in selecting casings.

Liabilities of Counties for torts and negligence. See note, 39 L. R. A. 64.

Liability of County for Injuries to adjoining property by construction or maintenance of bridge. See note, 21 L. R. A. (n. s.) 210.

25 Cal. 337–361, ENGLUND v. LEWIS.

Judgment Which cannot be Enforced is no judgment at all.

Approved in Howe v. Sears, 30 Utah, 349, 84 Pac. 1109, holding execution could not be issued on deficiency judgment on foreclosure of mortgage until deficiency was ascertained.

25 Cal. 361–367, PEOPLE v. FOREN.

Murder in Second Degree Defined.

Approved in People v. Biggins (Cal.), 3 Pac. 856, holding correct charge that evidence did not show involuntary manslaughter.

If Slayer Deliberately Resolves to Kill before committing the homicide, it is murder in first degree.

Approved in dissenting opinion in Cook v. State, 46 Fla. 73, 35 So. 683, court dividing equally on question of error in charge as to premeditation in murder case.

25 Cal. 367–384, 85 Am. Dec. 133, MACLAY v. LOVE.

Rights of Married Women as to Separate Property depend mainly upon constitution and statutes of state.

Approved in Sencerbox v. First Nat. Bank, 14 Idaho, 101, 93 Pac. 371, following rule.

Constitutionality of Statutes Affecting Rights based on pre-existing marriage. See note, 84 Am. St. Rep. 442, 443.

25 Cal. 384–397, McGLYNN v. MOORE.

Receipt of Rent by Lessor After Forfeiture of term by lessee is waiver of forfeiture unless done in ignorance thereof.

Approved in German-American Sav. Bank v. Gollmer, 155 Cal. 691, 102 Pac. 935, 24 L. R. A. (n. s.) 1066, holding lessor did not consent to assignment of lease by accepting rents thereafter without knowledge.

Waiver of Landlord's Right to maintain unlawful detainer. See note, 120 Am. St. Rep. 64.

Acceptance of Rent Thereafter Accruing as waiver of known cause of forfeiture. See note, 11 L. R. A. (n. s.) 832.

Effect of License to Commit Breach of condition subsequent, or waiver of past breach, to extinguish condition. See note, 11 L. R. A. (n. s.) 405.

Distinguished in Granite Bldg. Assn. v. Greene, 25 R. I. 53, 54 Atl. 794, where cause of forfeiture is continuing, waiver of breach by receipt of rent extends only to past breaches.

In Order to Work Forfeiture of Lease for nonpayment of rent, landlord must make demand for rent when due.

Reaffirmed in Hicks v. Beacham, 131 Ga. 91, 62 S. E. 46.

25 Cal. 397–404, TURNER v. TUOLUMNE COUNTY WATER CO.

Affidavit of Juror may be Received to impeach verdict arrived at by chance.

Approved in Weinburg v. Somps (Cal.), 33 Pac. 343, and Southern Nevada Gold etc. Min. Co. v. Holmes Mining Co., 27 Nev. 147, 73 Pac. 762, both following rule.

At Common Law, Affidavit of Jurors could not be received to impeach their verdict.

Approved in Southern Nevada Gold etc. Min. Co. v. Holmes Mining Co., 27 Nev. 145, 73 Pac. 762, following rule.

Verdict Arrived at by Adding Together amounts thought by each juror to be just and dividing total by twelve is not a chance verdict, but jurors cannot agree to be bound by result.

Approved in Dixon v. Pluns (Cal.), 31 Pac. 932, setting aside verdict reached by adding sums found just by individual jurors and dividing by twelve; Southern Nevada Gold etc. Min. Co. v. Holmes Mining Co., 27 Nev. 148, 73 Pac. 763, holding quotient verdict proper when amounts are conscientiously stated by jurors.

If Objection to Evidence is Overruled but no exception taken, it is presumed that ruling acquiesced in.

Approved in Annans v. Sewell, 47 Or. 373, 84 Pac. 395, following rule; Lee v. Murphy, 119 Cal. 367, 51 Pac. 550, applying rule to foreclosure of mortgage.

Liability for Damming Back stream. See note, 59 L. R. A. 858.

25 Cal. 404–434, LICK v. FAULKNER.

Treasury Notes are Legal Tender for payment of rent.

Approved in Sears v. Dewing, 96 Mass. (14 Allen) 428, holding treasury notes proper currency in which to pay amount due at market value on contract calling for payment in definite weight of gold coins.

Miscellaneous.—Cited in State v. Blaisdell, 18 N. D. 39, 119 N. W. 364, to point that legislative construction, when followed by

years of harmonious legislation is entitled to great weight in determining construction of constitutional provisions.

25 Cal. 434–436, KRAMER v. SAN FRANCISCO MARKET ST. R. R. CO.

Action for Wrongful Death can only be maintained by personal representative.

Approved in Bond v. United Railroads, 159 Cal. 280, 113 Pac. 370, determining measure of damages under Code of Civil Procedure, section 377, in action by parent for wrongful death of parent.

Common-law Right of Action of Parent for loss of services of child killed. See note, 41 L. R. A. 808, 809.

25 Cal. 437–440, LYLE v. ROLLINS.

Effect of Legal Remedy upon equitable jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 71.

25 Cal. 440–460, KIMBALL v. SEMPLE.

In Construing Doubtful Instrument court will place itself as nearly as possible in position of contracting parties.

Approved in Co-operative Bldg. Bk. v. Hawkins, 30 R. I. 181, 73 Atl. 621, holding in ambiguous description in deed parties' intention should be sought by consideration of all calls, state of property, and circumstances under which deed was made.

Effect of Covenants to Carry Title to a future or subsequently acquired interest where grantor's deed passed a present interest. See note, 13 L. R. A. (n. s.) 1006.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 337, 346.

25 Cal. 460–478, BOYCE v. CALIFORNIA STAGE CO.

Judgment of Jury is Final as to Damages where amount is not regulated by law, nor is so excessive as to suggest passion or prejudice in their assessment.

Approved in Coats v. Atchison Ry. Co., 1 Cal. App. 446, 82 Pac. 642, holding proper damages assessed by jury for injury to premises by railroad; Maloney v. Winston Bros. Co., 18 Idaho, 766, 111 Pac. 1089, affirming judgment on verdict for damages upon condition that part would be remitted.

Where Passenger is Injured by Means of instrumentalities employed in business of carrier, presumption is that carrier was negligent, and burden is on him to rebut negligence.

Approved in Bonneau v. North Shore R. R. Co., 152 Cal. 409, 125 Am. St. Rep. 68, 93 Pac. 107, following rule; Valente v. Sierra Ry. Co., 158 Cal. 416, 111 Pac. 97, instruction that railroad, as common carrier of passengers for reward, is bound to use utmost care and diligence for their safety is not incorrect; Renfro v. Fresno City Ry. Co., 2 Cal. App. 324, 84 Pac. 360, holding evidence sufficient to raise presumption of negligence of carrier, and so cast burden of rebutting negligence upon it; Dixon v. Pluns (Cal.), 31 Pac. 932, holding prima facie case made out by showing that plaintiff was struck on head while walking on street by defendant letting fall chisel from building overhead.

Presumption of Negligence from Happening of accident causing personal injuries. See notes, 113 Am. St. Rep. 103; 15 L. R. A. 36.

Court may Instruct Jury in Relation to whole field of inquiry unless counsel moves to strike out evidence offered at variance with pleadings.

Approved in Black v. Teeter, 1 Alaska, 566, sustaining charge when covering evidence received without objection though broader than pleadings.

Verdict cannot be Impeached by Affidavits of jurors except when verdict is arrived at by resort to chance.

Approved in Phillips v. Rhode Island Co., 32 R. I. 27, 78 Atl. 346, affidavits of jurors are inadmissible on motion for new trial to show jurors had privately visited place of accident.

25 Cal. 478–492, HUTTON v. REED.

At Common Law Assignment of Errors did not constitute part of transcript, but was founded upon it, and was filed in appellate court at, or subsequent to, time of filing transcript.

Approved in Smith Table Co. v. Madsen, 30 Utah, 300, 84 Pac. 886, assignment of errors need not be filed in court below.

Statement on Appeal or Motion for new trial should contain clear specification of particular grounds relied on by appellant.

Approved in Haggin v. Clark, 28 Cal. 165, holding insufficient appellant's statement on appeal; Chase v. Alaska F. & L. Co., 2 Alaska, 84, holding insufficient specification of grounds on motion for new trial.

When Appeal is Taken on Judgment-roll Alone, and no statement is made, specifications of error need not be inserted in transcript, but judgment will be affirmed, if no brief is furnished by appellant.

Approved in Goldberg v. Sisseton Loan etc. Co., 24 S. D. 61, 140 Am. St. Rep. 775, 123 N. W. 270, on appeal from judgment which brings up judgment-roll, sufficiency of findings to support judgment, though not questioned below, will, on proper assignment of error, be considered.

25 Cal. 492–502, LENT v. MORRILL.

If Mortgagor Disposes of Mortgaged Property and then renews note secured, and later regains ownership of mortgaged property, lien of mortgage is thereby extended till note is due.

Approved in Bernardy v. Colonial etc. Mortgage Co., 17 S. D. 642, 106 Am. St. Rep. 791, 98 N. W. 167, holding title acquired by grantor by patent passed under prior deed purporting to be in fee.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 680.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 554.

Miscellaneous.—Cited in Ex parte Yale, 24 Cal. 242, 85 Am. Dec. 62, referring historically to principal case.

25 Cal. 502–504, CURIAC v. ABADIE.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 522.

25 Cal. 504–511, 85 Am. Dec. 145, YANKEE JIM'S UNION WATER CO. v. CRARY.

Right of Use of Water is Acquired by five years' open, notorious, adverse user.

Approved in Evans v. Ross (Cal.), 8 Pac. 90, State v. Quantic, 37 Mont. 52, 94 Pac. 499, and Anderson v. Bassman, 140 Fed. 26, all following rule; Jobling v. Tuttle, 75 Kan. 364, 89 Pac. 704, where water claimed to be adversely used was from surplus above that required by owners and was used in common with public, use was not adverse; Tabbott v. Butte City Water Co., 29 Mont. 26, 73 Pac. 1113, adverse user of water by former tenant began when he delivered up possession.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 712, 714, 717.

Right of Prior Appropriation of water. See note, 30 L. R. A. 671.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

Liability of Water Companies. See note, 81 Am. St. Rep. 486.

25 Cal. 515–520, TEVIS v. ELLIS.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 129.

25 Cal. 520–531, PEOPLE v. LOVE.

Persons Severally Liable on Same Obligation may all or any of them be joined in same action at option of plaintiff.

Reaffirmed in Moreing v. Weber, 3 Cal. App. 22, 84 Pac. 223.

Form of Judgment on Penal Bonds. See note, 62 L. R. A. 448.

25 Cal. 531–535, PEOPLE v. GARCIA.

Indictment Charging Offense in Language of statute creating it is sufficient.

Approved in People v. Davenport, 13 Cal. App. 643, 110 Pac. 322, holding sufficient indictment for felony in language of statute although not using word "feloniously"; Brown v. State, 127 Wis. 203, 106 N. W. 540, information for rape not fatally defective for failure to contain word "feloniously" or equivalent.

Admission of Fact by Defendant's Counsel in criminal case, made for purpose of trial in open court, and not objected to by defendant, may be read in evidence against him at trial.

Approved in State v. Kinney, 21 S. D. 393, 113 N. W. 78, following rule; State v. Gordon, 35 Mont. 469, 90 Pac. 177, upholding instruction, on appeal when evidence was not brought up, which assumed admission of act, since defendant might have admitted the act.

Distinguished in State v. Butler, 151 N. C. 674, 65 S. E. 994, 25 L. R. A. (n. s.) 169, holding admissions by defendant's counsel, made at preliminary hearing to avoid continuance asked by state in order to get certain documents, were not admissible at trial at which state had such documents.

Larceny from Possession of Servant or agent. See note, 88 Am. St. Rep. 581.

25 Cal. 538–545, 85 Am. Dec. 151, MITCHELL v. HOCKETT.

Effect of Failure to Demand Payment. See note, 97 Am. St. Rep. 452.

Admissibility of Evidence of officer's return. See note, 129 Am. St. Rep. 851.

25 Cal. 545–555, LAY v. NEVILLE.

Particular Facts of Each Case Determine question of delivery and possession in sale of chattels.

Approved in Rapple v. Hughes, 10 Idaho, 345, 77 Pac. 725, following rule; Sequeira v. Collins, 153 Cal. 432, 95 Pac. 879, holding evidence failed to show transfer of possession of brick kilns on land of another; Avery Mfg. Co. v. Emsweller, 31 Ind. App. 293, 67 N. E. 947, holding delivery of machinery to be complete, though left at place of purchase, when purchaser asked it to be left there; Western Min. Supply Co. v. Quinn, 40 Mont. 160, 135 Am. St. Rep. 612, 105 Pac. 732, holding delivery of key of warehouse sold to be sufficient delivery as against creditors, when warehouse was personal property on leased land.

Admissibility Against Third Persons of declarations of deceased persons. See note, 94 Am. St. Rep. 677.

25 Cal. 555–563, HERRON v. HUGHES.

Conspiracy to Commit Tort is not Ground of action unless damage results therefrom.

Approved in Dowdell v. Carpy (Cal.), 61 Pac. 949, holding complaint charging conspiracy and malicious prosecution good only as to the latter, and demurrable before termination of prosecution; Marten v. Holbrook, 157 Fed. 717, holding complaint alleging conspiracy to deprive plaintiff of property and his confinement in asylum thereunder states cause of action for false imprisonment; Lasher v. Littell, 202 Ill. 555, 67 N. E. 373, holding action on conspiracy merely action on the case.

Miscellaneous.—Cited in Fox v. Hale etc. Silver Min. Co. (Cal.), 53 Pac. 36, to point that in charging fraud complaint must set up facts constituting fraud.

25 Cal. 564–583, CARPENTIER v. ATHERTON.

Specific Contract Law of 1863 is not Unconstitutional in providing for enforcement in terms of contracts payable in specified kind of money.

Approved in Sheehy v. Chalmers (Cal.), 36 Pac. 515, holding proper judgment payable in "U. S. gold coin" when note on which it was rendered was so payable.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 516.

Form of Judgment and Procedure in case of liability to make payment in coin. See note, 29 L. R. A. 593.

25 Cal. 585–587, ESTATE OF CARR.

Right of Persons Entitled to Administer Estate to have letters granted to persons not entitled to administer exists only where there is vacancy in the administration.

Distinguished in Estate of Myers, 9 Cal. App. 696, 100 Pac. 713, holding under sections 1365 and 1379, Code of Civil Procedure, right to nominate person not entitled to letters by persons entitled is at discretion of court.

25 Cal. 587–591, **FOX v. FOX.**

Facts Averred in Complaint and not Denied in answer are not required to be found by court.

Reaffirmed in Fouch v. Bates, 18 Idaho, 383, 110 Pac. 268.

25 Cal. 593–598, **CLARKE v. HUBER.**

Estoppels in Pais must be Pleaded.

Approved in Nolan v. Fidelity & Deposit Co., 2 Cal. App. 4, 82 Pac. 1120, Fritz v. Mills, 12 Cal. App. 117, 106 Pac. 726, and Smith v. Cascaden, 148 Fed. 799, 78 C. C. A. 458, all following rule; Seebach v. Kuhn, 9 Cal. App. 490, 99 Pac. 725, holding plaintiff bound to plead acts of prevention of performance, acceptance, or waiver by owner in action by contractor on building contract.

Appellant cannot Urge Objections not Advanced in lower court.

Approved in Spear v. United Railroads, 16 Cal. App. 647, 117 Pac. 961, refusing to consider alleged error in refusing to strike out testimony where no grounds for motion stated to lower court.

Miscellaneous.—Cited in dissenting opinion in People v. McNulty (Cal.), 28 Pac. 823, majority holding unconstitutional as ex post facto act of 1891, providing for execution of criminal convicted of murder.

25 Cal. 601–604, **PEOPLE v. EASTMAN.**

Judgment for Debt and Foreclosing Mortgage is taxable only in county of residence of owner of judgment.

Approved in Savings etc. Society v. Multnomah County, 169 U. S. 431, 18 Sup. Ct. 392, 42 L. Ed. 803, holding constitutional Oregon statute taxing mortgages in county where property subject to mortgage is situated; State of Indiana v. Pullman Palace Car Co., 16 Fed. 195, 11 Biss. 561, holding state cannot tax foreign corporation on gross receipts not received within such state; Territory of Arizona v. Delinquent Tax List, 3 Ariz. 180, 24 Pac. 182, debt due nonresident from resident, though secured by mortgage on land in state, is not taxable in state.

Situs for Purpose of Taxation of debts evidenced by notes and mortgages. See note, 16 L. R. A. 730.

Power to Tax Mortgages. See note, 16 L. R. A. 60.

Miscellaneous.—Cited in People v. Rains, 23 Cal. 130, 133, to point that description of property in assessment as improvements on real property assessed is sufficient; People v. Leet, 23 Cal. 164, holding sufficient description of tract of land by name.

25 Cal. 604–619, **GREELY v. TOWNSEND.**

What Adjudications of State Courts can be brought up in United States supreme court by writ of error. See note, 62 L. R. A. 520.

Practice and Procedure Governing Transfer of causes to federal supreme court on writ of error or appeal. See note, 66 L. R. A. 863.

25 Cal. 619–631, **SNEED v. OSBORN.**

Statement of Evidence by Appellate Court does not control court below on new trial, the trial court being controlled only by decisions of law.

Reaffirmed in Allen v. Bryant, 155 Cal. 263, 100 Pac. 707.

Acquiescence of Adjoining Owners for five years to incorrect position of boundary line estops them from saying such is not true line.

Approved in Loustalot v. McKeel, 157 Cal. 641, 108 Pac. 710, and Adams v. Child, 28 Nev. 185, 88 Pac. 1088, both following rule; Young v. Blakeman, 153 Cal. 483, 95 Pac. 890, holding agreement on boundary line between city lots and acquiescence therein by building up to it precluded adjoining owners from questioning correctness of line; Smith v. Robarts (Cal.), 9 Pac. 105, holding mutual mistake of coterminous proprietors as to division line does not affect their legal rights.

Distinguished in Lewis v. Ogram, 149 Cal. 509, 117 Am. St. Rep. 151, 87 Pac. 62, 10 L. R. A. (n. s.) 610, holding agreement on boundary line knowing it not to be true line, in absence of apt words of conveyance, does not pass title and is unenforceable.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 687.

Adverse Possession Due to Ignorance or mistake as to boundary. See note, 21 L. R. A. 834.

25 Cal. 631-634, ATHEARN v. POPPE.

What Adjudications of State Courts can be brought up in United States supreme court by writ of error. See note, 62 L. R. A. 533.

How and When Questions must be Raised and decided in state court to make case for writ of error from federal supreme court. See note, 63 L. R. A. 53.

25 Cal. 653-657, GREGORY v. HAWORTH.

Assignor in Fraud of Creditors cannot sue to recover property assigned.

Reaffirmed in Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 26 CALIFORNIA.

26 Cal. 11-23, O'CONNOR v. DINGLEY.

Where There was Special Contract Whereby Defendant was to pay plaintiff in notes, plaintiff's remedy is for damages for failure to give note and not for work and labor.

Distinguished in Castagnino v. Balletta (Cal.), 21 Pac. 1099, assumpsit lies to recover balance due on special contract to erect a building.

In Assumpsit, in Consequence of General Deviation from terms of contract made by consent, contract is admissible as basis for value of services.

Approved in City Street Imp. Co. v. Kroh, 158 Cal. 323, 110 Pac. 940, where street specifications changed, county is entitled to reduction in price from original contract.

26 Cal. 23-46, 85 Am. Dec. 157, DAVIS v. DAVIS.

Word "Representative" as Used in Practice Act, section 393, construed.

Approved in Gruenewald v. Neu, 215 Ill. 141, 74 N. E. 104, construing term "legal representatives" in will; Coffin v. Ontonagon Circuit Judge, 140 Mich. 425, 103 N. W. 837, grantee of defendant in suit to quiet title is embraced in term "representatives" in Compiled Laws of 1897, section 496, relating to substituted service.

Estoppel in Pais must be Pleaded fully and particularly.

Approved in Fritz v. Mills, 12 Cal. App. 117, 106 Pac. 726, and Tonkawa Milling Co. v. Town of Tonkawa, 15 Okl. 679, 83 Pac. 918, both following rule; Harper v. Hill, 159 Cal. 260, 113 Pac. 167, applying rule in action to recover mining claims; Nolan v. Fidelity & Deposit Co., 2 Cal. App. 4, 82 Pac. 1120, in action on stay bond sureties cannot, without pleading facts, claim that plaintiff is estopped from enforcing the bond because execution issued on judgment appealed from after bond given; dissenting opinion in Smith v. Cascaden, 148 Fed. 799, 78 C. C. A. 458, majority not passing on point.

Where Estoppel in Pais not Pleaded, but evidence introduced without objection as if it had been pleaded, objection to pleading deemed waived.

Approved in Gervaise v. Brookins, 156 Cal. 112, 103 Pac. 333, where complaint in ejectment alleges value of rents at certain sum per day and answer does not deny such allegation, but denies allegation of damage, finding that rents were certain sum implies an issue thereon so that plaintiff cannot urge contrary on appeal; Hubbard v. Lee, 6 Cal. App. 610, 92 Pac. 747, failure to plead estoppel cannot be raised for first time on appeal where no objection made to evidence thereof.

What Constitutes Estoppel in pais, stated.

Approved in dissenting opinion in El Paso Livestock etc. Co. v. Colorado Livestock etc. Co., 171 Fed. 29, 96 C. C. A. 262, majority holding vendor of cattle bound by statements of bank as its agent with reference to payment of draft.

Great Caution Should be Exercised in applying principle that where one of two innocent persons must suffer by act of third, he who enabled such third person to occasion loss must bear it.

Approved in Cooper v. Spring Valley Water Co., 16 Cal. App. 26, 116 Pac. 302, upholding refusal to so instruct where counsel conceded it was inapplicable to case.

Parol Evidence of Parol Declarations made long prior to trial, upon which estoppel in pais is sought to be founded, should be carefully scrutinized.

Approved in Dye v. Crary, 13 N. M. 460, 85 Pac. 1041, 9 L. R. A. (n. s.) 1136, following rule; Austin v. Wilcoxson, 149 Cal. 29, 84 Pac. 419, as to weight of oral declarations of alleged trustee to establish trust against him.

Declarations, to Constitute an Estoppel in pais, must amount to constructive fraud.

Approved in Ergenbright v. Henderson, 72 Kan. 32, 82 Pac. 525, following rule; Kenny v. McKenzie, 23 S. D. 119, 120 N. W. 784, fact that mortgagors having no notice of defect in assignment of mortgage acquiesced in foreclosure, believing proceedings valid, and delivered possession, did not estop them from asserting rights as against purchaser on ascertaining truth; dissenting opinion in Sherman v. Sherman, 23 S. D. 507, 122 N. W. 448, discussing elements of estoppel.

26 Cal. 50–68, TOMPKINS v. WEEKS.

Probate Court cannot Authorize Administrator to use funds of estate to carry on business with surviving partner of decedent.

Approved in Estate of Blythe, 2 Cof. Prob. 161, 162, denying power of probate court to grant administrator leave to expend moneys to preserve Mexican lands from forfeiture under conditions of grants.

26 Cal. 69–78, BRADLEY v. HARKNESS.

Ditch for Carrying Water is real estate.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 727, 93 Pac. 863, 15 L. R. A. (n. s.) 359, right to water which is diverted from stream into a canal for irrigation is real property, and land owner's right to have water flow from canal through lateral ditch is a servitude.

Joint Owners of Water Ditches in mining districts are tenants in common.

Approved in dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, majority holding where community ditch constructed,

majority interested not thereby vested with power to change at will, to plaintiff's damage, ancient course of said ditch.

In Action for Partition of Water Ditch, account of proceeds for water rates may be taken and mortgage held by one of owners may be adjusted by application of mortgagor's interest toward its payment.

Approved in Truth Lodge v. Barton, 119 Iowa, 239, 97 Am. St. Rep. 303, 93 N. W. 109, ordering partition sale of building erected by two joint owners of lot.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 407.

26 Cal. 79–88, 85 Am. Dec. 172, GALLAND v. JACKMAN.

Purchaser With Knowledge of His Grantor's prior unrecorded conveyance is not bona fide purchaser.

Approved in Zenda Mining etc. Co. v. Tiffin, 11 Cal. App. 66, 104 Pac. 12, purchaser at judicial sale against trustee of naked legal title, having knowledge of the record of documents evidencing the transaction and possession of true owner, acquires no title.

Distinguished in Womble v. Wilbur, 3 Cal. App. 542, 86 Pac. 919, bona fide purchaser from grantee in possession, between whom and his grantor escrow agreement made calling for installment payments and delivery of deed to grantee or assignees, who was ignorant of prior agreement charging original grantee with interest, is not chargeable with constructive notice thereof by its recordation after his purchase.

26 Cal. 88–112, MULFORD v. LE FRANC.

Where Language of Conveyance is Ambiguous, surrounding circumstances are considered in arriving at intent.

Approved in Tilton v. Flormann, 22 S. D. 334, 117 N. W. 381, following rule; Rockwell v. Light, 6 Cal. App. 565, 92 Pac. 650, construing word "trimmings" in contract for house painting; Grant v. Bannister, 160 Cal. 780, 118 Pac. 255, construing deed to partners individually.

Color of Title. See note, 88 Am. St. Rep. 705.

26 Cal. 129–134, PEOPLE v. ANDERSON.

In Bigamy and Criminal Conversation, proof of marriage in fact is necessary.

Cited in People v. Le Doux, 155 Cal. 548, 102 Pac. 522, arguendo.

26 Cal. 135–141, PEOPLE v. FRISBIE.

Pending Appeal, Party in Whose Favor Judgment is rendered has no vested right in judgment.

Approved in Lackman v. Klauenberg, 3 Cal. App. 185, 84 Pac. 777, bill of interpleader by sheriff against conflicting claimants of money in his hands is not demurrable on ground that it discloses an unsuccessful defense by him to action by one of claimants, judgment on which has been appealed to superior court for trial de novo.

Where Statute is Susceptible of Two Constructions, it is given that construction which will make it harmonize with constitution.

Approved in Chesebrough v. San Francisco, 153 Cal. 568, 96 Pac. 291, construing Political Code, section 3608, relative to valuation of corporate stock for tax purposes; Bacon v. Bacon, 150 Cal. 486, 89 Pac. 320, construing Code of Civil Procedure, section 1666, relative

to conclusiveness of decrees of distribution; dissenting opinion in People v. McNulty (Cal.), 28 Pac. 825, majority holding void act of 1891, amending Penal Code, sections 1217, 1227, 1229, providing time and place of executing death penalty.

26 Cal. 141–145, LOW v. ALLEN.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 688.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 554.

26 Cal. 149–155, RICKETSON v. RICHARDSON.

Statutes Relating to Service by publication must be strictly construed.

Approved in Estate of Hancock, 156 Cal. 810, 134 Am. St. Rep. 177, 106 Pac. 60, following rule; Livermore v. Ratti, 150 Cal. 465, 89 Pac. 328, applying rule to notice by posting of hearing of settlement of guardian's account; Harris v. Morris, 3 Cal. App. 154, 84 Pac. 679, affidavit of mailing to effect that affiant deposited in postoffice "a copy of said summons attached to a copy of the complaint," directed to four specified defendants, is insufficient.

An Affidavit for Publication which merely repeats language or substance of statute is insufficient; the probative facts and not the ultimate facts must be stated.

Approved in Cohen v. Portland Lodge, 144 Fed. 271, Mills v. Smiley, 9 Idaho, 330, 332, 76 Pac. 787, 788, and Harding v. Gillette, 25 Okl. 208, 107 Pac. 669, all following rule; Estate of Hancock, 156 Cal. 810, 811, 134 Am. St. Rep. 177, 106 Pac. 61, under Colorado statute, county court of that state does not acquire jurisdiction to order service by publication on nonresident defendant, on affidavit of attorney that plaintiff has good cause of action and that defendant is nonresident; Nicoll v. Midland Sav. & L. Co., 21 Okl. 596, 96 Pac. 746, applying rule to affidavit of publication of service on foreign corporation.

Where Only One of Losing Defendants Appeals, and error affects him only, appellate court will reverse as to him only.

Approved in Shreeder v. Davis, 43 Wash. 136, 86 Pac. 200, joint judgment against two or more persons for tort committed by their employer, though reversed as to one of parties appealing, remains in force as against another not appealing; Stevens v. Byrkett, 56 Or. 573, 109 Pac. 387, arguendo.

Entirety of Judgments Void as against some of the parties. See note, 91 Am. St. Rep. 369.

Miscellaneous.—Cited in Janes v. Throckmorton, 57 Cal. 374, reciting history of litigation.

26 Cal. 156–157, KERNS v. GRAVES.

Filing of Justice Court Transcript with county clerk does not empower latter to issue execution on judgment after five years from rendition.

Approved in Phillips v. Norton, 18 S. W. 538, 101 N. W. 730, filing of transcript of justice's judgment in circuit court does not extend time for issuing execution.

Distinguished in Holton v. Schmarback, 15 N. D. 40, 106 N. W. 37, under statute, district court in which justice's transcript of judgment

is filed may issue execution thereon five years after entry of judgment by justice.

26 Cal. 161-262, **BOURLAND v. HILDRETH.**

Legislature cannot Change Qualifications of voters prescribed by constitution.

Approved in dissenting opinion in Solon v. State, 54 Tex. Cr. 294, 114 S. W. 363, majority upholding act of 1905, making payment of poll tax condition precedent to right to cast ballot.

As to How Far Right to Vote is absolute. See note, 25 L. R. A. 482.

Votes Cast by Qualified Electors cannot be rejected for malconduct on part of election officers.

Approved in Starkweather v. Dawson, 14 Cal. App. 673, 112 Pac. 739, if ballots are erroneously rejected, court should count such ballots on recount, regardless of failure of election board to comply with law in marking ballots.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 91.

In Cases of Doubt as to Constitutionality of statute it must be upheld.

Approved in In re Spencer, 149 Cal. 400, 117 Am. St. Rep. 137, 86 Pac. 897, upholding child labor act of 1905; In re Finley, 1 Cal. App. 200, 81 Pac. 1042, upholding Penal Code, section 246, imposing death penalty on life convict who maliciously makes aggravated assault; dissenting opinion in Ex parte Dietrich, 149 Cal. 107, 84 Pac. 771, 5 L. R. A. (n. s.) 873, majority holding void act of 1905, requiring marking of butter packages.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 648, 657.

26 Cal. 262-263, **WRIGHT v. ROSS.**

If Notice of Appeal is Served and immediately afterward filed, service and filing are one act.

Approved in People v. Schmitz, 7 Cal. App. 343, 94 Pac. 409, where notice of appeal in criminal case is filed and served on same day, the order of filing and serving is immaterial.

26 Cal. 263-272, **ST. JOHN v. KIDD.**

Title by Naked Possession may be devested by abandonment.

Reaffirmed in Northern Assurance Co. v. Stout, 16 Cal. App. 557, 117 Pac. 621.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 892, 901.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 404, 406, 407.

26 Cal. 272-278, **ELLIS v. JEANS.**

Supreme Court cannot Examine Evidence for purpose of finding a fact.

Approved in Murdock v. Clarke (Cal.), 24 Pac. 274, following rule.

26 Cal. 279-286, **ELLSASSAR v. HUNTER.**

Where Notice of Motion for New Trial not filed within statutory time, though statement afterward made and settled and motion passed on by lower court, appellate court will strike statement from transcript if objection made.

Approved in Harris v. Careaga (Cal.), 2 Pac. 42, stipulated statements or notices had before date of filing of referee's decision and judgment are insufficient to form basis of motion for new trial.

26 Cal. 294–309, STODDARD v. TREADWELL.

A Written Contract may be Declared on according to its legal effect or it may be set forth in haec verba.

Approved in Santa Rosa Bank v. Paxton, 149 Cal. 198, 86 Pac. 194, upholding sufficiency of complaint in action on notes executed by attorney in fact under written power, which power is attached as exhibit; Hill v. McCoy, 1 Cal. App. 161, 81 Pac. 1016, upholding complaint by realty broker for commissions on sale of land under written memorandum describing property by name only, and set forth in haec verba, and which made additional averments to identify property.

Damages for Tort as Affected by loss of profits. See note, 52 L. R. A. 50.

26 Cal. 309–315, DEPUY v. WILLIAMS.

Action Founded on Fraud cannot be maintained by party to fraud.

Approved in Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486, applying rule in action to set aside deed.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 404, 407.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 899.

26 Cal. 316–328, 85 Am. Dec. 178, GODCHAUX v. MULFORD.

What Constitutes an Immediate Delivery and an actual and continued change of possession are questions of fact.

Approved in Freeman v. Hensley (Cal.), 30 Pac. 792, following rule; Simons v. Daly, 9 Idaho, 93, 72 Pac. 508, determination as to what constitutes "immediate delivery" and "actual possession" under Revised Statutes, section 3201, is for jury.

On Effect of Statute of Frauds on executed contracts. See note, 95 Am. St. Rep. 53.

Employment of Vendor by Vendee after sale may be shown as fact tending to show want of actual change of possession.

Reaffirmed in Hoffman v. Owens, 31 Nev. 491, 104 Pac. 243.

After Sale of Goods in Good Faith and an actual and notorious change of possession, employment of vendor as clerk is not fraud vitiating sale.

Approved in Roberts v. Burr (Cal.), 54 Pac. 851, where firm composed of father and son sold to wife and mother jewelry which was delivered to her and kept for three months in family home, except when she gave them part to sell to obtain necessaries, they returning it on failing to find purchaser, there was change of possession as against creditors.

26 Cal. 328–336, VALENCIA v. BERNAL.

Executors de Son Tort. See note, 98 Am. St. Rep. 197.

Rights of Heir in Personal Property of ancestor. See note, 112 Am. St. Rep. 731.

26 Cal. 336–361, PEOPLE v. MORRILL.

Tide Lands Vest in and Belong to State by virtue of its sovereignty.

Approved in People v. Kerber, 152 Cal. 733, 125 Am. St. Rep. 93, 93 Pac. 879, applying rule in determining title to tide lands in San Diego Bay; Eichelberger v. Mills Land etc. Co., 9 Cal. App. 639, 99 Pac. 122, a finding as to width of land, measured at each end thereof to point of extreme reach of wash of waves and of different width to highest point of tide level without specifying what tide intended, is insufficient to establish width of land.

Title to Land Between High and Low water mark. See note, 45 L. R. A. 239.

Parties Having Common Interest in annulling a patent, though they have no joint interest in land adverse to patentee, may join in action to cancel it.

Approved in Gillespie v. Gouly, 152 Cal. 644, 93 Pac. 857, devisees in severalty of distinct tracts of land under same will may unite as plaintiffs in action to remove cloud of fraudulent deed executed by their testator; Toomey v. Knobloch, 8 Cal. App. 587, 97 Pac. 530, owners in severalty of separate parcels may join as plaintiffs in action to cancel street assessment liens for invalidity of assessment and to have entire assessment diagram canceled; California Raisin Growers' Assn. v. Abbott, 160 Cal. 606, 117 Pac. 770, applying rule in action by growers' association against members.

Distinguished in Keyes v. Little York etc. Water Co., 53 Cal. 734, where action for tort is brought against several codefendants, it is essential that the wrong complained of be joint.

In Action by State to Cancel Patent for lands sold without authority of law, where claimant under patent is removing mineral from land, he may be enjoined from removing it.

Approved in Waskey v. McNaught, 163 Fed. 934, 90 C. C. A. 289, upholding injunction ancillary to ejectment suit to restrain mining pendente lite on placer ground.

26 Cal. 361–371, LENT v. SHEAR.

Subsequent Purchaser may Plead Limitations to defeat enforcement of lien of prior mortgage.

Approved in Hopkins v. Clyde, 71 Ohio St. 148, 104 Am. St. Rep. 737, 72 N. E. 848, one becoming owner of interests in realty belonging to one or more of heirs at law of mortgagor may plead limitations against foreclosure of mortgage.

Estoppel to Plead Statute of limitations. See note, 95 Am. St. Rep. 422.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 554.

26 Cal. 372–387, PERRY v. AMES.

District Court has Original Jurisdiction to issue mandamus.

Approved in Keech v. Joplin, 157 Cal. 5, 106 Pac. 224, upholding jurisdiction of district court of appeals over appeal in mandamus to compel payment of warrant against protection district fund though legality of tax is incidentally involved.

26 Cal. 387–393, WALLACE v. MOODY.

Act of 1860, Curing Defectively Acknowledged instruments, applies to all instruments in writing then copied in proper county records.

Approved in Parriott v. City of Hampton, 134 Iowa, 163, 111 N. W. 442, holding act curing defective acknowledgment applied to defectively acknowledged plat of city addition recorded prior to taking effect of curative act.

26 Cal. 393–420, **LANDERS v. BOLTON.**

Where Subscribing Witness is Out of Jurisdiction, instrument is admissible on proof of obligor's signature without proving handwriting of witness.

Approved in Boswell v. First Nat. Bk. of Laramie, 16 Wyo. 184, 185, 92 Pac. 629, 630, admitting proof of signatures of makers of powers of attorney on proof of their nonresidence and of nonresidence of witness to their signatures.

Distinguished in Castor v. Bernstein, 2 Cal. App. 708, 84 Pac. 246, admitting release by plaintiff's assignor to defendant for comparison of signature with that on assignment, without other proof of execution of release.

Necessity of Calling Subscribing Witnesses to prove attested instruments. See note, 35 L. R. A. 326, 328, 339.

Error will not be Presumed.

Reaffirmed in Guinsky v. Field, 1 Cal. App. 625, 82 Pac. 979.

Where Oldest Deed is not Recorded, burden is on second purchaser to show that he bought without notice for valuable consideration.

Approved in Austin v. Pulschen (Cal.), 39 Pac. 800, determining that defendant was not mortgagee without notice of plaintiff's lien for unpaid price.

Possession of Land as Notice of title. See note, 13 L. R. A. (n. s.) 51, 100, 109.

26 Cal. 420–435, **MAGRAW v. McGLYNN.**

Executor Holds Moneys of Estate in trust for use of those interested in estate.

Approved in Runge v. Wilson, 7 Cal. App. 578, 95 Pac. 179, where after sale of personalty by testator without delivery of possession, grantor died in possession and executor sold property to bona fide purchaser, to whom sale confirmed, replevin does not lie against executor or second purchaser.

Claims Against Estates of Decedents which have been allowed and approved become judgments of qualified nature only.

Approved in Haub v. Leggett, 160 Cal. 494, 117 Pac. 558, allowance and approval in part of claim against estate of decedent is no bar to action for whole claim.

26 Cal. 447–455, **WHITNEY v. BUCKMAN.**

Court may Appoint Receiver on Application for injunction if facts make out proper case for receiver though petition prays injunction.

Approved in McGarrah v. Bank of Southwestern Georgia, 117 Ga. 558, 43 S. E. 989, receiver may be appointed in proper case though no prayer for his appointment is made.

26 Cal. 455–478, **MERLE v. MATHEWS.**

Prior to Cession of California, Alien Grantee from Mexican acquired defeasible estate which he retained unless deprived of it by denouncement or by sovereign authority.

Approved in Catron v. Laughlin, 11 N. M. 635, 72 Pac. 33, determining validity of Mexican land grant.

Necessity for Judicial Proceeding to effect escheat. See note, 15 L. R. A. (n. s.) 381.

Effect of State Constitutions and Statutes upon inheritance by or from alien. See note, 31 L. R. A. 87.

Parol Evidence as to Consideration of deed. See note, 20 L. R. A. 112.

26 Cal. 479–514, 85 Am. Dec. 187, CAPERTON v. SCHMIDT.

Judgments are Conclusive Between Parties and their privies as to all matters directly in issue.

Approved in Taylor v. Taylor, 54 Or. 577, 103 Pac. 530, where divorce decree granted plaintiff a money allowance in specific real property with intent that such allowance should amount to division of common property and both parties acquiesced therein, it was conclusive against wife's right to recover rents of property conveyed to her, which rents accrued prior to conveyance; Caseday v. Lindstrom, 44 Or. 314, 75 Pac. 224, holding divorce decree concluded defendant with reference to rights in certain land; Remilliard v. Authier, 20 S. D. 295, 105 N. W. 628, 4 L. R. A. (n. s.) 295, decree in quiet title suit in which title put in issue and defendant claimed fee bars plaintiff from claiming as heir in subsequent suit; Memphis City Bank v. Schmidt, 110 Tenn. 361, 75 S. W. 1071, discussing principles of res adjudicata.

Conclusiveness of Judgment in Actions in nature of ejectment, as to claim of title, previously acquired, not in issue. See note, 4 L. R. A. (n. s.) 296.

Complaint in Ejectment. See note, 91 Am. St. Rep. 332.

26 Cal. 514–527, MOORE v. MURDOCK.

On Appeal from Order Denying New Trial, no objections will be examined except those specified.

Reaffirmed in Chase v. Alaska F. & L. Co., 2 Alaska, 84.

Where Sheriff Takes Property of A, then in his possession, as property of B on execution against B's property, A need not demand return of property before suing for damages.

Approved in Aber v. Twichell, 17 N. D. 233, 116 N. W. 97, giving of notice prescribed by Revised Codes, section 6951, is not necessary where sheriff attaches and sells property in possession of and owned by person not named in writ.

Contracts Made on Sunday are not void.

Approved in Hooks v. State, 58 Fla. 61, 50 So. 587, following rule; Rodman v. Robinson, 134 N. C. 513, 101 Am. St. Rep. 877, 47 S. E. 22, 65 L. R. A. 682, upholding contract for conveyance of land made on Sunday.

Mortgagee of Chattels Who Take same into his possession has legal title.

Approved in Anderson v. Montgomery Co. Nat. Bank, 64 Kan. 590, 67 Pac. 111, following rule.

Mortgagee's Right of Action against third persons for invasion of their rights. See note, 109 Am. St. Rep. 433.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 125.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 337.

Right of Cotenant, Agent, or Other Fiduciary to relocate mining claim for own benefit. See note, 50 L. R. A. 185.

26 Cal. 527–534, MORTON v. SOLAMBO COPPER MIN. CO.

Where One Locates Lode for Himself and others who have no knowledge of location, latter become tenants in common with him and he cannot devest their rights by relocation.

Approved in Stevens v. Grand Central Min. Co., 133 Fed. 30, 67 C. C. A. 284, co-owner who amends location notice and relocates claim holds title in trust for all.

Cotenants in Mines. See note, 91 Am. St. Rep. 855, 861.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769, 819.

26 Cal. 535–546, HAYES v. JOSEPHI.

When Liability of Sureties is fixed by rendition of judgment for plaintiff, surety may tender latter amount of judgment and be discharged if tender is refused.

Distinguished in Crane v. Renville State Bank, 73 Kan. 291, 85 Pac. 286, guarantor's offer to pay overdue note if holder wishes him to does not amount to tender releasing him from liability.

26 Cal. 546–577, FULLER v. FERGUSON.

Partnership Relation Exists Between Husband and Wife in all property acquired by spouses by their labor.

Approved in Hoaglin v. Henderson, 119 Iowa, 728, 97 Am. St. Rep. 335, 94 N. W. 250, 61 L. R. A. 756, husband and wife may be partners; Reade v. de Lea, 14 N. M. 450, 95 Pac. 133, discussing nature of community property.

Applicability of State Community Property Laws to realty acquired from federal government. See note, 26 L. R. A. (n. s.) 1119.

26 Cal. 581–595, HATHAWAY v. BRODY.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 516.

26 Cal. 615–633, ARGUELLO v. GREER.

Location of Boundaries. See note, 129 Am. St. Rep. 1011.

26 Cal. 641–651, PEOPLE ex rel. CONTRA COSTA CO. v. ALAMEDA CO.

Legislature may Make Provision for Payment of equitable claims between counties where new county has been created out of their territory.

Approved in Denver City Council v. Adams County Commrs., 33 Colo. 9, 77 Pac. 860, upholding act of 1903, making provision for payment by newly created city and county of Denver to other counties of proportionate interest in property of old county; Yamhill County v. Foster, 53 Or. 131, 99 Pac. 289, holding void act of 1907, providing for apportionment of state taxes to be collected by counties based on assessed valuation of counties for five years prior to 1901.

26 Cal. 655–665, PEOPLE ex rel. MULFORD v. MAYHEW.

Purchaser of Land at Sheriff's Sale does not acquire title until he gets sheriff's deed.

Approved in North Dakota etc. Cattle Co. v. Serumgard, 17 N. D. 489, 138 Am. St. Rep. 717, 117 N. W. 462, discussing effect and title of purchaser at foreclosure sale.

Nature of Title or Estate of Holder of sheriff's certificate before obtaining deed. See note, 15 L. R. A. 69.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 27 CALIFORNIA.

27 Cal. 11–49, 85 Am. Dec. 211, **HOOPER v. WELLS, FARGO & CO.**

Restrictions on Carrier's Common-law Liability for his benefit, inserted in receipt drawn by him and signed by him alone for goods intrusted to him, are construed most strongly against him.

Approved in Russell v. Erie R. R. Co., 70 N. J. L. 812, 59 Atl. 152, 67 L. R. A. 433, following rule; Welch v. Northern Pac. R. R. Co., 14 N. C. 24, 103 N. W. 397, construing clause requiring notice of damage before sheep arrive at destination.

Limitation of Carrier's Liability in bills of lading. See note, 88 Am. St. Rep. 101, 119.

Liability of Common Carrier Agreeing to Deliver to address, for loss of goods occasioned by carelessness of servant of connecting carrier, stated.

Approved in Colfax etc. Fruit Co. v. Southern Pac. Co. (Cal.), 46 Pac. 670, railroad receiving goods under agreement to forward them to destination and for passenger service through, and stipulation that its liability as carrier shall cease on delivery to first connecting carrier, it is liable for delay caused by its failure to notify each successive carrier of contract as to manner of transportation.

Which of Two or More Persons is Master of another conceded to be servant of one. See note, 37 L. R. A. 46.

District Court may, Before Judgment, allow amendment of complaint to conform to verdict.

Approved in Cain v. Cody (Cal.), 29 Pac. 779, applying rule in replevin.

27 Cal. 50–57, **HURLBUTT v. BUTENOP.**

Figures Placed Opposite Town Lots in Assessment-roll, without any statement as to whether they stand for cents or dollars, do not fix any valuation.

Reaffirmed in Fox v. Townsend, 152 Cal. 53, 91 Pac. 1007.

Distinguished in Carter v. Osborn, 150 Cal. 622, 89 Pac. 609, where in delinquent tax list under heading "amount" figures "4 00" with space between "4" and "ciphers" appears, absence of dollar-mark did not invalidate tax sale; Reid v. Southern Development Co., 52 Fla.

610, 42 So. 210, omission of words or marks to indicate dollars and cents as amount of assessment on assessor's books does not render assessment void where omission does not mislead.

27 Cal. 57–65, REED v. SPICER.

Ditch Used for Conveying Water for mining purposes is not mere easement or incorporeal hereditament.

Distinguished in Conover v. Atlantic City Sewerage Co., 70 N. J. L. 319, 57 Atl. 898, construing deed conveying use of certain ditch was not conveyance of land of ditch for which ejectment could be maintained.

If Two Persons Own Land as Tenants in common and one conveys to third person ditch crossing same and other afterward conveys to another third person same ditch, grantees are tenants in common.

Approved in dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, majority holding where community ditch constructed, majority interested not thereby vested with power to change at will, to plaintiff's damage, ancient course of said ditch.

False Description in Deed must be rejected.

Reaffirmed in Hall v. Bartlett, 158 Cal. 642, 112 Pac. 177.

27 Cal. 65–68, PEOPLE v. BLACKWELL.

It is Discretionary With Court to Allow District Attorney associate counsel to assist him in management of a case.

Approved in Territory of Hawaii v. Chong Chak Lai, 19 Haw. 438, attorney of complaining witness may assist in prosecution of criminal case by consent of public prosecutor; State v. Tyler, 122 Iowa, 129, 97 N. W. 985, upholding appointment of assistant to county attorney who examined witnesses before grand jury.

Right to Complain Because Prosecution is conducted or assisted by unofficial member of bar. See note, 24 L. R. A. (n. s.) 564.

Prosecuting Witness may be Asked if he employed special counsel to prosecute.

Approved in Estate of Bedford, 158 Cal. 148, 110 Pac. 304, as to foundation for impeachment of hostile witness.

Necessity, Mode and Record of Bringing Indictment into open court. See note, 26 L. R. A. (n. s.) 684, 685.

Standpoint of Determination as to Danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 536.

27 Cal. 69–79, 85 Am. Dec. 231, PEOPLE v. BATCHELDER.

Self-defense Set Up by Accused Who Began Conflict. See note, 45 L. R. A. 706, 707.

27 Cal. 80–84, OTIS v. HASELTINE.

Third Party Indorsing Contract Simultaneously with making of contract and agreeing that undertaking of one of parties shall be fulfilled, makes contract his own, and consideration therein expressed becomes consideration for his promise.

Approved in Scollard v. Bach, 136 Wis. 66, 116 N. W. 757, construing guaranty of judgment and stipulation binding defendant to pay judgment as one instrument in which consideration for guaranty was sufficiently expressed to satisfy statute of frauds.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 516.

27 Cal. 87–91, **KERNAN v. GRIFFITH.**

Swamp Land Grant Under Act of 1850 is grant in praesenti.

Reaffirmed in Foss v. Johnstone, 158 Cal. 130, 110 Pac. 299.

27 Cal. 92–99, **McGILLIVRAY v. EVANS.**

Only Partition Which Court can Make which will end disputes of tenants in common in water used for mines is to order sale and distribution of proceeds.

Approved in Hill v. Ground, 114 Mo. App. 88, 89 S. W. 345, where life tenant had no right to subsurface minerals and mining contract was abandoned during continuance of life estate, on partition sale life tenant not entitled to any part of value of land arising from probable existence of minerals therein.

Cotenancy in Mines. See note, 91 Am. St. Rep. 888.

27 Cal. 99–104, **LAMPING v. HYATT.**

Form of Judgment and Procedure in case of liability to make payment in coin. See note, 29 L. R. A. 597.

27 Cal. 104–106, **BOLTON v. LANDERS.**

Pendency of Action to Quiet Title does not abate subsequent suit between same parties to recover same land in which same facts are litigated.

Approved in Colburn v. Dortic, 49 Colo. 95, 111 Pac. 839, holding pending action in ejectment not ground for abatement of suit to quiet title.

Denial of Tenancy as Waiver of Notice to quit or demand of possession. See note, 25 L. R. A. (n. s.) 105.

27 Cal. 107–115, **HARPER v. MINOR.**

Where There is No Statement supreme court will only consider matters appearing in judgment-roll.

Reaffirmed in Anderson v. Southern Pac. R. Co. (Cal.), 65 Pac. 951.

27 Cal. 119–148, **MILLARD v. HATHAWAY.**

Where Title Taken in Name of One and consideration is paid by another, resulting trust arises in favor of latter.

Approved in Levy v. Ryland, 32 Nev. 466, 468, 109 Pac. 907, 908, and Lynch v. Herrig, 32 Mont. 275, 80 Pac. 243, both reaffirming rule; Prefumo v. Russell, 148 Cal. 457, 83 Pac. 812, where evidence in quiet title suit shows defendants contracted to purchase of owners, that defendants, the owners, and plaintiff's husband agreed that latter should advance balance due and take deed from owners to secure balance and husband deeded land to plaintiff without consideration, and that defendants were in possession, plaintiff's right was a mortgage.

Facts Constituting an Implied Trust may be proved by parol.

Approved in Mallagh v. Mallagh (Cal.), 16 Pac. 537, following rule.

Parol Evidence as to Consideration of deed. See note, 20 L. R. A. 109.

In Action to Establish Implied Trust on ground that deed executed to one and money furnished by another, party alleging implied trust must clearly prove that money belonged to him.

Approved in Copper River Min. Co. v. McClellan, 2 Alaska, 146, holding evidence insufficient to establish parol trust in mines; Eisen-

berg v. Goldsmith, 42 Mont. 575, 113 Pac. 1130, holding evidence in suit to establish resulting trust of one-eighth of mine purchased by decedent insufficient to show that at time of purchase decedent loaned plaintiff sum equal to one-eighth of price to pay for latter's interest.

Distinguished in Morrow v. Matthew, 10 Idaho, 431, 79 Pac. 199, holding rule does not apply in action to establish trust in mines located under "grubstake" contract.

27 Cal. 151–152, PEOPLE ex rel. WRIGHT v. COUNTY JUDGE OF PLACER.

District Court Alone has Jurisdiction to try and punish for contempt for violation of injunction issued out of district court.

Approved in Mau v. Stoner, 12 Wyo. 481, 76 Pac. 586, discussing right of court to punish for contempt where commissioner finds party guilty.

Courts, Tribunals and Persons authorized to punish contempts. See note, 117 Am. St. Rep. 958.

Writ of Prohibition. See note, 111 Am. St. Rep. 944, 950.

27 Cal. 171–175, STANFORD v. WORN.

Proceedings in Condemnation must Strictly follow statute.

Approved in McCarty v. Southern Pac. Co., 148 Cal. 216, 82 Pac. 620, holding void condemnation of lands for levees outside of city by city in own name instead of by state board of swamp land commissioners.

Condemnation Proceedings are a Nullity when they are not commenced in name of party directed by statute.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 216, 82 Pac. 619, holding void condemnation of lands for levees outside of city, by city in own name instead of by state board of swamp land commissioners.

27 Cal. 175–228, PEOPLE ex rel. McCULLOUGH v. PACHECO.

Public Revenues may be Appropriated in advance of their receipt.

Approved in Stein v. Morrison, 9 Idaho, 448, 75 Pac. 253, following rule; Hagan v. Commissioners' Court of Limestone County, 160 Ala. 555, 49 So. 420, holding void contract for erection of courthouse.

When an Appropriation is Made for an object to be accomplished and paid for within constitutional period and at same time revenue is provided to meet appropriation, contract made pursuant to appropriation and payable out of it does not create "debt" within prohibitory clause of Constitution.

Approved in McGilvery v. City of Lewiston, 13 Idaho, 348, 90 Pac. 349, under Lewiston charter council may create sewer district and levy assessments on lots therein in proportion to benefits received; Swanson v. Ottumwa, 118 Iowa, 176, 91 N. W. 1053, 59 L. R. A. 620, holding code, sections 742–745, 894, relating to taxation for city waterworks violates Constitution, article XI, section 3, limiting municipal indebtedness.

What Constitutes "Indebtedness" of Municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 406.

27 Cal. 228–238, 87 Am. Dec. 66, WILCOXSON v. BURTON.

Judgment Without Parties, however perfect in form, is void.

Approved in Ferrell v. Simmons, 63 W. Va. 46, 129 Am. St. Rep. 962, 59 S. E. 752, judgment that does not show for and against whom it is, is void for uncertainty.

Validity of Judgment without parties. See note, 129 Am. St. Rep. 964.

Right of Creditors to Question Validity of attachment. See note, 35 L. R. A. 780.

27 Cal. 238–248, McMINN v. O'CONNOR.

Certificate of Purchase of Realty executed by sheriff on execution sale is incompetent to establish any right to possession of premises therein described.

Approved in Noland v. Coon, 1 Alaska, 41, applying rule to marshal's certificate of sale.

Facts Occurring Subsequent to Filing of answer materially affecting rights of parties to advantage of defendant should be embodied in supplemental answer.

Approved in Bush v. Pioneer Mining Co., 3 Alaska, 615, title obtained by plaintiff after filing of original complaint is available by way of supplemental complaint and not by amendment.

Jurisdiction and Powers of consuls. See note, 45 L. R. A. 499.

Necessity for Calling Subscribing Witnesses to prove attested instruments. See note, 35 L. R. A. 326, 328.

27 Cal. 248–253, DOLL v. ANDERSON.

Court may Direct Issue of Fact to be tried by jury though parties have waived same.

Approved in Bullock v. Consumers' Lumber Co. (Cal.), 31 Pac. 367, following rule; Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N. C. 442, 49 S. E. 950, where in trespass parties submitted issues and stipulated that if jury should answer first question affirmatively then it was admitted that defendant trespassed, stipulation was binding.

27 Cal. 253–255, FRISBIE v. PRICE.

When Tenancy at Will is terminated. See note, 120 Am. St. Rep. 43.

27 Cal. 255–258, 87 Am. Dec. 75, HALL v. AUBURN TURNPIKE CO.

In Action Against Corporation by Payee of note executed by its officers in name of corporation, for debt due payee from their person, evidence that note not given for corporate debt is admissible under answer denying execution of note.

Approved in Dennie v. Clark, 3 Cal. App. 763, 87 Pac. 60, evidence as to material changes in writing relied on by plaintiff, after same signed, is admissible under denial of execution.

Extrinsic Evidence to Show who is liable as maker of note. See note, 20 L. R. A. 706.

27 Cal. 258–273, WILSON v. BRANNAN.

Mortgagor of Personalty may Redeem after conditions of mortgage are broken by paying debt at any time before foreclosure or sale.

Approved in Ely v. Williams, 6 Cal. App. 458, 92 Pac. 395, where chattel mortgage gives mortgagee right to take possession a default,

prior to election by mortgagee to foreclose does not bar mortgagee's replevin of property.

27 Cal. 274–282, SCHROEDER v. JAHNS.

Limitations Do not Run Against Continuing Trust till demand.

Approved in Kamihana v. Glade, 5 Haw. 498, following rule.

Limitations Do not Run Against Trust in moneys which are to be returned on demand till repudiation of trust by refusal to pay on demand.

Approved in Spencer v. Duncan (Cal.), 40 Pac. 549, holding evidence did not show sufficient denial of trust in moneys to put limitations in operation.

27 Cal. 295–299, STEINBACH v. LEESE.

Proof of Publication of Summons can only be made by parties named in statute.

Approved in Hinkle v. Lovelace, 204 Mo. 223, 120 Am. St. Rep. 698, 102 S. W. 1019, 11 L. R. A. (n. s.) 730, under statute, petition in divorce must be verified by plaintiff in person.

Defendant cannot Appear in Action so as to give court jurisdiction over his person, except by answering, demurring, or giving written notice of appearance.

Approved in Salmonson v. Streiffer, 13 Cal. App. 398, 110 Pac. 146, excepting to sufficiency of sureties on attachment bond is not an appearance in the action.

Writ of Assistance Against Owner will be Refused when court in mortgage foreclosure does not acquire jurisdiction over person owning land at time of foreclosure.

Cited in Fox v. Stubenrauch, 2 Cal. App. 93, 83 Pac. 84, arguendo.

Jurisdiction of Equity to Put Party in possession in aid of decree. See note, 93 Am. St. Rep. 164.

27 Cal. 300–322, McMINN v. WHELAN.

Statutes Relating to Service by Publication must be strictly followed.

Approved in Livermore v. Ratti, 150 Cal. 465, 89 Pac. 328, applying rule to notice by posting of hearing of settlement of guardian's account.

Creditor at Large Without Judgment cannot sue to set aside debtor's conveyance.

Approved in Lyden v. Spohn-Patrick Co., 155 Cal. 183, 100 Pac. 238, complaint merely alleging commencement of action against debtor and attachment therein on property involved and which does not allege existence of indebtedness nor transfer of property involved is insufficient to set aside fraudulent transfer.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 40.

If Character of Witness is Called in Question during trial and judge makes remark from bench indorsing his respectability, it is ground for reversal if testimony of witness is material.

Approved in People v. Conboy, 15 Cal. App. 101, 113 Pac. 704, holding remarks of judge after seven hours' deliberation, that there was no reason why twelve honest men should not reach a conclusion, are ground for reversal; Hughes v. State, 3 Okl. Cr. 391, 106 Pac. 547, and

Banks v. State, 2 Okl. Cr. 341, 101 Pac. 611, both holding it is error to single out defendant and instruct on credibility of his testimony; State v. Greene, 33 Utah, 501, 94 Pac. 989, in adultery, where evidence of defendant's marriage was purely indirect, court's remark that man should not live in a town for years with woman as his wife and then go free because state could not directly prove marriage is reversible error; Foster v. Hall, 1 Tenn. Civ. App. 36, applying rule to remarks of judge in presence of jury as to effect of certain evidence.

Limited in Partelow v. Newton & Boston Ry. Co., 196 Mass. 32, 81 N. E. 896, refusing to reverse for unfavorable comment by judge on credibility of witness where instruction states jury are judges of credibility.

Distinguished in Bradbury v. McHenry (Cal.), 57 Pac. 1000, remark by court on rejecting evidence offered by plaintiff that he could see plaintiff's dilemma and wanted to give them all possible latitude, but did not see materiality of evidence, was not reversible error.

Where Certificate of Tax Sale is to "Michael Dundon" and tax deed is to "Patrick Michael Dundon, Jr.," deed is inadmissible, where it appears there were two persons of such names.

Approved in Porter v. Butterfield, 116 Iowa, 732, 89 N. W. 201, where name on statement of consent of voters to grant of liquor permit is different from that on poll-books, parol is inadmissible to show signer voted at preceding election though under different name.

Presumption of Identity of Person from identity of name. See note, 17 L. R. A. 825.

Claimant of Land in Possession failing to pay taxes and purchasing at tax sale does not thereby acquire title.

Qualified in Allen v. Evans, 7 Ariz. 361, 64 Pac. 412, where plaintiff bought land in 1894 and on same day defendant, an adverse claimant, took possession and in 1895 property was sold for delinquent taxes and purchased by defendant, plaintiff not entitled to enjoin issuance of tax deed.

Effect of Tax Sale on Land held by life tenant. See note, 32 L. R. A. 805.

Necessity for Calling Subscribing Witnesses to prove attested instruments. See note, 35 L. R. A. 326, 328.

27 Cal. 329–337, 87 Am. Dec. 81, De UPREY v. De UPREY.

Partition Suit Should not be Dismissed as to particular defendant unless he makes disclaimer in absolute and unconditional terms.

Approved in Lorenz v. Jacobs (Cal.), 3 Pac. 656, and Moore v. Wallace, 16 Okl. 116, 82 Pac. 826, both following rule.

Any Question Affecting Rights of Any or all of parties may be tried and determined in partition.

Approved in Baca v. Anaya, 14 N. M. 392, 94 Pac. 1019, following rule; Adams v. Hopkins (Cal.), 69 Pac. 230, rights of adverse occupants may be determined in partition; Snyder v. Arn, 187 Mo. 178, 86 S. W. 199, after decision in partition had become final against plaintiff and one of defendants declared owner, court had jurisdiction over cross-bill alleging deed made pendente lite by owner to other defendant was procured by fraud; dissenting opinion in German Savings etc. Soc. v. Tull, 136 Fed. 11, 69 C. C. A. 1, majority upholding federal jurisdiction over partition suit and refusing to making realignment of parties; Emeric v. Alvarado, 64 Cal. 618, 629, 2 Pac. 487, arguendo.

Partition Suit. See note, 128 Am. St. Rep. 912.

Effect of Compulsory Partition. See note, 101 Am. St. Rep. 867.

Right of One Out of Possession to partition. See note, 20 L. R. A. 629.

27 Cal. 337–339, JENKINS v. FRINK.

An Application for an Order is a motion.

Cited in dissenting opinion in Gamble v. District Court, 27 Nev. 248, 74 Pac. 533, arguendo.

27 Cal. 340–342, PEOPLE v. HODGES.

Accessory must be Indicted and Tried in county where offense of accessory was committed, though principal offense was committed in another county.

Distinguished in Edge v. State, 117 Tenn. 414, 99 S. W. 1100, where physician committed criminal operation in sister state on female who died in certain county in Tennessee, such county did not have jurisdiction over prosecution of accessory who in such county procured physician to perform operation.

27 Cal. 346–349, REED v. ELDREDGE.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 517.

27 Cal. 350–357, ELLIS v. POLHEMUS.

Word "Claim" as Used in Acts concerning estates of decedents, when referring to claims against estate, includes a mortgage.

Approved in Dodson v. Crocker, 16 S. D. 488, 94 N. W. 393, when defendant agreed to purchase of plaintiff a mechanic's lien provided it was first claim on property, term "claim" included taxes.

27 Cal. 360–369, AMERICAN CO. v. BRADFORD.

An Easement or Servitude may be Created by grant or prescription.

Approved in Yuba Cons. Goldfields v. Hilton, 16 Cal. App. 232, 116 Pac. 714, determining right to take driftwood from land.

In Order for Presumption of Title from use of water to be conclusive, right to use of water must have been asserted under claim of title with knowledge and acquiescence of person having prior right.

Approved in Richard v. Hupp (Cal.), 37 Pac. 921, where flume constructed over another's land, evidence was admissible to show abandonment of prescriptive easement.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 714, 722.

Right of Prior Appropriation of water. See note, 30 L. R. A. 671.

Burden of Proving Right to Water by adverse use is on claimant.

Approved in Anderson v. Bassman, 140 Fed. 26, following rule.

Distinguished in Alper v. Tormey, 7 Cal. App. 11, 93 Pac. 404, where evidence indisputably shows use of easement was open and continuous for statutory period with defendant's knowledge, but latter claimed use was permissive, question of support of finding of prescription is not one of burden of proof.

27 Cal. 369–372, BAGLEY v. WARD.

Filing and Recording in Recorder's Office of copies of docket entries of justice of peace does not make judgment a lien on judgment debtor's realty.

Approved in Erkson v. Parker, 3 Cal. App. 100, 84 Pac. 438, under Code of Civil Procedure, section 710, certified copy of judgment, and not an abstract in form prescribed by sections 900 and 897, must be filed with auditor.

Docketing Judgments. See note, 87 Am. St. Rep. 673.

27 Cal. 372–375, ELGIN v. HILL.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 757, 778.

27 Cal. 376–394, CROWTHER v. ROWLANDSON.

Proof That Grantor at Time of Conveyance was incapacitated from taking rational care of property by reason of mental delusion is sufficient to set aside conveyance for insanity.

Reaffirmed in Clarke v. Irwin, 63 Neb. 547, 88 N. W. 786.

If One is Induced to Execute Conveyance while insane, limitations do not run against his right to set deed aside until reason restored.

Reaffirmed in Clarke v. Irwin, 63 Neb. 549, 88 N. W. 786.

27 Cal. 394–404, PEOPLE v. SHOTWELL.

One Guilty of Forging Check and of Attempting to pass it with intent to defraud another may be tried for these acts as constituting one crime.

Approved in State v. Swensen, 13 Idaho, 6, 81 Pac. 380, holding information for forgery defective in failing to allege making of instrument was with intent to defraud.

Where Statute Makes Two or More Distinct Acts connected with same transaction indictable, they may be joined in one count.

Approved in Irvin v. State, 52 Fla. 55, 41 So. 786, applying rule in prosecution for keeping gaming-table.

Objection to Indictment as Charging More than one offense must be taken by demurrer.

Approved in Irvin v. State, 52 Fla. 56, 41 So. 786, following rule.

27 Cal. 404–408, PEOPLE v. ANTONIO.

Jurisdiction to Punish Crimes committed by or against Indians. See note, 21 L. R. A. 170.

27 Cal. 408–413, BURNETT v. PACHECO.

Statement on Appeal Which Does not Specify Errors relied on is insufficient.

Reaffirmed in Chase v. Alaska F. & L. Co., 2 Alaska, 84.

27 Cal. 415–418, PARTRIDGE v. SAN FRANCISCO.

Statement on Application for New Trial should specify errors relied on.

Reaffirmed in Chase v. Alaska F. & L. Co., 2 Alaska, 84.

27 Cal. 425–432, 87 Am. Dec. 87, AGNEW v. STEAMER CONTRA COSTA.

Carrier's Liability for Loss of or injury to livestock. See note, 130 Am. St. Rep. 438.

27 Cal. 433–438, 87 Am. Dec. 90, BUCKOUT v. SWIFT.

Severance and Removal of House from Land covered by mortgage withdraws house from operation of mortgage lien.

Disapproved in Sanford v. Kunkel, 30 Utah, 387, 85 Pac. 366, removal of building by third persons to land other than that on which erected, without knowledge of owner, does not relieve building from liability for mechanic's lien.

Mortgagee's Right of Action against third persons for invasion of their rights. See note, 109 Am. St. Rep. 436.

27 Cal. 439–451, **NORRIS v. HENSLEY.**

If Word "Heirs" is Used in General Sense to indicate those to whom by law property would pass by descent and not in special sense to designate particular individuals, whole estate vests in fee simple.

Approved in Estate of De Bernede, 4 Cof. Prob. 494, discussing meaning of word "descendants" with reference to Civil Code, section 1334.

Contrivances Designed to Operate in Restraint of alienation of property or to divert it from regular course of descent are discouraged.

Cited in Estate of Hall, 4 Cof. Prob. 448, 449, bequest to person on attaining age of twenty-five years is vested on death of testator.

Rule in Shelley's Case. See note, 29 L. R. A. (n. s.) 975, 1038, 1072, 1160.

27 Cal. 451–465, **McLAUGHLIN v. PIATTI.**

If Goods, While Mingled With Others, are sold by number, weight or measure, title remains in seller until property is separated and identified.

Approved in Potts Drug Co. v. Benedict, 156 Cal. 329, 104 Pac. 435, 25 L. R. A. (n. s.) 609, construing assignment of leasehold as operating as present transfer.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 15, 45, 56.

Bill of Sale of Specific Number of cattle in herd, giving purchaser right of selection, gives purchaser right, after demand and refusal, to recover possession of entire herd in action at law and then make selection.

Approved in Garcia v. Gunn, 119 Cal. 322, 51 Pac. 687, upholding replevin to recover wild goat skins taken by trespassers on island leased by plaintiff from Mexican government.

Insolvency Alone is not Ground for specific performance of sale of personalty.

Approved in Livesley v. Johnston, 45 Or. 50, 106 Am. St. Rep. 647, 76 Pac. 951, following rule; Ridenbaugh v. Thayer, 10 Idaho, 671, 80 Pac. 232, enforcing specific performance of contract to furnish cordwood where part of wood furnished.

Miscellaneous.—Cited in Walti v. Gaba, 160 Cal. 327, 116 Pac. 964, to effect that use of word "sold" does not always import present sale.

27 Cal. 470–475, **PEOPLE v. BANVARD.**

Motion for Nonsuit Should Contain precise grounds therefor.

Reaffirmed in Estate of Higgins, 156 Cal. 260, 104 Pac. 8.

In Quo Warranto Where Relator Claims Office as against incumbent, court may determine right of either party thereto.

Approved in dissenting opinion in People v. Horan, 34 Colo. 325, 86 Pac. 259, majority holding proceedings in quo warranto for purpose of ousting one from public office cannot be converted into election contest.

27 Cal. 476–483, **HILL v. SMITH.**

Requisites and Sufficiency of Denials in answer stated.

Cited in Milwaukee Gold etc. Co. v. Gordon, 37 Mont. 215, 95 Pac. 997, upholding sufficiency of allegation that defendant has not sufficient knowledge or information to form a belief as to matters alleged in complaint.

Fact That Miner Works Claim in Such Way as to cause least possible injury to ditch and water flowing therein is no defense to action for injuries caused thereby.

Approved in Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 555, 96 Pac. 294, holding liable hydraulic miner who places bar in course of stream and above same deposits mining debris, so as to cause portion of riparian owner's land to be washed away, irrespective of question of negligence.

Pollution of Stream by Mining. See note, 24 L. R. A. 67.

Reasons Constituting Groundwork of rules of common law touching water rights are in effect in this state.

Limited in Lux v. Haggin (Cal.), 4 Pac. 922, discussing rights of appropriators of running water and riparian rights.

In Controversies Over Water Rights for Mining Purposes effect on rights of prior appropriators of acts of subsequent appropriators is determinative question.

Approved in Lux v. Haggin (Cal.), 4 Pac. 926, discussing respective rights of riparian owners and appropriators of waters of running stream.

Right of Prior Appropriation of Water. See note, 30 L. R. A. 673.

Miscellaneous.—Cited in Mogollon etc. Copper Co. v. Stout, 14 N. M. 254, 91 Pac. 726, to point that fact that complaint unites necessary allegations for legal and equitable relief does not deprive party of right to jury trial on legal issues.

27 Cal. 489–491, **PEOPLE v. AH PING.**

Mere Fact That One is With Another who enters house and steals therefrom, and sees him steal without interfering, does not render him guilty of entering dwelling with intent to steal.

Approved in Moore v. State, 4 Okl. Cr. 216, 111 Pac. 824, instruction that one who stands by and consents or acquiesces in commission of crime is a participant therein is erroneous.

27 Cal. 491–495, **HEGELER v. HENCKELL.**

If Statement on Motion for New Trial is not filed within statutory time, right to move for new trial is waived.

Distinguished in Sherman v. Southern Pac. Co., 31 Nev. 287, 102 Pac. 257, attorney's affidavit that owing to business taking him to another state after expiration of extension of time to move for new trial and impression that stipulation included another day, he neglected to get extension, entitles him to relief.

Clerical Errors in Entries of Judicial Proceedings may be corrected after term if record itself shows the error.

Approved in San Francisco v. Brown, 153 Cal. 650, 96 Pac. 284, upholding power of court, on plaintiff's motion, at any time to correct judgment entered by clerk at defendant's request which was different from that rendered; Milwaukee Trust Co. v. Clark Realty Co., 146 Wis. 237, 131 N. W. 361, order of sale could not, after land sold, be

amended nunc pro tunc by inserting words "to sell entire estate and interest, including interest of mortgagee," so as to conform to statute.

Judge at Chambers has No Power to make order directing clerk to enter in minutes nunc pro tunc an order alleged to have been made in open court.

Approved in Klein v. Southern Pac. Co., 40 Fed. 216, fact that judge at chambers expressed willingness to make desired order extending time for filing motion for new trial, where no such order actually made in court, does not warrant entry of such order nunc pro tunc.

Entry of Judgment Nunc Pro Tunc. See note, 20 L. R. A. 147.

27 Cal. 495–497, **WALLACE v. ELDREDGE.**

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 517.

Miscellaneous.—Cited in Lawler v. Bashford-Burmister Co., 5 Ariz. 101, 46 Pac. 74, as to requisites of petition for setting aside default.

27 Cal. 498–500, **WALLACE v. ELDREDGE.**

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 517.

27 Cal. 500–502, **PEOPLE v. BROWN.**

Where Evidence in Criminal Case is Conflicting, appellate court will not grant new trial on ground that verdict is contrary to evidence.

Reaffirmed in Territory v. Miramontez, 4 Ariz. 180, 36 Pac. 36.

27 Cal. 502–506, **OWEN v. DOTY.**

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 391.

27 Cal. 507–515, 87 Am. Dec. 95, **PEOPLE v. KING.**

Criminal Code has Worked Same Change in criminal pleadings as has been wrought by Civil Code in civil actions.

Approved in State v. Sly, 11 Idaho, 112, 113, 115, 80 Pac. 1126, 1127, upholding sufficiency of information for murder; State v. Hliboka, 31 Mont. 460, 78 Pac. 967, information charging accused committed murder, willfully, unlawfully, feloniously and premeditatedly and of his malice aforethought, charges murder in first degree.

Indictment for Murder Need not Aver means by which homicide was committed.

Reaffirmed in Molina v. Territory, 12 Ariz. 16, 95 Pac. 103.

Juror not Incompetent for Implied Bias unless he entertains fixed opinion as to guilt or innocence of defendant.

Approved in Brady v. Territory, 7 Ariz. 19, 60 Pac. 700, following rule; Leigh v. Territory, 10 Ariz. 134, 85 Pac. 950, holding juror not disqualified because of opinion.

Indictment for Murder Designating Degree of murder is not void.

Reaffirmed in State v. Noah, 20 N. D. 292, 124 N. W. 1126.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 470, 474.

Miscellaneous.—Cited in People v. Biggins (Cal.), 3 Pac. 856, upholding charge against involuntary manslaughter where evidence

showed deceased while drunk assaulted defendant, who thereupon knocked him down and jumped on his face, from which act death ensued.

27 Cal. 522–524, PEOPLE v. CAZALIS.

Notice of Motion is Necessary to supply lost pleading.

Approved in dissenting opinion in Gamble v. District Court, 27 Nev. 246, 74 Pac. 532, as to necessity for motion to change place of trial.

27 Cal. 524–565, CARPENTIER v. WEBSTER.

One Tenant in Common may be Guilty of ouster of cotenant by entering into exclusive possession of, and excluding him from, portion less than whole of common property.

Approved in Tustin v. Faught, 23 Cal. 242, reaffirming rule; Hawaiian Commercial etc. Co. v. Waikapu Sugar Co., 9 Haw. 81, discussing whether there had been ouster by one tenant in common from portion of land.

Creation of Prescriptive Title by adverse possession by one cotenant. See note, 109 Am. St. Rep. 610, 621.

Miscellaneous.—Cited in dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, to point that rights in water ditch are governed by law regulating tenancy in common.

27 Cal. 565–572, ROFF v. DUANE.

Trespasser cannot Refuse to Account for Rents and Profits by showing that they were disbursed for benefit of owner.

Reaffirmed in Bowman v. Hazen, 69 Kan. 700, 77 Pac. 596.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 410.

27 Cal. 572–588, PEOPLE v. POOL.

Where Several Conspire to Rob and to resist arrest even to taking life, and after robbery kill officer in resisting arrest, acts and declarations of one in furtherance of common design are acts of all.

Approved in People v. Kauffman, 152 Cal. 336, 92 Pac. 863, upholding sufficiency of evidence to sustain finding of conspiracy to resist arrest in furtherance of which officer killed, where parties conspired to commit burglary.

Homicide in Carrying Out unlawful conspiracy. See note, 68 L. R. A. 199, 216, 220.

Homicide in Commission of unlawful act. See note, 63 L. R. A. 402.

Homicide in Resisting Arrest or of officers of justice. See note, 66 L. R. A. 372, 373, 384.

Evidence of Other Crimes is admissible to show motive.

Approved in Thompson v. United States, 144 Fed. 18, 75 C. C. A. 172, where defendant charged with counterfeiting bank notes in connection with another, testimony of latter that prior to making of notes defendant told him that he was liable to arrest for abortion and wanted notes for bail, is admissible to show motive; State v. Martin, 47 Or. 286, 83 Pac. 850, in murder, evidence that defendant had had intercourse with deceased's daughter is admissible to show motive in connection with evidence of decedent's threats to prosecute for seduction.

Evidence of Other Crimes in criminal cases. See note, 62 L. R. A. 211.

Words "Willful," "Deliberate" and "Premeditated," as used in statute relating to murder, mean same thing.

Cited in dissenting opinion in Cook v. State, 46 Fla. 70, 73, 35 So. 682, 683, discussing sufficiency of instruction on premeditation.

There is a "Willful Killing" Whenever There is Simply a specific intent, a design or purpose to take life.

Reaffirmed in Smith v. State, 126 Ga. 546, 55 S. E. 476.

Right of Policeman to make arrest. See note, 84 Am. St. Rep. 696.

Right to Resist Arrest. See note, 84 Am. St. Rep. 702.

What Information Accused is Entitled to at time of arrest. See note, 42 L. R. A. 676.

27 Cal. 588–596, **DORE v. SELLERS.**

If Contractor Agrees to Construct Building in consideration of sum due by him to owner, portion of contract price represented by debt is no lien on building.

Approved in Hampton v. Christensen, 148 Cal. 736, 84 Pac. 202, upholding right of owner to deduct from completion payment materials necessarily supplied by owner by reason of contractor's failure to place them in building and also stipulated damages for contractor's delay in completion.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

Employees of Contractor Acquire No Lien independent of the one existing on original contract which they may enforce for amount due them to extent of sum due contractor.

Overruled in Los Angeles etc. Brick Co. v. Los Angeles etc. Development Co., 7 Cal. App. 463, 464, 94 Pac. 776, determining right of subcontractor's materialman to lien.

27 Cal. 596–603, **VANDEWATER v. McRAE.**

Effect of Mortgage on Liability of Maker and indorser of note stated.

Cited in Kinsel v. Ballou, 151 Cal. 761, 762, 91 Pac. 623, indorser of note secured by mortgage may be sued on his obligation without foreclosure of mortgage.

27 Cal. 603–607, **CUNNINGHAM v. HAWKINS.**

A Mortgage, as Between Parties, does not pass legal title to grantee.

Reaffirmed in Halloran v. Holmes, 13 N. D. 420, 101 N. W. 313.

27 Cal. 611–613, 87 Am. Dec. 102, **DELAND v. HIETT.**

Payment of Part of Amount Due on money judgment under agreement that it shall operate as full satisfaction will not discharge judgment.

Cited in Marshall v. Bullard, 114 Iowa, 465, 87 N. W. 428, 54 L. R. A. 862, where assignee of judgment issued execution against one of two debtors, but before levy agreed with third party to satisfy whole if half of judgment paid, and latter paid it, agreement is valid.

Nature and Elements of Accord and satisfaction. See note, 100 Am. St. Rep. 419, 428, 429.

Accord and Satisfaction by part payment. See note, 20 L. R. A. 786.

27 Cal. 613–630, CREIGHTON v. MANSON.

Statutes Creating Lien on Lot for street improvements must be strictly construed.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 216, 82 Pac. 619, holding void condemnation of lands for levees outside of city by city in own name instead of by state board of swamp land commissioners.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 33.

Statute Creating Lien on Lot to secure payment of assessment for street improvements must be strictly construed.

Reaffirmed in State v. Duis, 17 N. D. 322, 116 N. W. 752.

Whether a Personal Liability may be created for an easement. See notes, 133 Am. St. Rep. 932; 35 L. R. A. 61.

27 Cal. 630–638, PEOPLE v. YSLAS.

Intent to Commit Violence Accompanied by acts which if not interrupted would be followed by personal violence amount to an assault.

Reaffirmed in People v. Piercy, 16 Cal. App. 15, 116 Pac. 322.

27 Cal. 643–649, LEACH v. DAY.

Injunction Does not Lie to Restrain Trespass where complainant has adequate remedy at law.

Approved in Waskey v. McNaught, 163 Fed. 934, 90 C. C. A. 289, upholding injunction pendente lite as ancillary to ejectment to recover mines.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 745.

Injunction Against Repeated Trespass. See note, 13 L. R. A. (n. s.) 177.

Injunction or Ejectment as Proper Remedy where highway illegally opened. See note, 25 L. R. A. (n. s.) 511.

Injunctive Relief as to Fences or Gates. See note, 7 L. R. A. (n. s.) 69.

27 Cal. 649–655, MARRINER v. SMITH.

Purchaser of Land Subject to Lien of judgment obtained by fraud against his grantor cannot remove lien and enjoin sale under judgment unless he affirmatively shows sale will injure him.

Reaffirmed in Frankel v. Garrard, 160 Ind. 213, 66 N. E. 689.

Distinguished in Austin v. Union Paving etc. Co., 4 Cal. App. 613, 88 Pac. 732, sale of land on execution against grantor of legal title which has passed to plaintiff casts cloud upon plaintiff's title and he may enjoin sale.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 102.

Assignment of Right to Set Aside Judgment. See note, 15 L. R. A. 813.

27 Cal. 655–685, PEOPLE v. BOARD OF SUPERVISORS OF SAN FRANCISCO.

Rules of Civil Practice Act are applicable to proceedings in mandamus.

Reaffirmed in Taylor v. Burks, 6 Cal. App. 228, 91 Pac. 815.

Where Peremptory Writ of Mandamus, without alternative writ, is asked, court may grant any relief consistent with case made and embraced within issues.

Approved in School District v. School District, 33 Colo. 52, 78 Pac. 692, following rule and permitting amendments to conform to relief granted.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 853.

27 Cal. 685–688, LEVY v. GETLESON.

An Order Denying Motion to Retax Costs can be reviewed on appeal from judgment only by annexing statement.

Reaffirmed in Schomberg v. Long, 15 N. D. 507, 108 N. W. 332.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 28 CALIFORNIA.

28 Cal. 11–13, PRADER v. GRIMM.

Plaintiff in Action on Injunction Bond is not entitled to attorney's fees unless he has actually paid attorney.

Reaffirmed in Hooper v. Patterson (Cal.), 32 Pac. 514.

Recovery on Injunction Bond of attorneys' fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 76.

28 Cal. 13–21, FORD v. CHAMBERS.

Miscellaneous—Cited in Bullard v. His Creditors, 56 Cal. 603, fraud, in civil action, may be found upon simple preponderance of evidence.

28 Cal. 21–26, PEOPLE v. SMYTH.

Claimant of Office can Recover Salary thereof only on proof of title.

Approved in Bannerman v. Boyle, 160 Cal. 199, 200, 116 Pac. 732, 733, applying rule under amendment of 1891 to Political Code, sections 936, 937.

De Jure Officer is Entitled to Salary, though it has been paid to one in possession without right.

Approved in Albright v. Sandoval, 216 U. S. 340, 30 Sup. Ct. 320, 54 L. Ed. 508, affirming 14 N. M. 349, 93 Pac. 718, and holding de jure officer may recover from de facto incumbent fees and emoluments of office, less actual cost of obtaining them; Macfarlane v. Damon, 8 Haw. 28, salary of office follows title; Ransom v. City of Boston, 192 Mass. 306, 78 N. E. 484, veteran employed in labor service of city may sue to recover wages accruing subsequent to wrongful discharge; dissenting opinion in Chubbuck v. Wilson, 151 Cal. 174, 90 Pac. 526, majority holding under statute incumbent is entitled to salary pending contest; Gibbs v. Manchester, 73 N. H. 270, 61 Atl. 131, arguendo.

Distinguished in Merkley v. Williams, 3 Cal. App. 270, 84 Pac. 1016, and Chubbuck v. Wilson, 151 Cal. 164, 90 Pac. 527, both holding under statute incumbent entitled to salary pending contest.

Disapproved in Coughlin v. McElroy, 74 Conn. 402, 92 Am. St. Rep. 224, 50 Atl. 1027, holding contrary; Brown v. Tama County, 122 Iowa, 750, 101 Am. St. Rep. 296, 98 N. W. 564, officer de jure after gaining possession cannot recover from county salary paid to officer de facto; Stearns v. Sims, 24 Okl. 632, 104 Pac. 47, de jure chief of police, wrongfully suspended, cannot recover from city salary paid chief of police de facto during such period.

De Facto Officers. See note, 140 Am. St. Rep. 192.

Effect of Payment to De Facto Officer upon right of officer de jure to salary. See note, 19 L. R. A. 689.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 192.

Necessary Parties to Proceedings in mandamus. See note, 105 Am. St. Rep. 125.

28 Cal. 26–37, LEESE v. CLARK.

Recitals in a Judgment Entered by the clerk are unnecessary.

Approved in Lauret v. Miller (Cal.), 11 Pac. 744, refusing to take notice therefrom that plaintiff moved for judgment on pleadings.

28 Cal. 37–44, 87 Am. Dec. 103, RAMSDELL v. FULLER.

Property Conveyed to Wife for Money consideration is presumed to be common property.

Approved in Nilson v. Sarment, 153 Cal. 527, 126 Am. St. Rep. 91, 96 Pac. 316, statute changing rule not retroactive.

What is Community Property. See notes, 126 Am. St. Rep. 125; 4 Cof. Prob. 67.

Parties Purchasing from Husband real estate deeded to wife for money consideration do so at their peril.

Approved in Nilson v. Sarment, 153 Cal. 532, 126 Am. St. Rep. 91, 96 Pac. 318, purchaser from wife of property taken in her name must ascertain at his peril whether it is community property.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 112.

28 Cal. 44–58, PEOPLE v. OULTON.

The Salary is Incident to the Title to an office, not to its occupation and exercise.

Approved in Bannerman v. Boyle, 160 Cal. 199, 116 Pac. 732, applying rule under amendment of 1891 to Political Code, sections 936, 937.

Distinguished in Tout v. Blair, 3 Cal. App. 181, 84 Pac. 671, and Merkley v. Williams, 3 Cal. App. 270, 84 Pac. 1016, both holding under statute incumbent entitled to salary pending contest.

The State Librarian Holds Over Until the election and qualification of his successor.

Approved in State v. Lund, 167 Mo. 235, 66 S. W. 1063, under statute, city comptroller does not hold over.

Distinguished in State v. Acton, 31 Mont. 39, 77 Pac. 300, after tie vote in election for school superintendent, incumbent entitled to hold over until successor regularly elected.

28 Cal. 59–64, CONNER v. JONES.

Effect of Re-entry Clauses in leases. See note, 127 Am. St. Rep. 87.

Miscellaneous.—Cited in Kenny v. Seu Si Lun, 101 Minn. 255, 112 N. W. 221, 11 L. R. A. (n. s.) 831, landlord not required to de-

termine what would be reasonable time within which to remove fixtures.

28 Cal. 68–71, PEOPLE ex rel. CARPENTIER v. LOUCKS.

Party Desiring Stay of Proceedings pending motion for new trial must obtain order to that effect.

Approved in Pierce v. City of Los Angeles, 159 Cal. 518, 114 Pac. 820, granting order to preserve status quo pending motion for new trial.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 867.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 853, 862.

28 Cal. 72–74, BIDLEMAN v. BROOKS.

Assessor cannot Arbitrarily Divide Lot into strips and assess different portions separately.

Approved in Toothman v. Courtney, 62 W. Va. 181, 58 S. E. 920, undivided interest in land or mineral underlying land cannot properly be entered and taxed on the land book.

28 Cal. 75–97, McGARRAHAN v. MAXWELL.

Appeal Operates as Supersedeas where no appeal bond is required.

Cited in People v. Bank of San Luis Obispo, 159 Cal. 77, 112 Pac. 871, arguendo.

Reversal of Judgments. See note, 96 Am. St. Rep. 127.

28 Cal. 99–101, CARDER v. BAXTER.

Refusal to Argue Motion for New Trial is not abandonment of same.

Cited in Boin v. Spreckels Sugar Co., 155 Cal. 615, 102 Pac. 939, arguendo.

In Order to Contest Patent, Defendant must bring himself in privity with paramount source of title.

Approved in Ewbank v. Mikel, 6 Cal. App. 143, 91 Pac. 674, where contestant failed to commence suit in time, state alone has right to set aside patent.

Distinguished in Williams v. City of San Pedro, 153 Cal. 51, 94 Pac. 237, certificate of purchase inadmissible where it was admitted that tide lands were within city of San Pedro.

28 Cal. 102–105, 87 Am. Dec. 107, STEVENSON v. SMITH.

Facts Out of Which Special Damages arise must be specially averred.

Approved in Razzo v. Varui (Cal.), 21 Pac. 763, reaffirming rule; Rice v. Cassells, 48 Colo. 77, 108 Pac. 1003, injury to property from wrongful taking may be recovered in replevin when claimed in complaint; Union Traction Co. v. Sullivan, 38 Ind. App. 529, 76 N. E. 122, loss of time or interference with business of person injured must be specially averred; Fleming v. Baltimore R. R. Co., 51 W. Va. 56, 41 S. E. 169, to recover special damages for loss of business and custom, causes of loss must be specially set out and particular loss alleged.

Distinguished in Lynch v. McGhan, 7 Cal. App. 134, 93 Pac. 1044, interest on value of property converted and value of use cannot both be recovered.

Duty to Preserve and Return Property Replevied. See note, 69 L. R. A. 288.

28 Cal. 115–118, PEOPLE v. SHEPARD.

Certiorari Does not Lie where there is an appeal.

Approved in Olcese v. Justice's Court, 156 Cal. 85, 103 Pac. 317, certiorari lies where there is no appeal to a court of general common-law jurisdiction; Chapman v. Justice Court, 29 Nev. 161, 86 Pac. 554, certiorari does not lie to review conviction before justice of the peace because statute authorizing same invalid.

28 Cal. 122–123, SHELDON v. LOOMIS.

Effect of Judgment, as Against Attaching Officer not party thereto, establishing title to property seized under execution. See note, 14 L. R. A. (n. s.) 530.

28 Cal. 123–142, PEOPLE v. HOLDEN.

Statute Authorizing Election Contest does not exclude remedy by quo warranto.

Cited in dissenting opinion in Pratt v. Breckinridge, 112 Ky. 38, 43, 65 S. W. 146, 148, arguendo.

The Ballots are Better Evidence of what occurred at the election than the tally list.

Approved in Averyt v. Williams, 8 Ariz. 359, 76 Pac. 464, fact that ballots might have been tampered with does not warrant their rejection; Edwards v. Logan, 114 Ky. 320, 70 S. W. 854, when ballot-boxes might have been opened, ballots inadmissible without satisfactory proof that they had not been tampered with.

Scope and Effect of Election Law provisions for preserving ballots. See note, 30 L. R. A. (n. s.) 602.

Person Who Removes to County, while in service of the United States, may acquire residence there.

Approved in Cory v. Spencer, 67 Kan. 662, 663, 73 Pac. 924, 63 L. R. A. 275, member of soldiers' home may acquire residence there for voting purposes.

Act Providing for Election Contest does not take away remedy by quo warranto.

Approved in People v. Bass, 15 Cal. App. 67, 113 Pac. 697, people not bound by stipulation of relator in quo warranto; Toncray v. Budge, 14 Idaho, 634, 95 Pac. 29, legislature may confer jurisdiction over election contest on whomsoever it sees fit.

Acquiring Residence as Voter while attending school at public institution. See note, 23 L. R. A. 215.

28 Cal. 151–157, CALDERWOOD v. BROOKS.

Where Affidavit of Service of Summons states county in which service was made, it will be presumed that defendant was a resident thereof.

Approved in Pellier v. Gillespie (Cal.), 4 Pac. 1137, reaffirming rule; Mantle v. Casey, 31 Mont. 411, 78 Pac. 592, service having been made upon defendants in same county, return of sheriff need not show that they were all residents of county.

Unless Service of Notice of Motion for new trial appears from record, court has no jurisdiction.

Approved in McGregor v. Pierce, 17 S. D. 54, 95 N. W. 282, reaffirming rule; Harris v. Careaga (Cal.), 2 Pac. 42, service of notice prior to filing of referee's decision, ineffectual.

Effect of Judgment against tenant as res judicata. See note, 112 Am. St. Rep. 24, 31.

Delay of Landlord in Enforcing Forfeiture as waiver. See note, 24 L. R. A. (n. s.) 1065.

Notice of Intention to Move for new trial may be waived.

Reaffirmed in Gibson v. Berryman, 14 Cal. App. 333, 111 Pac. 927.

Miscellaneous.—Cited in Lynch v. West, 63 W. Va. 576, 60 S. E. 608, return of private individual executing process must show place of service.

28 Cal. 157–161, **ECHOLS v. CHENEY.**

Deed of One Describing Himself as attorney in fact for his principal does not convey title of principal.

Approved in Love v. Sierra Nevada Lake etc. Co., 32 Cal. 651, 91 Am. Dec. 602, instrument purporting to be mortgage of corporation, but signed by trustees individually, does not bind corporation.

28 Cal. 170–175, **MORE v. DEL VALLE.**

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 523.

28 Cal. 175–180, 87 Am. Dec. 111, **FRANKLIN v. DORLAND.**

Recitals in Deeds as Evidence. See note, 125 Am. St. Rep. 965.

28 Cal. 182–187, **LUCAS v. TODD.**

Upon Collateral Attack, the Presumption is that order of probate court accepting resignation of executor was properly made.

Approved in Goldtree v. McAlister (Cal.), 23 Pac. 209, finding that will had been duly proved in foreign country not open to collateral attack.

When Probate Court has Jurisdiction of subject matter, all intendments are in favor of court's action.

Approved in Estate of Welch, 3 Cof. Prob. 305, applying rule to order for widow's allowance.

Conclusiveness of Probate as Res Judicata. See note, 21 L. R. A. 681, 683.

28 Cal. 187–194, **HOAG v. PIERCE.**

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 383, 384.

28 Cal. 194–205, **HORN v. JONES.**

Possession is Prima Facie Evidence of title.

Distinguished in dissenting opinion in Kraus v. Congdon, 161 Fed. 29, 88 C. C. A. 182, majority holding that action to quiet title, under Washington statute, may be maintained by one who took possession in order to institute action.

One Claiming Under Sheriff's Deed is not bound by decree of foreclosure to which he was not a party.

Approved in Fleming v. Prudential Ins. Co., 19 Colo. App. 128, 73 Pac. 753, beneficiary under trust deed not bound by foreclosure of mechanic's lien to which he was not a party.

28 Cal. 205–212, **PEOPLE v. AH WOO.**

A Description in an Indictment is not insufficient because a more certain one might be given.

Approved in People v. Machado (Cal.), 63 Pac. 67, indictment sufficiently describes stolen property as "one cow, the same being the property then and there of H."

Where the Instrument Charged to have been forged is set out in full in the indictment, it is immaterial what it is called.

Reaffirmed in People v. McGlade, 139 Cal. 68, 72 Pac. 601.

If a Forged Order is Made Payable to the defendant, it is sufficient to charge him with uttering same, without charging an indorsement.

Approved in People v. Johnson, 7 Cal. App. 129, 93 Pac. 1042, not necessary to aver how receipt might have been used to defraud; People v. Di Ryana, 8 Cal. App. 339, 96 Pac. 921, applying rule to forged proof of loss to fire insurance company.

28 Cal. 212–214, **HARDING v. COWING.**

Miscellaneous.—Cited in Lawler v. Bashford-Burmister Co., 5 Ariz. 101, 46 Pac. 74, where defendant sets out good reason for default and tenders answer showing meritorious defense, default should be set aside.

28 Cal. 214–218, **PEOPLE v. THOMPSON.**

When Indictment Contains More than one count, it must clearly appear that the different counts are descriptive of the same transaction.

Approved in Sturgis v. State, 2 Okl. Cr. 373, 375, 102 Pac. 62, counts for selling intoxicating liquor and for conveying it from one place to another cannot be joined.

28 Cal. 219–224, **CARLETON v. TOWNSEND.**

Identity of Grantor With Grantee in older deed is presumed from identity of name, though deeds recite different residences.

Approved in Estate of Hartman, 157 Cal. 209, 107 Pac. 106, common paternity presumed from identity of name; Lee v. Murphy, 119 Cal. 368, 51 Pac. 550, that mortgage was acknowledged before mortgagee as notary public presumed from identity of name; Sturgis v. State, 2 Okl. Cr. 373, 102 Pac. 61, two counts in indictment held to charge separate offenses.

Where Plaintiff in Ejectment Shows Possession in himself, defendant cannot prevail by showing title in third person.

Approved in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987, applying rule to ejectment to recover possession of water ditch.

Miscellaneous.—Cited in Tulare Irr. Dist. v. Collins, 154 Cal. 443, 97 Pac. 1125, unused lands of irrigation district exempt from execution.

28 Cal. 224–226, **WALLS v. PRESTON.**

Acts of Defendant as Defense in unlawful detainer. See note, 120 Am. St. Rep. 65.

28 Cal. 228–232, **PEOPLE v. SUPERVISORS.**

In Action to Foreclose Mortgage, allegation that parties other than mortgagor have or claim an interest in the mortgaged property is sufficient.

Reaffirmed in Wardlow v. Middleton, 156 Cal. 586, 105 Pac. 738.

28 Cal. 232–238, JEWELL v. JEWELL.

"Descendants" of a Person are His Children, grandchildren, and their children to the remotest degree.

Cited in Estate of De Bernede, 4 Cof. Prob. 493, 494, construing word "descendants" as used in various sections of Civil Code.

On Death of Husband Intestate, leaving no descendants, widow inherits half of community property.

Distinguished in Estate of Roach, 159 Cal. 263, 113 Pac. 375, where will bequeathed community property to wife for life and after deducting portion to which she is entitled by law gave remainder to brothers, "remainder" is half of community property.

28 Cal. 245–247, JONES v. FROST.

Motion for Change of Venue, after demurrers to original and amended complaint, is too late.

Approved in Smith v. Pelton Water Wheel Co., 151 Cal. 401, 90 Pac. 933, motion made about seven months after denial of similar motion too late.

28 Cal. 247–254, MATTER OF RING.

The Doctrine of Res Adjudicata does not apply to proceedings on habeas corpus.

Approved in Ex parte White, 2 Cal. App. 727, 84 Pac. 243, no appeal from order discharging petitioner.

Judgment in Criminal Case is Sufficient if it states offense of which defendant was convicted and penalty imposed by court.

Approved in Ex parte Haase, 5 Cal. App. 545, 90 Pac. 948, in judgment upon plea of guilty of burglary in first degree, it will be presumed on habeas corpus that court determined degree of crime.

Where Defendant is not in Custody under proper process, he will not be discharged on habeas corpus where judgment has actually been rendered against him.

Approved in Michaelson v. Beener, 72 Neb. 766, 101 N. W. 1008, where prisoner is held under void commitment, he should be remanded on habeas corpus to court where information or indictment is pending against him.

28 Cal. 254–259, PEOPLE v. SAN FRANCISCO ETC. R. R. CO.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 273.

28 Cal. 263–265, ZEIGLER v. WELLS, FARGO & CO.

Error of the Court in Its Charge not considered where none are specified in the statement.

Approved in Chase v. Alaska F. & L. Co., 2 Alaska, 84, motion for new trial making no specification of the actual and particular grounds relied upon, insufficient.

An Erroneous Reference by Number to a section of an act may be corrected to effectuate the legislative intent.

Approved in Village of Melrose Park v. Dunnebecke, 210 Ill. 428, 71 N. E. 433, amendment of certain sections of original act repeals prior amendment of same sections.

28 Cal. 265–276, PEOPLE v. KING.

Where Defendant Refuses to Plead, court may pronounce judgment against him as upon a plea of guilty.

Approved in Hollibaugh & Bunten v. Hehn, 13 Wyo. 277, 79 Pac. 1047, statute providing that if accused plead guilty, he shall be committed until sentence, is valid.

Distinguished in State v. Walton, 50 Or. 146, 91 Pac. 491, 13 L. R. A. (n. s.) 811, verdict in criminal case, where there has been neither arraignment nor plea, is a nullity.

To Effectuate the Legislative Intent, reference to section to be amended will be corrected.

Approved in Hollibaugh & Bunten v. Hehn, 13 Wyo. 282, 79 Pac. 1049, reaffirming rule.

Necessity of Claiming Constitutional Protection against self-incrimination. See note, 4 L. R. A. (n. s.) 1145.

Effect of Agreement for Immunity of accomplice testifying for prosecution. See note, 24 L. R. A. (n. s.) 445.

28 Cal. 276-281, SPENCER v. PRINDLE.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 522.

28 Cal. 281-288, 87 Am. Dec. 115, McCOMB v. REED.

Right of Creditors to Question Validity of attachment. See note, 35 L. R. A. 767, 777.

Form of Judgment and Procedure in Case of liability to make payment in coin. See note, 29 L. R. A. 597.

Miscellaneous.—Cited in Potlatch Lumber Co. v. Runkel, 16 Idaho, 197, 101 Pac. 397, 23 L. R. A. (n. s.) 536, owner of property attached may intervene in main action to assert his title.

28 Cal. 288-295, 87 Am. Dec. 121, LANE v. GLUCKAUF.

Judgment may be Rendered for Interest, though not prayed for in complaint.

Approved in Cassacia v. Phoenix Ins. Co., 28 Cal. 631, reaffirming rule; Marx v. Raley, 6 Cal. App. 482, 92 Pac. 521, plaintiff entitled to interest on price of goods sold from date of sale.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 521.

28 Cal. 295-301, ABBOTT v. DOUGLASS.

Answer, Though Stricken Out, is still entitled to place in judgment-roll.

Approved in McCall v. Herring, 116 Ga. 237, 42 S. E. 469, reaffirming rule; Shaughnessy v. Holt, 236 Ill. 487, 86 N. E. 257, count, though stricken out, is still part of complaint for reference purposes.

28 Cal. 301-320, HIDDEN v. JORDAN.

Statement on Motion for a New Trial is presumed to contain all the testimony upon the points specified therein.

Approved in Lunnun v. Morris, 7 Cal. App. 711, 95 Pac. 910, rule applies to bill of exceptions on appeal from judgment.

A Finding Should Consist of a Concise, distinct, pointed and separate statement of each essential fact established by the evidence.

Distinguished in In re Bullard's Estate (Cal.), 31 Pac. 1120, findings of ultimate facts will not be disregarded because intermixed with other matters.

Specific Findings Control the general finding.

Approved in Clint v. Eureka Crude Oil Co., 3 Cal. App. 466, 86 Pac. 818, finding that deed was delivered controlled by findings of facts showing that there was no delivery.

When Judgment is Reversed and New Trial granted in general terms, case goes back for trial on all the issues of fact.

Approved in Latter-Day Saints' Church v. Watson, 27 Utah, 540, 76 Pac. 707, and Meadows v. Osterkamp, 19 S. D. 380, 103 N. W. 643, both reaffirming rule.

A Mortgagee in Possession will be Accountable for the actual receipts of the net rents and profits, and nothing more, unless they were reduced or lost by his willful default or gross negligence.

Distinguished in Murdock v. Clarke (Cal.), 24 Pac. 275, reasonable care required.

A Trust, if Enforced at All, will be enforced according to its terms.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, reaffirming rule.

Miscellaneous.—Cited in Hidden v. Jordan, 32 Cal. 402, same case, on subsequent appeal, stating that court did not determine validity of items in account but only legal principles applicable thereto.

28 Cal. 320–323, GATES v. SALMON; S. C., 35 Cal. 576, 95 Am. Dec. 139.

Appeal Does not Lie from Interlocutory Judgment in partition, determining interests of several parties and appointing referee to make partition.

Approved in Skallberg v. Skallberg, 84 Neb. 716, 121 N. W. 979, and Camp Phosphate Co. v. Anderson, 48 Fla. 234, 111 Am. St. Rep. 77, 37 So. 725, both reaffirming rule.

Miscellaneous.—Cited in Marlin v. Walker, 68 Cal. 321, 9 Pac. 185, referring historically to cited case; Wickersham v. Denman, 68 Cal. 385, 9 Pac. 724, action for costs incurred in cited case.

28 Cal. 328–331, PEOPLE v. CORBETT.

Verdict in Criminal Case where there has been no arraignment or plea is a nullity.

Approved in State v. Walton, 50 Or. 147, 167, 91 Pac. 492, 495, 13 L. R. A. (n. s.) 811, reaffirming rule; State v. Chambers, 9 Idaho, 678, 75 Pac. 276, failure of clerk to read information and state plea is ground for reversal; State v. Walton, 51 Or. 576, 91 Pac. 496, defendant cannot waive arraignment by asking for continuance and thereafter submitting to trial without protest.

Disapproved in Gaines v. United States, 1 Ind. Ter. 302, 37 S. W. 100, refusing to reverse conviction of misdemeanor where there was no arraignment or plea.

28 Cal. 331–335, HAWXHURST v. LANDER.

One in Actual Possession of Real Estate is presumed to hold it in subordination to the legal title.

Approved in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987, when defendants, who had been using ditch under permission, asserted right thereto, they became trespassers.

Miscellaneous.—Cited in Merryman v. Kirby, 13 Cal. App. 345, 109 Pac. 636, to point that plaintiff in ejectment must have right to possession.

28 Cal. 335–340, CASEMENT v. RINGGOLD.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 622.

28 Cal. 340–345, 87 Am. Dec. 128, FERREA v. KNIPE.

A Riparian Owner Should not Erect Dams whereby water is spread out and lost by evaporation and absorption.

Approved in North Alabama etc. Ry. Co. v. Jones, 156 Ala. 367, 47 So. 147, reaffirming rule; Lux v. Haggin (Cal.), 4 Pac. 921, 926, every riparian proprietor has an equal right to the unimpeded flow and reasonable use of water flowing in a natural stream over his land; Anderson v. Bassman, 140 Fed. 26, ditches should be so constructed as not to cause waste of water; Lonsdale Co. v. City of Woonsocket, 25 R. I. 431, 56 Atl. 449, city as riparian proprietor has no right as against lower riparian proprietor to abstract water for purpose of municipal water supply; Lone Tree Ditch Co. v. Rapid City E. & G. L. Co., 16 S. D. 462, 93 N. W. 652, to hold water during day and to let it down in large quantities at night is unreasonable use.

Distinguished in San Joaquin etc. Irr. Co. v. Fresno Flume & Irr. Co., 158 Cal. 629, 112 Pac. 183, upper riparian owner may impound flood waters to float logs so long as he does no damage to lower proprietor.

Liability for Facilitating Evaporation from stream. See note, 59 L. R. A. 334.

Correlative Rights of Upper and lower proprietors as to use and flow of stream. See note, 41 L. R. A. 746.

Care Necessary to Avoid Waste in diverting water from stream. See note, 15 L. R. A. (n. s.) 240.

28 Cal. 345–380, EMERY v. SAN FRANCISCO GAS CO.

The Words "Taxation" and "Taxed" in the constitution refer to general taxes laid upon all property to defray the ordinary expenses of government and not to assessments levied on city lots to pay for street improvements.

Approved in Paving District v. Sisters of Mercy, 86 Ark. 114, 109 S. W. 1167, statute exempting from taxation does not exempt from assessments for local improvements; Boston Asylum etc. v. Street Commissioners, 180 Mass. 487, 62 N. E. 962, statute exempting school from taxation does not relieve it from assessments for street improvements; Jones v. Holzapfel, 11 Okl. 417, 68 Pac. 514, special assessments do not come within provision of organic act requiring taxes to be according to value of property.

Local Assessments for Benefits on property exempt from general taxation. See note, 35 L. R. A. 33, 34.

The Constitution Does not Forbid Assessment of city lots fronting on a street for street improvements.

Approved in Piper's Appeal, 32 Cal. 557, upholding assessment on district for expense of widening street; Clute v. Turner, 157 Cal. 81, 106 Pac. 243, upholding assessment on district for expense of opening and extending street.

Assessments for Improvements by Front-foot Rule. See note, 28 L. R. A. (n. s.) 1130, 1131, 1135, 1138, 1140, 1157, 1158, 1159, 1179.

Whether a Personal Liability may be created for an assessment. See note, 133 Am. St. Rep. 932.

28 Cal. 380–382, PEOPLE v. JUAREZ.

Character of Intent in larceny. See note, 88 Am. St. Rep. 606.

28 Cal. 382–393, PEOPLE v. STRATTON.

In Legal Idea, an Office is an entity.

Approved in State v. Rose, 74 Kan. 268, 86 Pac. 298, 6 L. R. A. (n. s.) 843, mayor whose office has been forfeited for misconduct cannot be elected for remainder of term; Childs v. State, 4 Okl. Cr. 480, 116 Pac. 548, act creating office not invalid because it does not require that office be filled.

Miscellaneous.—Cited in State v. Crumbaugh, 26 Tex. Civ. App. 526, 63 S. W. 927, office is not property within constitutional provision against depriving persons of property without due process of law.

28 Cal. 395–396, PEOPLE v. STEWART.

On Trial for Murder Defendant may introduce evidence to prove his good character for peace and quiet.

Approved in People v. Albers, 137 Mich. 689, 100 N. W. 912, defendant on trial for perjury may introduce evidence of his good character for truth and veracity.

Evidence of Good Character to create doubt of guilt. See notes, 103 Am. St. Rep. 897; 20 L. R. A. 617.

28 Cal. 404–406, PEOPLE v. GASSAWAY.

One Indicted as Principal cannot be Convicted as accessory after the fact.

Approved in State v. Jones, 115 Iowa, 119, 88 N. W. 198, accessory after the fact is not accomplice so as to require corroboration.

28 Cal. 409–414, VILHAC v. BIVEN.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 516.

28 Cal. 416–423, GRAY v. PALMER.

Final Judgment has Been Rendered when order for judgment has been entered in minutes and judgment has been signed and filed.

Approved in People v. Schmitz, 7 Cal. App. 344, 94 Pac. 409, appeal in criminal case, taken after rendition of judgment, is not premature because taken before its entry; Brownell v. Superior Court, 157 Cal. 706, 109 Pac. 93, decree of final distribution not "taken" when orally announced by court and entered in clerk's rough minutes; Mears v. Shaw, 32 Mont. 578, 81 Pac. 339, allegation that certain parties were adjudged bankrupts not sufficient allegation that judgment was "duly given or made."

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 627.

Entry of Judgment is Mere Ministerial Duty to be performed by clerk.

Approved in State v. District Court, 42 Mont. 173, 111 Pac. 732, mandamus will not lie against judge to compel entry of judgment.

28 Cal. 423–429, PEOPLE v. KELLY.

Recent Possession of Stolen Property is incriminating circumstance.

Reaffirmed in People v. King, 8 Cal. App. 332, 96 Pac. 918.

28 Cal. 429–444, **PEOPLE v. SUPERVISORS OF SAN FRANCISCO.**

No Cause of Action for the Recovery of money exists against the county until a claim has been presented to the board of supervisors.

Approved in Farmers' etc. Bank v. Los Angeles, 151 Cal. 657, 91 Pac. 796, demand for return of taxes paid under protest, necessary.

28 Cal. 445–449, **PEOPLE v. DODGE.**

Denial of Continuance upon Admissions by prosecution as affected by right of accused to meet witnesses. See note, 16 L. R. A. 240.

28 Cal. 449–456, **BEALS v. AMADOR COUNTY.**

Implied Liability of County for interest on its obligations. See note, 17 L. R. A. (n. s.) 553.

28 Cal. 456–465, **PEOPLE v. OLWELL.**

At Common Law, upon a Second Indictment for the same offense, the prisoner was required to plead specially a former conviction.

Distinguished in dissenting opinion in People v. Bennett (Cal.), 50 Pac. 707, majority holding that defendant, convicted of assault with a deadly weapon, under charge of assault with intent to commit murder, must, on new trial, plead acquittal of higher offense.

Insanity may be Proved under plea of not guilty.

Approved in State v. Speyer, 207 Mo. 555, 106 S. W. 510, 14 L. R. A. (n. s.) 836, reaffirming rule.

28 Cal. 465–476, **PEOPLE v. HENDERSON.**

Change of Judges, With Defendant's Consent, after evidence is closed, not ground for reversal.

Approved in People v. Casselman, 10 Cal. App. 237, 101 Pac. 695, that several judges presided at different times during trial, defendant not objecting, not prejudicial error.

Semble, That Grand Juror not a Citizen at the time he was summoned is disqualified.

Distinguished in Carter v. United States, 1 Ind. Ter. 350, 37 S. W. 206, members of five civilized tribes are competent grand jurors.

Testimony of Threats Made by Deceased against third person immediately before homicide are inadmissible.

Approved in State v. Raice, 24 S. D. 116, 123 N. W. 710, proof that deceased had been guilty of acts of violence to third persons of which defendant had been informed is inadmissible.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 711.

28 Cal. 479–484, **GORHAM v. GILSON.**

Where Corporation is Induced to convey property by fraud of part of its stockholders, innocent stockholders cannot sue to compel reconveyance to them.

Approved in Hearst v. Putnam Mining Co., 28 Utah, 194, 107 Am. St. Rep. 698, 77 Pac. 756, 66 L. R. A. 784, reaffirming rule.

28 Cal. 484–489, 87 Am. Dec. 135, **CARPENTIER v. MENDENHALL.**

Creation of Prescriptive Title by adverse possession by one cotenant. See note, 109 Am. St. Rep. 621.

28 Cal. 490–496, PEOPLE v. SHULER.

Statutory Definition of Robbery is in no material respect different from common-law definition.

Approved in State v. Luhano, 31 Nev. 283, 102 Pac. 261, robbery committed where fact attended with threatening word or gesture.

An Indictment for Robbery charging that money was taken from the person of the prosecuting witness need not allege that it was in his possession at the time.

Approved in People v. Ho Sing, 6 Cal. App. 753, 93 Pac. 204, reaffirming rule; People v. Cleary, 1 Cal. App. 53, 81 Pac. 754, arguendo.

Robbery by Taking from One Property belonging to another. See note, 67 L. R. A. 344.

Bias of Trial Judge is No Legal Ground for change of venue in criminal action.

Approved in McDowell v. Levy (Cal.), 8 Pac. 857, bias of trial judge does not constitute legal incapacity.

Distinguished in Day v. Day, 12 Idaho, 563, 565, 86 Pac. 533, 534, under state constitution prejudice of judge is ground for disqualification.

Sufficiency of Circumstantial Evidence. See note, 97 Am. St. Rep. 776.

28 Cal. 507–520, PEOPLE v. FRANK.

An Indictment Which Charges, in the Same Count, the forging of an indorsement and the uttering of such forged indorsement, does not charge two offenses.

Approved in People v. Ellenwood, 119 Cal. 169, 51 Pac. 554, making and passing fictitious check may be charged in one count; People v. Swaile, 12 Cal. App. 195, 107 Pac. 136, upholding indictment for placing explosive near house with intent "to injure, intimidate and terrify" certain persons; State v. Swensen, 13 Idaho, 6, 81 Pac. 380, information held defective in that it did not properly charge either making or uttering of forged check; State v. Klughery, 91 Minn. 408, 98 N. W. 100, making of forged instrument and uttering it, as one transaction, constitute but one offense; People v. Barnnovich, 16 Cal. App. 432, 117 Pac. 574, information alleging two intents in commission of one offense in use of dynamite to injure person and his property does not allege two offenses.

In Order to Constitute Forgery, it is not necessary that the forged instrument should be available.

Approved in People v. Johnson, 7 Cal. App. 129, 93 Pac. 1043, information for forging receipt need not aver how instrument might be used to defraud.

Disapproved in State v. Carragin, 210 Mo. 370, 109 S. W. 558, 16 L. R. A. (n. s.) 561, where one count charges making and another uttering forged instrument, prosecution must elect between them at close of evidence.

Failure to Comply With Statute requiring stamping of writings. See note, 84 Am. St. Rep. 199.

Want of Internal Revenue Stamp on instrument as affecting criminal prosecution. See note, 46 L. R. A. 455.

In Order to Render the Estoppel of a judgment conclusive, it must appear with certainty that the facts were directly and necessarily found in favor of the defendant.

Distinguished in Graves v. Hebbron, 125 Cal. 406, 58 Pac. 14, admitting extrinsic evidence that boundary lines were established in former action.

On Trial for Forgery the Admissibility of evidence to show guilty intent is largely in the discretion of the trial judge.

Approved in People v. Harben, 5 Cal. App. 34, 91 Pac. 400, admitting subsequent acts of passing worthless state bank notes as evidence of design; People v. Hutchings, 8 Cal. App. 555, 97 Pac. 327, admitting diagram of brand of owner and hide of stolen animal.

Admissibility of Evidence of other crimes. See notes, 105 Am. St. Rep. 1006; 62 L. R. A. 343.

When Statute Enumerates Series of Acts, any one of which may constitute offense, all such acts may be charged in single count.

Approved in People v. Wolfrom, 15 Cal. App. 735, 115 Pac. 1090, applying rule to information for fraudulently selling property subject to chattel mortgage.

Indictment or Information in vagrancy. See note, 137 Am. St. Rep. 958.

Undelivered Deed as Memorandum to satisfy statute of frauds. See note, 22 L. R. A. 273.

Miscellaneous.—Cited in People v. McPherson, 6 Cal. App. 269, 91 Pac. 1099, forgery is the false making, with fraudulent intent, of some writing that, if genuine, might injure another.

28 Cal. 520–527, **CULVER v. ROGERS.**

Execution Sale of Homestead on deficiency judgment docketed after declaration of homestead will be enjoined.

Approved in Roth v. Insley, 86 Cal. 140, 24 Pac. 854, enjoining execution sale of homestead, though void under statute.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 100.

28 Cal. 527–534, **THOMPSON v. SMITH.**

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 397, 407.

28 Cal. 539–545, **LALLY v. WISE.**

Each of Parties to Whom Injunction Bond is made payable may sue on same.

Approved in Harrington v. Gordon, 42 Wash. 696, 80 Pac. 188, recovery may be had on garnishment bond given to two defendants, though only one obligee sustains damage.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 14.

28 Cal. 545–548, **JOHNSON v. SANTA CLARA CO.**

Physicians Who Contract to Treat all inmates of county infirmary are not entitled to additional compensation for treating patients sick with contagious diseases and housed in separate building.

Approved in Castle v. Bannock County, 8 Idaho, 130, 67 Pac. 37, individual county commissioner cannot employ physician to care for smallpox patients at expense of county.

28 Cal. 551–555, **MOORE v. MORROW.**

Landlord may Bring Ejectment without waiting one month after notice to quit.

Approved in Hayden v. Collins, 1 Cal. App. 261, 81 Pac. 1121, in ejectment it is immaterial that facts also show cause of action in unlawful detainer.

28 Cal. 555–561, BUCKMAN v. WHITNEY.

Disposition of Appeal Where Without Fault of appellant record is lost or incomplete. See note, 25 L. R. A. (n. s.) 863, 865.

28 Cal. 561–567, 87 Am. Dec. 139, RANDOLPH v. HARRIS.

Actions on Lost Instruments. See note, 94 Am. St. Rep. 474, 475.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 531.

28 Cal. 567–569, COLEMAN v. WOODWORTH.

Objection That Claim was not Presented to administrator is waived if not made in trial court.

Distinguished in Burke v. Maguire, 154 Cal. 464, 98 Pac. 24, complaint against administrator, which does not allege presentation of claim, is bad on general demurrer.

Cause of Action for Wrongful Taking of personal property survives against personal representatives.

Approved in Thornton-Thomas Co. v. Bretherton, 32 Mont. 90, 80 Pac. 12, cause of action for wrongfully procuring appointment of receiver for corporation survives.

28 Cal. 569–589, DURYEA v. BURT.

Partner in Mining Partnership may convey his interest without dissolving partnership.

Reaffirmed in Blackmarr v. Williamson, 57 W. Va. 253, 50 S. E. 256.

Cotenants in Mines. See note, 91 Am. St. Rep. 857, 879.

If Two or More Persons Acquire and work mining claim, sharing profits and losses, they are partners.

Approved in Doyle v. Burns, 123 Iowa, 495, 99 N. W. 197, parties may be tenants in common of mining property without being partners; Broatch v. Boysen, 175 Fed. 707, 99 C. C. A. 278, upholding agreement for acquisition of coal lands, though not signed by all parties; dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, majority holding that majority of owners could not change course of ditch constructed as community enterprise.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 965, 971, 997, 1087.

As to When Real Estate will be Considered partnership property. See note, 27 L. R. A. 451, 455, 463, 485.

Each Member of a Mining Partnership has a lien upon its property for debts due creditors of partnership and for moneys advanced by him.

Reaffirmed in Connolly v. Bouck, 174 Fed. 315, 98 C. C. A. 184.

Rights of Partners Inter Se in partnership realty. See note, 28 L. R. A. 95, 102.

Position of Surviving Partners in partnership realty. See note, 28 L. R. A. 133.

28 Cal. 589–590, PEOPLE v. DE LACEY.

Where, on Application for Continuance on ground of convenience of witnesses, there is counter-affidavit tending to show want of good faith, there is no abuse of discretion in denying application.

Approved in Miller v. State, 39 Wis. 68, 119 N. W. 855, application for continuance may be resisted by counter-affidavits in certain cases.

Miscellaneous.—Cited in People v. Elster (Cal.), 3 Pac. 885, to point that recent possession of stolen property is an incriminating fact.

28 Cal. 591–599, LUCAS v. SAN FRANCISCO.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 327.

28 Cal. 599–602, BENNETT v. BENNETT.

Court has No Jurisdiction to grant divorce without averment and proof that applicant has been resident of state for statutory period.

Approved in Rumping v. Rumping, 36 Mont. 43, 91 Pac. 1058, 12 L. R. A. (n. s.) 1197, reaffirming rule; Becklenberg v. Becklenberg, 232 Ill. 122, 83 N. E. 424, where finding of residence was held insufficient.

Averment of Residence in Complaint for divorce and failure to deny such averment do not avoid necessity of proving residence.

Approved in Bradfield v. Bradfield, 154 Mich. 119, 129 Am. St. Rep. 468, 117 N. W. 589, defendant not precluded by such admission from raising question of residence.

28 Cal. 603–605, PEOPLE v. MIDDLETON.

Commissioners of Funded Debt of San Francisco are not officers.

Approved in dissenting opinion in Benedict v. City of New Orleans, 115 La. 666, 39 So. 800, majority holding that commissioners to build courthouse are officers.

28 Cal. 605–612, PAGE v. FOWLER.

To Constitute Adverse Possession of Public Land, it is sufficient that party in possession claims right to the possession as against all the world except the United States.

Approved in Boe v. Arnold, 54 Or. 65, 102 Pac. 294, reaffirming rule.

Right to Possession of Public Land cannot be tried in personal action.

Approved in Lieberman v. Clark, 114 Tenn. 131, 85 S. W. 262, 69 L. R. A. 732, plaintiffs in replevin may recover timber taken from land in their adverse possession by defendant entering under deed from person out of possession; dissenting opinion in Lieberman v. Clark, 114 Tenn. 151, 85 S. W. 267, 69 L. R. A. 732, majority holding that plaintiffs in replevin may recover timber taken from land in their adverse possession by defendant entering under deed from person out of possession.

Replevin by or Against One in adverse possession of land for things severed. See note, 69 L. R. A. 735.

Miscellaneous.—Cited in Pacific Live Stock Co. v. Isaacs, 52 Or. 65, 96 Pac. 464, referring historically to cited case.

28 Cal. 618–628, FICKEN v. JONES.

Presumption of Negligence from Occurrence of accidents. See note, 15 L. R. A. 33.

Miscellaneous.—Cited in Pieper v. Centinela Land Co., 56 Cal. 175, to point that all defendants should join in motion for change of venue.

28 Cal. 628–631, CASSACIA v. PHOENIX INS. CO.

Breach of Condition in Policy cannot be made as defense where issue not raised by pleadings.

Approved in Smith v. Mut. Cash Guar. Fire Ins. Co., 21 S. D. 442, 113 N. W. 97, breach of condition, representation or warranty in fire policy must be specially pleaded.

Where Answer is Filed, Judgment may be rendered for principal and interest, though complaint prays judgment only for principal.

Approved in Fremont County v. Fremont Co. Bank, 145 Iowa, 16, 123 N. W. 785, reaffirming rule.

28 Cal. 639–641, PEOPLE v. WESTON.

Mandamus will not Lie to compel county judge to try appeal from justice's court, which he had dismissed as improperly taken.

Distinguished in Scott v. Shields, 8 Cal. App. 19, 96 Pac. 389, granting mandamus to compel judge to cause witness to answer deposition.

28 Cal. 641–644, BUFFENDEAU v. BROOKS.

Bond may be Shown to have Been Given to sheriff to indemnify him against loss in selling property in violation of injunction.

Approved in Benicia Agricultural Works v. Estes (Cal.), 32 Pac. 940, parol evidence admissible to show that consideration for note was withdrawal of opposition to discharge in insolvency; Daw v. Niles (Cal.), 33 Pac. 1115, parol evidence admissible to show agreement, in violation of constitution, that mortgagor should pay taxes.

Indemnity to Sheriffs. See note, 86 Am. St. Rep. 557, 558.

28 Cal. 645–649, FERRIS v. IRVING.

Revocation of Power of Attorney. See note, 110 Am. St. Rep. 859.

Effect on Contract of Death of Party. See note, 23 L. R. A. 710.

Effect of Legal Remedy upon equitable jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 71.

28 Cal. 649–652, GLIDDEN v. PACKARD.

Notice of Motion to Dissolve Attachment does not constitute appearance.

Approved in Salmonson v. Streiffer, 13 Cal. App. 397, 110 Pac. 145, exception to sureties on attachment bond does not constitute appearance.

Default Judgment Entered by Clerk, where there has been no service of summons or appearance, is void.

Approved in Dible v. Hanson, 17 N. D. 23, 114 N. W. 372, judgment entered by clerk without order is nullity.

28 Cal. 668–673, SEALE v. McLAUGHLIN.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 849, 857.

28 Cal. 673–685, **NEVADA COUNTY ETC. CANAL CO. v. KIDD.**

Rule That Pleading must be Taken most strongly against pleader has no application where amendment is sought.

Approved in Atlanta etc. R. R. Co. v. Georgia Ry. etc. Co., 125 Ga. 800, 54 S. E. 754, reaffirming rule.

Miscellaneous.—Cited in Nevada County etc. Co. v. Kidd, 37 Cal. 327, on subsequent appeal.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 29 CALIFORNIA.

29 Cal. 19–47, 87 Am. Dec. 146, BOYD v. BLANKMAN.

Purchase by Administrator at his own sale is only voidable.

Approved in Estate of Richards, 154 Cal. 494, 98 Pac. 535, reaffirming rule; Dane v. Layne, 10 Cal. App. 371, 101 Pac. 1069, sale to appraiser would be at most voidable; Shelby v. Creighton, 65 Neb. 493, 101 Am. St. Rep. 630, 91 N. W. 372, sale to trustee of trust property is not necessarily void.

Who may not Purchase at Judicial, execution and other compulsory sales. See note, 136 Am. St. Rep. 796, 800.

The Statute of Limitations applies to causes of action both in equity and at law.

Approved in Williams v. Southern Pacific R. R. Co., 150 Cal. 628, 89 Pac. 600, cause of action for wrongful entry and for equitable relief by injunction barred at same time.

Demurrer on Ground of Statute of Limitations is sustained when time stated exceeds time defined as limitation.

Reaffirmed in Fay v. Costa, 2 Cal. App. 243, 83 Pac. 278.

Answer Stating That Cause of Action has not accrued within five years is sufficient plea of statute of limitations.

Approved in Osborn v. Hopkins, 160 Cal. 504, 117 Pac. 521, answer alleging cause of action for services did not accrue within two years next before commencement of action sufficiently pleads statute of limitations.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 798.

29 Cal. 47–72, HAGER v. SHINDLER.

A Rich Man may Make a fraudulent deed as well as one who is insolvent.

Approved in Bekins v. Dieterle, 5 Cal. App. 695, 91 Pac. 175, where fraud proved, question whether debtor has other property is immaterial.

Effect on Legal Title of Conveyance of land in fraud of creditors. See note, 67 L. R. A. 867, 868, 900.

Purchaser at Sheriff's Sale may have deed of judgment debtor, in fraud of creditors, canceled.

Approved in Haskell v. Sutton, 53 W. Va. 217, 44 S. E. 537, canceling unauthorized oil lease by guardian of minor.

Right of Purchaser at Execution Sale to have fraudulent transfer by judgment debtor set aside. See note, 110 Am. St. Rep. 81, 82, 84.

Disclosures Foreign to Object for which attorney was retained are not privileged.

Approved in In re Niday, 15 Idaho, 566, 98 Pac. 847, attorney may be compelled to produce letters which were not submitted to him for his professional opinion.

29 Cal. 75–96, **EMERY v. BRADFORD.**

Officers Alone must Determine whether contract has been properly performed.

Approved in Cahill v. Colgan (Cal.), 31 Pac. 617, approval of claim by board of examiners and appropriation by legislature are conclusive as against controller.

Assessments for Improvements by front-foot rule. See note, 28 L. R. A. (n. s.) 1130, 1140, 1159.

Whether a Personal Liability may be created for an assessment. See notes, 133 Am. St. Rep. 932, 937; 35 L. R. A. 60.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 905, 907, 908.

29 Cal. 112–119, **SAN FRANCISCO ETC. R. R. CO. v. MAHONEY.**

In Condemnation Proceedings, the Owner is entitled to compensation at the time the land is taken.

Approved in California Southern R. Co. v. Colton Land & Water Co. (Cal.), 2 Pac. 40, compensation is value at time of trial.

Miscellaneous.—Cited in Davidson v. Texas etc. Ry. Co., 29 Tex. Civ. App. 58, 67 S. W. 1095, all persons claiming interest in land sought to be condemned may be made defendants in eminent domain proceedings.

29 Cal. 120–122, **BROWN v. ORR.**

A Married Woman is not Bound by a promissory note executed by her jointly with her husband.

Reaffirmed in Von Hasslocher v. Robinson's Executors, 3 Haw. 804.

29 Cal. 123–124, **WALSH v. MATHEWS.**

Assessments for Improvements by front-foot rule. See note, 28 L. R. A. (n. s.) 1130, 1140.

Whether a Personal Liability may be created for an assessment. See notes, 133 Am. St. Rep. 932; 35 L. R. A. 60.

Defects in Work as Defense to assessment for local improvement. See note, 56 L. R. A. 907.

29 Cal. 124–129, **HARRIS v. McGREGOR.**

Transactions in Name of Supposed but nonexisting corporation. See note, 94 Am. St. Rep. 597.

29 Cal. 129–131, **COCHRAN v. COCHRAN.**

Defects in Work as Defense to assessment for local improvement. See note, 56 L. R. A. 907.

29 Cal. 131–137, LONG v. NEVILLE.

Sheriff, Under Writ of Restitution, must remove all persons who came on property after suit brought, unless under title adverse to defendant.

Approved in Baum v. Roper, 1 Cal. App. 439, 82 Pac. 391, person so entering will be dispossessed unless he clearly shows that he did not enter under or in collusion with defendants.

Effect of Judgment in Ejectment against tenant upon landlord not a party, or vice versa. See note, 26 L. R. A. (n. s.) 598.

29 Cal. 139–142, LYONS v. LEIMBACK.

Facts Found Should Make Complete cause of action or defense.

Approved in Coburn Cattle Co. v. Small, 35 Mont. 293, 88 Pac. 955, special verdict should find all facts necessary, in connection with pleadings, to support judgment.

29 Cal. 142–146, HUNSAKER v. STURGIS.

Agent of Vendor Commits Fraud by becoming agent of purchaser.

Approved in Curry v. King, 6 Cal. App. 576, 92 Pac. 665, transaction by which agent acquired land of principal presumptively fraudulent; Hunter Realty Co. v. Spencer, 21 Okl. 164, 95 Pac. 760, 17 L. R. A. (n. s.) 622, where agent acts for both parties in exchange of real estate, contract is voidable.

Pledgee must Account for All Profits derived from bailment.

Approved in Leggat v. Palmer, 39 Mont. 309, 102 Pac. 329, such profits must be applied first to interest on debt, then to principal, any surplus remaining to be held for pledgor.

29 Cal. 147–150, 87 Am. Dec. 164, BOARD OF COMMISSIONERS OF SAN JOSE FUNDED DEBT v. YOUNGERS; S. C., 29 Cal. 172.

Plaintiff cannot Dismiss Suit unless attorney assents.

Approved in Boca etc. R. R. Co. v. Superior Court, 150 Cal. 156, 157, 88 Pac. 719, reaffirming rule; Rincon Water etc. Co. v. Anaheim Union Water Co., 115 Fed. 550, judgment of dismissal by consent, entered on motion of defendant's attorneys, not judgment on merits.

Distinguished in Paulson v. Lyson, 12 N. D. 359, 97 N. W. 534, upholding stipulation made by defendant, without knowledge of his attorney, for dismissal of action.

Extent to Which Litigant may Control Cause in which he has appeared as attorney. See note, 93 Am. St. Rep. 170.

Right of Attorney to Enter Retraxit. See note, 25 L. R. A. (n. s.) 1314.

While Attorney of Record Remains Such, his right to control litigation cannot be questioned.

Reaffirmed in Choctaw etc. R. Co. v. Burgess, 21 Okl. 121, 95 Pac. 610.

29 Cal. 150–155, GRADWOHL v. HARRIS.

Assignee may Sue for Entire Claim though only part of beneficial interest intended to pass by assignment.

Approved in Sroufe v. Soto Bros. & Co., 5 Ariz. 12, 43 Pac. 221, upholding assignment for collection.

When It was Intended that part only of beneficial interest should pass by assignment, assignors may intervene in action to assert their equity.

Cited in Faricy v. St. Paul Inves. & Sav. Soc., 110 Minn. 317, 125 N. W. 678, permitting one claiming to be owner of bonds to intervene in suit for their recovery; Greene v. McAuley, 70 Kan. 611, 79 Pac. 136, 68 L. R. A. 308, arguendo.

Written Admission Does not Estop Party making it from showing mistake therein.

Approved in Mahon v. Rankin, 54 Or. 336, 102 Pac. 611, evidence received to explain written admissions.

29 Cal. 156–160, BLANC v. KLUMPKE.

If Nuisance in Highway Interferes with free use of private property, owner may have private action to abate same..

Approved in Cushing-Wetmore Co. v. Gray, 152 Cal. 123, 125 Am. St. Rep. 47, 92 Pac. 72, lot owner may suffer special injury from obstructions placed in street not immediately in front of his property; Stricker v. Hillis, 15 Idaho, 713, 715, 99 Pac. 832, 833, evidence held to show that injury sustained by plaintiff from obstruction of highway was different from that suffered by general public; Mountain Copper Co. v. United States, 142 Fed. 644, 73 C. C. A. 621, arguendo.

Right to Obstruct or Destroy Rights of navigation. See note, 59 L. R. A. 53.

Right of Owner of Upland to access to navigable water. See note, 40 L. R. A. 604.

Private Right of Action for obstruction of navigable stream. See note, 3 L. R. A. (n. s.) 1126.

29 Cal. 160–165, CARPENTIER v. GARDINER.

The Appellate Court will not Find Facts upon the evidence in the record.

Approved in Murdock v. Clarke (Cal.), 24 Pac. 274, reaffirming rule.

Power of Appellate Court Over Verdict for excessive damages. See note, 26 L. R. A. 388.

29 Cal. 168–171, REAY v. COTTER.

Purchaser of Leased Property cannot recover possession from tenant by unlawful detainer proceedings.

Approved in Scott-Hyman v. Grant, 50 Tex. Civ. 42, 114 S. W. 856, tenant may resist suit by landlord by interposing superior title acquired by purchase from landlord or at judicial sale.

Right of Purchasers or Lessees to bring unlawful detainer. See note, 120 Am. St. Rep. 37.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 111.

29 Cal. 172–180, BOARD OF COMMISSIONERS OF SAN JOSE FUNDED DEBT v. YOUNGER.

A Contract will not be Rescinded for misrepresentation where no confidential relation existed between the parties, and the facts were equally accessible to both.

Approved in Oppenheimer v. Clunie, 142 Cal. 321, 75 Pac. 902, applying rule to alleged fraudulent representations as to condition of theater; Fritz v. Fritz, 94 Minn. 268, 102 N. W. 707, refusing to reform contract though party executing it unable to read English language; Farlow v. Chambers, 21 S. D. 131, 110 N. W. 96, refusing to relieve defendant from contract which he signed without reading

upon plaintiff's representation that it conformed to prior oral agreement.

Distinguished in Watson v. Molden, 10 Idaho, 581, 79 Pac. 506, granting relief for false statements as to water rights and irrigation of land made to person unfamiliar with such matters.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 597.

Ignorance or Carelessness as Affecting Right to equitable relief from contract by which one has been overreached. See note, 5 L. R. A. (n. s.) 800.

A Contract will not be Rescinded for suppression of fact unless such concealment resulted in injury.

Approved in Wills v. Porter (Cal.), 61 Pac. 1111, refusing to compel repayment to corporation of debt paid its principal stockholder.

29 Cal. 180–189, WALLACE v. SAN JOSE.

What Constitutes "Indebtedness" of Municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 407.

29 Cal. 189–192, THOMPSON v. LYNCH.

Proof That Intestate Said that he did not own any interest in land is not sufficient to sustain allegation that he executed and delivered deeds to same.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, semble, but holding error, if any, immaterial.

Sale by Administrator of Land once property of intestate casts cloud upon title.

Disapproved in Chamberlain v. Baker, 28 Tex. Civ. App. 500, 67 S. W. 533, sale under execution against grantor is not cloud upon title.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 108.

29 Cal. 192–193, LEFFINGWELL v. GRIFFING.

An Appeal Does not Lie from an order directing a statement on motion for new trial to be settled.

Disapproved in Magee v. Superior Court, 10 Cal. App. 161, 101 Pac. 535, order made after judgment in action in which execution sale of money was made, directing payment thereof to purchaser, is appealable.

29 Cal. 194–200, CURIAC v. PACKARD.

A Common-law Bond in form, given to procure discharge of goods attached, is sufficient compliance with statute.

Approved in Bailey v. Aetna Indemnity Co., 5 Cal. App. 744, 91 Pac. 417, no order of court for release of attached property necessary; Dackich v. Barich, 37 Mont. 501, 97 Pac. 935, holding that sureties in bond given for release of attachment bound themselves to pay judgment.

29 Cal. 200–210, McDONALD v. ASKEW.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 267.

Right of Prior Appropriator of water. See note, 30 L. R. A. 672.

29 Cal. 210–214, PEOPLE ex rel. LIVINGSTON v. PACHECO.

The Attorney General is the only person authorized to appear for the people in the supreme court.

Approved in State v. Miles, 11 Idaho, 786, 83 Pac. 697, brief of appellant and transcript of record in criminal case must be served on attorney general; Henry v. State, 87 Miss. 35, 38, 39 So. 863, 864, governor cannot sue in name of state.

Necessary Parties to Proceedings in mandamus. See note, 105 Am. St. Rep. 123.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 622.

29 Cal. 214–224, JANSON v. BROOKS.

Incompetent Testimony Admitted without objection will be treated as competent.

Approved in Durkee v. Chino Land and Water Co., 151 Cal. 571, 91 Pac. 393, party acquiescing in measure of damages is bound thereby.

29 Cal. 224–227, IN RE PACHECO'S ESTATE.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 380.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 333.

29 Cal. 238–243, DUPUY v. SHEAR.

Court may Strike Complaint from files where there has been unreasonable delay in serving summons.

Approved in State Sav. Bank v. Albertson, 39 Mont. 421, 102 Pac. 694, mere lapse of time will not justify dismissal.

29 Cal. 243–251, FANJOY v. SEALES.

Individual Liability for Falling Walls or buildings. See note, 34 L. R. A. 562.

Liability of Contractor to Third Persons for defects after completion and acceptance. See note, 26 L. R. A. 506.

Liability of Owner to Contractor or his employees for existing defects in building being erected. See note, 22 L. R. A. (n. s.) 858.

Liability of Employer After Assuming Control of subject matter of work executed by contractor. See note, 3 L. R. A. (n. s.) 602.

Liability for Injury to Servant in using appliance for purpose other than for which primarily intended. See note, 16 L. R. A. (n. s.) 984.

29 Cal. 251–252, NEVILLE v. SOLANO COUNTY.

Liability of County for Temporary Guard for jail is not to sheriff, but to persons employed as guard.

Distinguished in Mombert v. Bannock County, 9 Idaho, 475, 75 Pac. 240, holding, under statute, that person who furnished sheriff with necessaries for prisoners must look to sheriff for payment.

29 Cal. 257–264, PEOPLE v. HUGHES.

After Conviction of Arson With Intent to defraud insurance company, variance between name of company as charged and as proved is no ground for arrest of judgment.

Approved in People v. Monroe (Cal.), 33 Pac. 780, where information set out forged instrument as order addressed to city, proof that it was addressed to auditor not variance.

In Prosecution for Arson With Intent to defraud insurance company, slight variance in name of company is immaterial.

Approved in People v. Spencer, 16 Cal. App. 758, 117 Pac. 1040, applying rule to variance in name of bank on which check drawn without funds.

Under Indictment for Arson With Intent to defraud duly incorporated insurance company, proof of de facto existence of corporation sufficient.

Approved in People v. Morley, 8 Cal. App. 374, 97 Pac. 85, reaffirming rule; State v. Stevens, 16 S. D. 313, 92 N. W. 421, applying rule to prosecution of cashier for receiving deposit after bank's insolvency.

Presumption as to Incorporation. See note, 22 L. R. A. 278.

In Trial for Arson With Intent to defraud insurance company, it is not necessary to prove that policy was valid.

Reaffirmed in People v. Morley, 8 Cal. App. 376, 97 Pac. 86.

Crime of Arson, and who may commit same. See note, 101 Am. St. Rep. 27.

Arson in Setting Fire to one's own building. See note, 32 L. R. A. 648.

Miscellaneous.—Cited in Ex parte Prosole, 32 Nev. 381, 108 Pac. 632, construing statutes relating to arson.

29 Cal. 267-273, JACKSON v. SHAWL.

Where Borrower has Contracted to Pay Pawnbroker more than legal interest, he can recover pledge upon tendering principal and legal interest.

Distinguished in Levinson v. Boas, 150 Cal. 193, 194, 88 Pac. 828, 12 L. R. A. (n. s.) 575, allowing recovery of pledge without such tender where pawnbroker had violated law in other particulars besides charging excessive interest; Porter v. Fisher (Cal.), 34 Pac. 701, broker employed to sell land and personalty thereon under contract, invalid as to the land because not in writing, may recover commission on value of personalty.

Validity of Contracts in Business which it is misdemeanor to transact. See note, 12 L. R. A. (n. s.) 578, 582, 586, 587, 594, 616.

Constitutionality of Statutory Discrimination as to interest rates. See note, 27 L. R. A. (n. s.) 899.

29 Cal. 273-278, REESE v. STEARNS.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 521.

29 Cal. 278-280, MYER v. KOHN.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 517.

Form of Judgment and Procedure in case of liability to make payment in coin. See note, 29 L. R. A. 593.

29 Cal. 281-282, STODDARD v. TREADWELL.

Point not Made in Court below or embraced in grounds of appeal will not be considered.

Approved in Yaeger v. Southern Cal. Ry. Co. (Cal.), 51 Pac. 193, on appeal from order denying new trial, question not presented to trial court on motion cannot be considered.

Prevailing Party may Recover Costs of former trial.

Approved in Hughes v. Chicago etc. R. R. Co., 126 Wis. 537, 106 N. W. 530, reaffirming rule.

Miscellaneous.—Cited in San Francisco v. Certain Real Estate, 42 Cal. 518, refusing to dismiss appeal where record showed that no opposition was made but failed to show presence of appellant or counsel; Green v. Brown etc. Co., 11 N. M. 663, 72 Pac. 18, court may grant new trial in ejectment conditioned upon payment of costs.

29 Cal. 283–292, **DAVIS v. LIVINGSTON.**

Failure of Subcontractor in Notice of lien to state correctly name of contractors is not necessarily fatal.

Approved in Cady Lumber Co. v. Conkling, 70 Neb. 811, 98 N. W. 44, reaffirming rule.

29 Cal. 292–299, 87 Am. Dec. 170, **DERRINGER v. PLATE.**

The Right to a Trademark is not limited in its enjoyment by territorial bonds.

Approved in Hygeia Distilled Water Co. v. Consolidated Ice Co., 144 Fed. 142, right not affected by fact that plaintiff has not yet extended his trade to locality occupied by defendant.

Miscellaneous.—Cited in Sartor v. Schaden, 125 Iowa, 704, 101 N. W. 514, one person may have trademark in one country and another the same trademark in another country.

29 Cal. 312–317, **O'CONNOR v. BLAKE.**

The Defense of a Prior Lis Pendens is available only where the plaintiff at least, in both actions, is the same.

Approved in Helfrich v. Romer, 16 Cal. App. 436, 118 Pac. 459, reaffirming rule; Rodney v. Gibbs, 184 Mo. 10, 82 S. W. 189, rule does not apply where defendant in one action is plaintiff in the other.

29 Cal. 317–325, **ROBINSON v. FORREST.**

In Order That He may Attack Patent there must be priority of title between plaintiff and the United States.

Approved in Ewbank v. Mikel, 6 Cal. App. 142, 91 Pac. 673, settler on state land, who did not contest application for patent within specified time, cannot thereafter enforce trust in land patented.

Neither Sections nor Their Subdivisions can be said to have any existence until divided by approved survey.

Approved in Carroll v. United States, 154 Fed. 431, 83 C. C. A. 245, deed describing unsurveyed lands by section and subdivision inadmissible to show color of title; Clearwater Timber Co. v. Shoshone County, 155 Fed. 631, lands not taxable until survey accepted by land department.

29 Cal. 326–329, **BRUNN v. MURPHY.**

Miscellaneous.—Cited in Hayes v. Ducasse, 119 Cal. 684, 52 Pac. 121, tax deed containing recitals made imperative by Political Code prima facie evidence that property has been sold as required by law.

29 Cal. 330–336, **CARPENTIER v. MITCHELL.**

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 175.

Liability of Cotenants to Account for use and occupation and rents and profits. See note, 28 L. R. A. 840.

29 Cal. 337–356, **MORRISON v. BOWMAN.**

Though Testator cannot Dispose of the property of another, acceptance by latter of bequest under will is confirmation of such disposition.

Approved in In re Smith's Estate (Cal.), 38 Pac. 951, conveyance by wife of life estate devised in will purporting to dispose of community property is acceptance of provisions of will; Smithsonian Institution v. Meech, 169 U. S. 414, 18 Sup. Ct. 396, 42 L. Ed. 793, condition that "the legatees acquiesce in," will be broken where they contest devise on ground that property did not belong to testator.

If It Appears That Testator did not intend to dispose of his wife's share of the common property, her acceptance of bequest will not operate as an election.

Approved in Glenn v. Gunn, 88 Mo. App. 433, widow not put to her election by acceptance of statutory allowance.

Widow's Election Between Will and Dower or community property. See note, 92 Am. St. Rep. 705.

Husband has not Power to Dispose by Will of wife's interest in common property.

Approved in Painter v. Painter, 4 Cof. Prob. 345, holding wife took half of community estate as survivor and half of remainder under will.

29 Cal. 359–385, 89 Am. Dec. 49, MYERS v. MOTT.

An Order Refusing to Dissolve an attachment is not appealable.

Approved in Nail v. Superior Court, 11 Cal. App. 29, 103 Pac. 903, reaffirming rule; Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 486, 114 Pac. 839, denying appeal from order refusing to vacate appointment of receiver.

Attachment Lien is Dissolved by death of defendant.

Disapproved in Wartman v. Pecka, 8 Ariz. 12, 68 Pac. 535, holding contrary.

Effect of Death of Party After Judgment upon remedy by execution. See note, 61 L. R. A. 375.

No Property may be Taken in Attachment that is not liable to seizure under the execution when issued.

Approved in Rust v. McWilliams, 3 Alaska, 572, evidence showing certain machinery not subject to attachment because not owned by defendant.

29 Cal. 385–392, DOE v. VALLEJO.

The Court will Apply the Same Rule with reference to balancing conflicting testimony in suits in equity as in actions at law.

Approved in Stuart v. Hauser, 9 Idaho, 71, 72 Pac. 725, applying rule where case submitted upon oral testimony; Morrow v. Matthew, 10 Idaho, 433, 79 Pac. 200, refusing to reverse decree establishing trust because plaintiff did not prove case beyond reasonable doubt.

29 Cal. 393–395, BLOOD v. SHANNON.

Where Principal Refused to ratify sale made by agent because he had already sold property, he could not thereafter place his refusal on the ground that agent had accepted check instead of money.

Approved in Donley v. Porter, 119 Iowa, 454, 93 N. W. 575, where principal refused to complete sale on ground that price should have been net, he could not resist payment of commissions because sale did not comply with instructions as to payment; Dosch v. Andrus, 111 Minn. 293, 126 N. W. 1073, evidence held insufficient to establish waiver.

Right to Commissions Where Broker procures purchaser at owner's price, but on slightly different terms, and owner refuses to consummate sale. See note, 21 L. R. A. (n. s.) 938.

Performance by Real Estate Broker of contract to find purchaser or effect exchange. See note, 44 L. R. A. 605, 623, 626.

Real Estate Broker's Commissions as affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 606.

When Real Estate Broker is considered as procuring cause of sale or exchange. See note, 44 L. R. A. 344, 351.

Broker's Right to Make Sale as exclusive of owner's. See note, 24 L. R. A. (n. s.) 281.

29 Cal. 395–407, EX PARTE McCARTHY.

Legislature may Investigate any matter concerning which it has power to act.

Approved in Application of Bunkers, 1 Cal. App. 67, 81 Pac. 750, state senator guilty of bribery in accepting money to prevent investigation of building and loan corporation.

29 Cal. 407–413, 89 Am. Dec. 57, WINTER v. STOCK.

Deed to L. B. & Co. Vests legal title in L. B. alone.

Approved in Ketchum v. Barber (Cal.), 12 Pac. 251, reaffirming rule; Rixford v. Zeigler, 150 Cal. 438, 119 Am. St. Rep. 229, 88 Pac. 1093, deed to unincorporated "church community" passed no title, legal or equitable, where no possession taken; Close v. O'Brien, 135 Iowa, 307, 112 N. W. 801, deed to firm of C. & A. made C. and A. tenants in common.

As to When Real Estate will be Considered Partnership property. See note, 27 L. R. A. 460.

The Opinion of Counsel as to Title is not admissible on issue respecting the validity of such title.

Approved in Reed v. Sefton, 11 Cal. App. 90, 103 Pac. 1096, opinion of attorney inadmissible on question whether title is marketable.

What Constitutes "Satisfactory Title" within requirement of agreement relating to land. See note, 18 L. R. A. (n. s.) 742.

29 Cal. 414–415, PEOPLE v. RICHMOND.

Coercion as Defense to Crime. See notes, 106 Am. St. Rep. 727; 19 L. R. A. 358.

Criminal Liability of Children. See note, 36 L. R. A. 210.

29 Cal. 415–418, PEOPLE v. ROSBOROUGH.

Judgment in Proceedings in insolvency is appealable.

Approved in Keech v. Joplin, 157 Cal. 5, 106 Pac. 224, district court of appeals has jurisdiction of appeal in mandamus to compel payment of warrant out of general fund of drainage district.

Mandamus is Proper Remedy against public officers. See note, 98 Am. St. Rep. 896.

29 Cal. 418–420, EDGERLY v. SCHOONER SAN LORENZO.

Lien for Materials Furnished for construction of vessel continues for one year from time demand falls due.

Reaffirmed in Barstow v. The Aurelia, 45 Or. 289, 77 Pac. 836.

29 Cal. 422–427, BAILEY v. TAAFFE.

Order Setting Aside Default Judgment rests much in the discretion of the court, which discretion is a legal and not a mental discretion.

Approved in Parks v. Coyne, 156 Mo. App. 394, 137 S. W. 340, and Hall v. McConey, 152 Mo. App. 11, 132 S. W. 621, both following rule; Harris v. Morris, 3 Cal. App. 152, 84 Pac. 678, setting aside default when affidavit of mailing of summons insufficient; Jenkins v. Gamewell Fire Alarm Tel. Co. (Cal.), 31 Pac. 571, reversing order setting aside default where nothing to show that plaintiff's attorneys expressly or impliedly extended time to answer; Culver v. Mtn. Home Elec. Co., 17 Idaho, 674, 107 Pac. 67, refusing to set aside default where it did not appear that there was any defense; Eklund v. Lewis Lumber Co., 13 Idaho, 585, 92 Pac. 532, refusing to set aside default in absence of proper showing; Western Loan Co. v. Smith, 12 Idaho, 106, 85 Pac. 1089, refusing to set aside default in absence of affidavits from counsel as to inadvertence; Holzeman v. Henneberry, 11 Idaho, 431, 83 Pac. 498, reversing order vacating default judgment where there was no defense on merits nor any surprise; Poff v. Lockridge, 22 Okl. 470, 98 Pac. 430, default set aside because of sickness in defendant's family and miscarriage of letters; Moody v. Reichow, 37 Wash. 307, 308, 80 Pac. 462, refusing to vacate default on defendant's affidavit that, because of his imperfect English, he had difficulty in explaining his defense to counsel.

Affidavit of Merits, Made by Counsel, stating that so far as he has examined defendant's title he believes it is better than plaintiff's, is insufficient.

Approved in Copper King of Arizona v. Johnson, 9 Ariz. 72, 76 Pac. 595, affidavit insufficient which failed to state in what defense consisted or why affidavit was not made by party.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 265.

29 Cal. 427–429, PEOPLE v. MOORE.

Action to Abate Nuisance is "a case in equity."

Approved in Meek v. De Latour, 2 Cal. App. 263, 83 Pac. 301, denying trial by jury.

29 Cal. 429–436, PEOPLE v. EVANS.

In Action upon Joint and Several Bond, any or all signers may be joined.

Approved in Moreing v. Weber, 3 Cal. App. 22, 84 Pac. 223, applying rule to contract for street work.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 190.

The Sureties on an Official Bond are liable, though it was approved by the wrong officer or board.

Approved in Fremont County v. Fremont Co. Bank, 138 Iowa, 172, 115 N. W. 928, quaere, whether sureties on bond given by bank to secure deposit of county funds would be liable where such deposit unauthorized; Henry County v. Salmon, 201 Mo. 154, 100 S. W. 24, holding sureties of county depositary, though county court made no preliminary order appointing him as such; Deer Lodge Co. v. United States Fidelity etc. Co., 42 Mont. 328, 112 Pac. 1064, defect in approval of bond will not avail surety.

29 Cal. 437–444, **HASKELL v. MOORE.**

If Complaint Contains More than one count and one of counts does not state cause of action, answer need not deny allegations of such count.

Approved in Lyden v. Spohn-Patrick Co., 155 Cal. 180, 100 Pac. 237, objections to such a count not waived by failure to demur.

Assumption of Debts on Dissolution of partnership. See note, 9 L. R. A. (n. s.) 68, 73.

29 Cal. 444–449, **MASTICK v. THORP.**

A Court of Equity will not Grant a new trial in an action at law where defendant knew of judgment in time to have moved for new trial.

Approved in Brum v. Ivins, 154 Cal. 21, 129 Am. St. Rep. 137, 96 Pac. 878, reaffirming rule; City of Fort Pierre v. Hall, 19 S. D. 669, 117 Am. St. Rep. 972, 104 N. W. 472, refusing city equitable relief against default judgment where defenses had been matters of public record for five years.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 327.

Injunctions Against Judgments obtained by fraud, accident, mistake, surprise, and duress. See note, 30 L. R. A. 787.

29 Cal. 449–453, **PEOPLE v. HASTINGS.**

Legislature cannot Fix Assessed Value of property.

Approved in Pratt v. Breckinridge, 112 Ky. 15, 65 S. W. 139, act providing for appointment by legislature of state board of election commissioners invalid; dissenting opinion in Purnell etc. v. Mann, 105 Ky. 121, 50 S. W. 267, majority upholding statute providing for appointment by legislature of state board of election commissioners.

A Valid Assessment is Necessary for the validity of a tax.

Approved in Clark v. Maher, 34 Mont. 401, 87 Pac. 274, bank which failed to pay taxes on property subject to taxation but not assessed, not deprived of right to injunction against illegal tax.

Making of Certified Copy of Assessment-roll of another assessor for previous year is not assessment.

Approved in Tremmel v. Mess, 46 Wash. 139, 89 Pac. 488, tax deed invalid where city purchased assessment-roll from county.

29 Cal. 453–459, **FINCH v. TEHAMA COUNTY.**

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 535.

29 Cal. 460, **PEOPLE v. BURNEY.**

Certiorari will not Lie to review errors of law of county court in cases where it has jurisdiction.

Approved in Matter of Hughes, 159 Cal. 364, 113 Pac. 686, determination that petition for writ of habeas corpus is sufficient is not reviewable on certiorari.

Distinguished in Moore v. Rennick, 1 Alaska, 174, allowing certiorari to justice's court where amount involved less than two hundred dollars.

29 Cal. 460–466, BONDS v. HICKMAN.

Appellate Court cannot Amend transcript.

Approved in Mendocino County v. Peters, 2 Cal. App. 27, 82 Pac. 1123, reaffirming rule.

Appellate Court may Order Document added to or stricken from transcript.

Approved in California Wine Assn. v. Commercial etc. Co., 159 Cal. 53, 112 Pac. 860, permitting incorporation of special verdicts in record to sustain general verdict.

29 Cal. 466–479, WOODS v. BUGBEY.

In Order to Protect Himself from Creditors of the vendor, the purchaser must have that possession which places him in that relation to the property which owners usually occupy.

Approved in Kennedy v. Conroy (Cal.), 44 Pac. 796, no change in possession of sheep and hogs where both vendor and vendee continued to live on farm; Sequeira v. Collins, 153 Cal. 432, 95 Pac. 878, evidence insufficient to show change in possession of brick kilns.

As to Whether Presumption of Fraud flowing from retention of chattel by vendor may be overcome. See note, 24 L. R. A. (n. s.) 1139.

29 Cal. 480–485, PEOPLE v. SASSOVICH.

Title of District Judge who has come into possession of office by color of right cannot be collaterally questioned.

Approved in Matter of Danford, 157 Cal. 431, 108 Pac. 325, motion to arrest judgment because of alleged alienage of judge properly denied.

29 Cal. 486–491, FAIR v. STEVENOT.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 56, 58, 59, 68.

29 Cal. 492–503, RICE v. CUNNINGHAM.

Miscellaneous.—Cited in McClung v. Cullison, 15 Okl. 410, 82 Pac. 501, heir of intestate mortgagor is not necessary party to suit to foreclose.

29 Cal. 503–507, 89 Am. Dec. 61, BRUMMAGIM v. TALLANT.

Limitations of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 487.

Maturity of Certificate of Deposit. See note, 15 L. R. A. 387.

When Statute Begins to Run on certificate of deposit. See note, 29 L. R. A. (n. s.) 686.

29 Cal. 507–514, JAHNS v. NOLTING.

Administrator may Sue for Conversion of personal estate of deceased.

Approved in London, Paris & American Bank v. Aronstein, 117 Fed. 605, 54 C. C. A. 663, executor may sue corporation for conversion where it wrongfully refused to transfer shares on its books.

Administrator has Right to Personal Property for purposes of administration.

Approved in Friese v. Friese, 12 N. D. 85, 95 N. W. 447, refusing to substitute sons of decedent as plaintiffs in suit on contract, though contract made for their benefit.

Rights of Heir in Personal Property of ancestor. See note, 112 Am. St. Rep. 731.

29 Cal. 514–526, GARWOOD v. GARWOOD.

The Judgment of a Court having jurisdiction is conclusive evidence as between the same parties and their privies where the same point arises in relation to a different matter.

Approved in Estate of Bell, 153 Cal. 340, 95 Pac. 376, judgment held conclusive against existence of order granting family allowance; Mossman v. Hawaiian Government, 10 Haw. 427, adjudication of question of descent in probate proceedings not conclusive as to one not privy to such proceedings; Burgess v. Stribling, 134 Mich. 38, 95 N. W. 1003, order appointing J. guardian of insane person conclusive on question of marriage on J.'s petitions for appointment as her administrator; Taylor v. Taylor, 54 Or. 581, 103 Pac. 531, rejecting evidence to show what was determined in action; People v. Albers, 137 Mich. 684, 100 N. W. 910, defendant's acquittal of bribery no bar to his prosecution for perjury committed on trial; Caseday v. Lindstrom, 44 Or. 315, 75 Pac. 224, finding held conclusive, though not referred to in decree; dissenting opinion in Gulling v. Washoe County Bank, 29 Nev. 272, 89 Pac. 31, majority holding evidence showed that matters sought to be litigated had been determined in former action.

Doctrine of Res Adjudicata Applies to Decrees of probate court, as well as to those of any other judicial tribunal.

Approved in Guardianship of Treadwell, 3 Cof. Prob. 317, applying rule where applications for guardianship were filed in different counties; Estate of Welch, 3 Cof. Prob. 304, applying rule to order for family allowance.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 685, 687.

Parol Evidence is Admissible to show identity of persons named in record of former judgment.

Approved in Lillis v. People's Ditch Co. (Cal.), 29 Pac. 783, parol evidence as to capacity of ditch admissible to aid in construing former judgment.

Identity of Names in Record is prima facie sufficient to establish identity of persons.

Approved in Estate of Hartman, 157 Cal. 209, 107 Pac. 106, common parentage established by identity of name.

Distinguished in Bryan v. Kales, 3 Ariz. 428, 31 Pac. 519, where record shows judgment of M. W. Kales against M. W. Kales, as administrator, identity of name does not show identity of person because record would thereby be impeached.

29 Cal. 533–549, PEOPLE v. HOME INS. CO.

The Bonds of This State, owned by a foreign insurance company but kept in this state, are subject to taxation.

Approved in Western Assur. Co. v. Halliday, 126 Fed. 259, 61 C. C. A. 271, municipal bonds deposited with state superintendent of insurance are subject to taxation; Armour Packing Co. v. City

Council of Augusta, 118 Ga. 553, 555, 98 Am. St. Rep. 128, 45 S. E. 424, 425, city may tax notes, accounts and other shares in action in hands of agent of nonresident corporation doing business therein; Metropolitan Life Ins. Co. v. Board of Assessors, 115 La. 705, 39 So. 849, money loaned within state by nonresident corporation is taxable, though notes are kept outside of state.

Situs of Debt for Taxation, apart from creditor's domicile. See note, 2 L. R. A. (n. s.) 638.

Implied Exemption of State or municipal bonds. See note, 7 L. R. A. (n. s.) 663.

The Object of the Description in an assessment is simply to identify the property assessed with reasonable certainty.

Approved in San Francisco v. Flood, 64 Cal. 506, 2 Pac. 264, assessment for "mining stock" sufficient.

State Bonds are Subject to taxation.

Approved in State National Bank v. City of Memphis, 116 Tenn. 650, 94 S. W. 608, 7 L. R. A. (n. s.) 663, reaffirming rule; Bank of Russellville v. City of Russellville, 133 Ky. 640, 134 Am. St. Rep. 479, 118 S. W. 922, city may tax its bonds in hands of another.

29 Cal. 562–564, PEOPLE v. JOCELYN.

Affidavit for Continuance held insufficient.

Approved in Melbourne v. State, 51 Fla. 72, 40 So. 190, on second or subsequent application for continuance extraordinary diligence must be shown.

29 Cal. 567–575, 89 Am. Dec. 64, HALL v. CRANDALL.

If an Agent, in Executing a Contract, uses terms which charge himself, he is liable thereon.

Approved in Fritz v. Kennedy, 119 Iowa, 630, 93 N. W. 604, holding one who purchased horse without disclosing that he was acting as agent for real purchaser.

Where Contract of Officers of Corporation binds only corporation by its terms, any personal liability of officers results from their undertaking to act without authority.

Approved in Simmonds v. Long, 80 Kan. 158, 101 Pac. 1071, 23 L. R. A. (n. s.) 553, persons who make contract assuming to act as agents for another, who repudiates contract, are liable for amounts received thereunder in action for money had and received; Griswold v. Haas, 145 Mo. App. 585, 122 S. W. 783, plaintiff cannot sue agent on contract itself and recover damages for false representation of facts of agency; Le Roy v. Jacobsky, 136 N. C. 448, 48 S. E. 797, 67 L. R. A. 977, denying recovery for false assertion of authority where action proceeded on theory that agent was personally bound.

Personal Liability of Officers on Note made for corporation. See note, 19 L. R. A. 676.

29 Cal. 575–577, PEOPLE v. AH YEK.

In Indictment for Rape it is not necessary to allege age of accused.

Approved in Peckham v. People, 32 Colo. 145, 75 Pac. 423, and Johnson v. People, 202 Ill. 58, 66 N. E. 878, both reaffirming rule.

29 Cal. 579–580, PEOPLE v. JACOBS.

Pointing Unloaded Firearm as assault. See note, 15 L. R. A. (n. s.) 1274.

29 Cal. 589–597, **GIFFORD v. CARVILL.**

One Defrauded by False Statement may rescind contract and recover what he has paid thereunder, or affirm contract and recover for injury sustained from false statement.

Approved in Sonnesyn v. Akin, 14 N. D. 257, 104 N. W. 1029, reaffirming rule; Wesley v. Diamond, 23 Okl. 176, 109 Pac. 526, party must either affirm contract or rescind it.

One Resisting Payment of Promissory Note on ground of fraud must offer to return property and rescind contract.

Distinguished in Haydon v. St. Louis etc. R. R. Co., 117 Mo. App. 89, 93 S. W. 837, restoration of consideration is not prerequisite to suit to cancel agreement and for damages, if petition offers to do equity.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 609.

Expression of Opinion as Fraud. See note, 35 L. R. A. 436.

29 Cal. 597–605, **WAKEFIELD v. GREENHOOD.**

A Promise to Pay a Draft by one who holds no funds of drawer must be in writing.

Approved in Chicago Heights Lumber Co. v. Miller, 219 Ill. 82, 109 Am. St. Rep. 314, 76 N. E. 53, applying rule though drawer paid part of draft and kept written order in his possession.

Validity of Parol Promise to Accept and order of bill of exchange. See note, 26 L. R. A. 621.

Complaint in Action on Promise by defendant to accept a draft which another might draw on him need not aver that promise was in writing.

Approved in Levy v. Ryland, 32 Nev. 469, 109 Pac. 908, statute of frauds must be set up by answer and not by demurrer.

29 Cal. 605–610, **SCHELLHOUS v. BALL.**

New Trial on Ground of Surprise should not be granted unless verdict mainly attributable thereto and surprise did not result from fault of moving party.

Approved in Rauer's Law etc. Co. v. Bradbury, 3 Cal. App. 262, 84 Pac. 1009, new trial rightly refused where accident might have been guarded against, and it did not appear that different result would be reached; Hall v. Jensen, 14 Idaho, 173, 93 Pac. 965, new trial rightly denied where no diligence shown and newly discovered evidence is simply for impeachment; Hill v. McKay, 36 Mont. 446, 93 Pac. 347, affirming order denying new trial where no showing of diligence nor any probability that new trial would result differently; Coolidge v. Taylor, 79 Vt. 536, 65 Atl. 584, new trial properly granted in view of unexpected attitude of judge toward evidence when different result would be likely.

29 Cal. 610–612, **HENRY v. EVERTS.**

Miscellaneous.—Cited in Henry v. Everts, 30 Cal. 425, on subsequent appeal.

29 Cal. 615–619, **BOLTON v. STEWART.**

Order Granting New Trial will not be Reversed because reason given is bad, provided there was a good reason for granting it.

Reaffirmed in Davis v. Jacobson, 13 N. D. 432, 101 N. W. 315.

29 Cal. 619–622, SKIDMORE v. TAYLOR.

Replevin is Proper Remedy to recover package of gold coin sealed up in leather bag.

Approved in Eddings v. Boner, 1 Ind. Ter. 178, 38 S. W. 1111, replevin will lie to recover belt containing purse and money.

When Replevin on Claim and Delivery is sustainable. See note, 80 Am. St. Rep. 757.

29 Cal. 622–632, PEOPLE v. GARNETT.

Larceny Committed at the Same Time as a burglary is not included in the burglary.

Approved in People v. Devlin, 143 Cal. 130, 76 Pac. 901, party charged with burglary cannot plead former conviction of petit larceny committed in connection with the burglary; Sturgis v. State, 2 Okl. Cr. 373, 102 Pac. 61, selling intoxicating liquor and conveying it from one place in the state to another are separate offenses.

Exclusion of Witness for Prosecution, on motion for defendant, is within discretion of court.

Approved in Loose v. State, 120 Wis. 121, 97 N. W. 528, testimony of witness admissible, though he has violated rule for his exclusion.

Objection That Indictment Charges two offenses must be taken by demurrer.

Approved in State v. Stevens, 81 Vt. 455, 70 Atl. 1061, duplicity cannot be urged by motion in arrest.

Conviction on Testimony of accomplice. See note, 98 Am. St. Rep. 169.

29 Cal. 632–635, PEOPLE ex rel. LAMBY v. DEVINELLI.

Courts, Tribunals and Persons authorized to punish contempts. See note, 117 Am. St. Rep. 951.

Remedies of Plaintiff Dispossessed after being put in possession under judgment in ejectment. See note, 135 Am. St. Rep. 649.

29 Cal. 637–642, GILLAM v. SIGMAN.

The Facts, Circumstances, or **Declarations** which grow out of the principal fact in question, which are contemporaneous with it, and serve to illustrate, qualify, or explain it, constitute the res gestae.

Distinguished in People v. Petruzo, 13 Cal. App. 577, 110 Pac. 327, rejecting declaration made day after homicide.

29 Cal. 642–643, PEOPLE v. ROONEY.

Form of Judgment on Penal Bonds. See note, 62 L. R. A. 448.

29 Cal. 644–658, GRANT v. MOORE.

In Action for Malicious Prosecution, primary question to be considered is want of probable cause.

Approved in Hynes v. Nelson (Cal.), 2 Pac. 37, where uncontradicted evidence tends to show want of probable cause, no abuse of discretion in setting aside verdict for plaintiff.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 457, 472.

29 Cal. 661–664, BRUMMAGIM v. SPENCER.

Nature of Demand when there is default in rent. See note, 120 Am. St. Rep. 53.

29 Cal. 664–673, LEESE v. CLARK.

Prima Facie All Who Go into Possession of land after action is brought to recover possession must go out, if plaintiff recovers.

Approved in Baum v. Roper, 1 Cal. App. 439, 82 Pac. 391, reaffirming rule; Harrod v. Burke, 76 Kan. 912, 123 Am. St. Rep. 179, 92 Pac. 1129, where sheriff returns that he put plaintiff in possession and put out person not party to action, it will be presumed that latter was in privity with party.

29 Cal. 673–678, COGHILL v. MARKS.

Subsequent Attaching Creditor may intervene in action between first attaching creditor and defendant.

Approved in Faricy v. St. Paul Inves. & Sav. Soc., 110 Minn. 317, 125 N. W. 678, one claiming to be owner of bonds may intervene in suit for their possession.

Right of Other Claimants of Property to intervene in attachment, See note, 23 L. R. A. (n. s.) 537.

Right of Creditors to Question Validity of attachment. See note, 35 L. R. A. 767, 780.

29 Cal. 678–685, PEOPLE v. HARRIS.

The Act of Voting More Than Once at the same election is not a crime unless done knowingly and with wrong intent.

Distinguished in People v. Hartman, 130 Cal. 491, 62 Pac. 824, belief in invalidity of former marriage no defense in prosecution for bigamy; State v. Savre, 129 Iowa, 134, 113 Am. St. Rep. 452, 105 N. W. 391, 3 L. R. A. (n. s.) 455, evidence that accused was in doubt as to his residence and consulted attorney is admissible.

When the Commission of An Unlawful Act is proved, the law in the first instance presumes it to have been intended.

Approved in People v. Abbott (Cal.), 4 Pac. 772, in prosecution for murder, burden is on accused to show want of malice.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 467.

NOTES

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30 Cal. 11–64, PECK v. VANDENBERG.

Decree in Partition Determining Relative Interests of parties is interlocutory.

Approved in Skallberg v. Skallberg, 84 Neb. 718, 121 N. W. 980, and Camp Phosphate Co. v. Anderson, 48 Fla. 234, 111 Am. St. Rep. 77, 37 So. 725, both reaffirming rule.

Deed to Children in Consideration of love and affection and the sum of five dollars is gift.

Approved in Lynch's Estate, 220 Pa. 18, 69 Atl. 291, reaffirming rule.

What is Community Property. See notes, 126 Am. St. Rep. 111, 125; 4 Cof. Prob. 53, 67.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 112.

30 Cal. 65–76, LICK v. DIAZ.

Complaint Alleging Title by Grant will not authorize proof of title by adverse possession.

Approved in Emerson v. Yosemite Gold Min. etc. Co., 149 Cal. 59, 85 Pac. 125, semble, that plaintiffs alleging title by forfeiture could prevail only by proof of such title.

30 Cal. 78–92, BIBEND v. LIVERPOOL ETC. INS. CO.

Assignments of Things Which have No Present actual existence are enforceable in equity.

Approved in Bank of Yolo v. Bank of Woodland, 3 Cal. App. 568, 86 Pac. 822, prospective commissions and profits of charterer of vessel, assignable.

Sale of Expectancy by Prospective Heir. See note, 33 L. R. A. 270.

Assignment of Fire Insurance Policy as collateral security creates equitable lien on proceeds as soon as loss occurs.

Approved in Knoll v. Melone, 1 Cal. App. 642, 82 Pac. 984, assignment as collateral security for payment of note creates lien only.

Assignability of Insurance Agent's Right to commissions on renewal premiums. See note, 18 L. R. A. (n. s.) 195.

30 Cal. 98–105, PEOPLE v. JOHNSON.

Proceedings for Violations of Ordinances as prosecutions for crime. See note, 33 L. R. A. 36.

30 Cal. 105–114, ESTATE OF ISAACS.

Petition and Account Filed With View to final settlement are part of record on appeal.

Approved in In re Smith's Estate (Cal.), 38 Pac. 951, where neither bill of exceptions nor statement of evidence, findings of fact must be accepted as true; Estate of Thayer, 1 Cal. App. 105, 81 Pac. 659, decree of partial distribution, notice of appeal therefrom and remittitur reversing decree, filed after order settling account, no part of judgment-roll on appeal from such order; In re Dougherty's Estate, 34 Mont. 342, 86 Pac. 40, account, record of objections thereto and finding and order constitute judgment-roll.

Property on Which Commissions are allowed administrator. See note, 1 Cof. Prob. 214.

Miscellaneous.—Cited in Estate of Parsons, 159 Cal. 428, 114 Pac. 571, where record contains no bill of exceptions, only question is whether record is sufficient to sustain order.

30 Cal. 114–123, DOMEC v. STEARNS.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 127.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 328.

30 Cal. 126–135, 89 Am. Dec. 70, NORTON v. LAROO.

Mutual Accounts are Made Up of matters of setoff.

Reaffirmed in Copriviza v. Rilovich, 4 Cal. App. 29, 87 Pac. 399.

30 Cal. 135–138, BABER v. McLELLAN.

Purchaser of Real Property at sheriff's sale has only a lien on same.

Distinguished in North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 491, 138 Am. St. Rep. 717, 117 N. W. 463, purchaser at foreclosure sale under power contained in mortgage acquires complete title.

Nature of Title or Estate of Holder of sheriff's certificate before obtaining deed. See note, 15 L. R. A. 69.

30 Cal. 138–150, DENTZEL v. WALDE.

Prior to Act of April 3, 1863, a married woman could not convey her separate estate by attorney in fact.

Approved in Dow v. Gould etc. Min. Co., 31 Cal. 645, 647, upholding act requiring deed conveying separate property of wife to be signed by husband.

It is not Necessary That the Husband's Name should appear in body of deed or power of attorney for sale of wife's separate estate, if he sign, seal and acknowledge it.

Approved in Peter v. Byrne, 175 Mo. 248, 97 Am. St. Rep. 576, 75 S. W. 438, upholding deed of married woman's land, though husband's name did not explicitly appear in introductory clause thereof; dis-

senting opinion in Holt v. Kaaukai, 11 Haw. 503, majority holding written consent of husband to have been necessary to wife's conveyance of her lands.

Distinguished in Cordano v. Wright, 159 Cal. 618, 115 Pac. 230, where husband and wife each owned undivided half interest in land, her interest not transferred by her signature to deed purporting to convey husband's interest alone.

Power of Attorney by Married Woman. See note, 84 Am. St. Rep. 764.

Sufficiency of Husband's Joinder in wife's conveyance of land. See note, 97 Am. St. Rep. 585, 586.

Effect of Signature of Deed or Mortgage by one not named in it. See note, 13 L. R. A. (n. s.) 299.

Constitutionality of Statute Legalizing Invalid private contract. See note, 22 L. R. A. 381.

30 Cal. 151–160, PEOPLE v. STRONG.

The Maxim, "Falsus in Uno, Falsus in Omnibus," applies only where a witness willfully gives false testimony.

Approved in Singer Mfg. Co. v. Cramer, 109 Fed. 658, 48 C. C. A. 588, testimony must have been willfully false and as to a material matter.

Distinguished in Kaufman v. Boismier, 25 Okl. 255, 105 Pac. 327, witness making false statement is presumed to have done so intentionally and willfully.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 680.

A Confession is the Voluntary Declaration made by a person who has committed a crime of his agency or participation therein.

Approved in Ex parte Hayden, 12 Cal. App. 147, 106 Pac. 894, upholding law punishing as a vagrant one who admits that he is a swindler; State v. Force, 69 Neb. 172, 95 N. W. 45, confession admissible where made so long after involuntary confession as to raise presumption that it was not influenced thereby; State v. Moore, 36 Utah, 525, 105 Pac. 294, statement of woman charged with adultery that she was wife of another is not confession.

Distinguished in People v. Stokes, 5 Cal. App. 211, 89 Pac. 999, admission may be received in evidence without preliminary proof.

The Most Satisfactory Definition of Reasonable Doubt is that of Chief Justice Shaw in 5 Cush. 320.

Approved in State v. De Lea, 36 Mont. 541, 93 Pac. 818, definition not objectionable as excluding doubt which may arise from lack of evidence.

It is Error for Court to Assume in instruction that defendant has confessed crime, when he has not.

Approved in Territory v. Kay, 3 Ariz. 94, 21 Pac. 153, instruction which assumes material fact to have been proved is erroneous.

Instructions on Circumstantial Evidence. See note, 97 Am. St. Rep. 794.

30 Cal. 160–170, PEOPLE ex rel. SIMMONS v. SANDERSON.

Statute Making Chief Justice ex-officio trustee of state library is invalid.

Disapproved in In re Appointment of Reviser, 141 Wis. 617, 124 N. W. 679, justices of supreme court may act as state library trustees and as such appoint reviser of statutes.

Who are Public Officers. See note, 17 L. R. A. 247.

30 Cal. 173–175, McDONALD v. DAVIDSON.

An Express Averment in the Answer contrary to the averment of the complaint raises an issue and is equivalent to a denial.

Reaffirmed in White v. Spreckels, 10 Cal. App. 294, 101 Pac. 923.

30 Cal. 190–191, BOULWARE v. CRADDOCK.

Where Sheriff Seizes on Execution property not belonging to judgment debtor, demand on sheriff before bringing suit is unnecessary.

Approved in Daggett v. Gray (Cal.), 40 Pac. 961, where original possession was lawful, demand before suit is necessary.

Disapproved in Mariner v. Wasser, 17 N. D. 364, 138 Am. St. Rep. 714, 117 N. W. 344, sheriff is not guilty of conversion of property taken from judgment debtor until he receives notice of actual ownership.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 125.

30 Cal. 192–202, 89 Am. Dec. 85, WILLSON v. CLEAVELAND.

Matters of Evidence Should be Stricken from complaint.

Approved in Ahlers v. Smiley, 11 Cal. App. 346, 104 Pac. 998, striking out record in former suit as being merely evidentiary.

Where Plaintiff Relies upon Naked Possession, defendant may prove abandonment under the general issue.

Approved in Bell v. Bed Rock etc. Min. Co., 36 Cal. 218, evidence of abandonment of mining claim admissible without special plea.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 892.

Defendant in Ejectment may Deny Title and also plead statute of limitations.

Approved in Eaton v. Metz (Cal.), 40 Pac. 948, defendant not bound by admissions involved in inconsistent defenses.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 98.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 198, 208.

Default Judgment Prematurely entered by clerk is void.

Approved in Dible v. Hanson, 17 N. D. 23, 114 N. W. 372, default judgment considered by clerk without order of court is nullity.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 848.

Relocation of Mining Claim as abandoned or forfeited. See note, 68 L. R. A. 847.

30 Cal. 202–206, 89 Am. Dec. 85, WELSH v. KIRKPATRICK.

Idem Sonans as Applied to default judgments. See note, 100 Am. St. Rep. 332.

30 Cal. 206–208, PEOPLE v. BYRNES.

Instructions Should Always be Given with reference to the facts proved.

Approved in People v. Feliz (Cal.), 69 Pac. 220, error for court to single out fact and tell jury that it is insufficient to warrant conviction.

If Charge is Sufficiently Comprehensive, the rule is satisfied, particularly where the accused does not request a more specific charge.

Reaffirmed in People v. Smith, 3 Cal. App. 67, 84 Pac. 451.

When Court Instructs Jury to Determine whether killing was unlawfully done, it should define word "unlawfully."

Approved in State v. Fordham, 13 N. D. 502, 101 N. W. 890, in trial for robbery words "felonious" and "wrongful" as applied to the taking of property should have been defined.

30 Cal. 208–214, FITCH v. BUNCH.

Where Allegations of Complaint are Connected by "and," denial of allegations conjunctively is insufficient.

Approved in Duckworth v. Watsonville Water etc. Co., 150 Cal. 530, 89 Pac. 343, denial that defendant is "entitled to the exclusive use of all the waters" of lake, insufficient.

Deed Deposited with Third Person, to be delivered at grantor's order, is not escrow.

Approved in Everts v. Everts, 120 Iowa, 42, 94 N. W. 497, father might recall deeds deposited with third person to be delivered to sons on father's death; Van Valkenberg v. Allen, 111 Minn. 336, 137 Am. St. Rep. 561, 126 N. W. 1093, where deed was sent to bank for delivery on payment of named sum, bank could not be compelled to deliver it on payment of smaller amount.

Conditions Ineffectual to Create Escrow. See note, 130 Am. St. Rep. 958.

Delivery of Deed to Third Person, or record, or delivery for record, by grantor. See note, 54 L. R. A. 873, 900.

When Grantor Deposits Deed with third person, to be delivered at grantor's order, he may revoke such authority.

Approved in Hunter Realty Co. v. Spencer, 21 Okl. 161, 95 Pac. 759, 17 L. R. A. (n. s.) 622, reaffirming rule.

To Make Deed Deposited with Third Party an escrow, parties must have bargained and sold and performed every act necessary to constitute a complete contract.

Approved in Davis v. Brigham, 56 Or. 49, 107 Pac. 963, where offer to sell land at certain price within specified time was not accepted within time, deposit of deed by owner in bank with instruction to collect price named did not constitute an escrow; Fultz v. Melcher, 1 Tenn. Civ. App. 86, holding there was no meeting of minds as required to make escrow.

30 Cal. 214–218, PEOPLE v. ENGLISH.

Under Indictment for Assault with intent to commit murder, defendant may be convicted of assault with a deadly weapon.

Approved in Mapula v. Territory, 9 Ariz. 202, 80 Pac. 390, one charged with murder may be convicted of aggravated assault; State v. Tough, 12 N. D. 432, 96 N. W. 1027, indictment for burglary in third degree will sustain conviction for entering railroad car with intent to steal.

Indictment for Assault with Intent to commit murder need not charge particular acts constituting assault.

Approved in High v. Territory, 12 Ariz. 148, 100 Pac. 449, applying rule to indictment for rape.

30 Cal. 218–223, RYAN v. DOUGHERTY.

Arbitrator must Make Award within time limited.

Approved in In re Abrams & Brennan, 2 Cal. App. 239, 83 Pac. 364, and Jordan v. Lobe, 34 Wash. 48, 74 Pac. 818, both reaffirming rule.

Agreement to Arbitrate Does not Give court jurisdiction unless it further stipulates that submission may be entered as order of court.

Distinguished in Matter of Silliman, 159 Cal. 157, 113 Pac. 136, where parties to pending suit agree to arbitrate, it will be presumed that they intended submission to be entered as rule of court.

30 Cal. 229–236, 89 Am. Dec. 88, LE ROY v. ROGERS.

One in Possession of Land is unaffected by a judgment to which he is neither a party nor privy.

Distinguished in Nemo v. Farrington, 7 Cal. App. 446, 94 Pac. 875, it will be presumed that grantee pendente lite had constructive notice of ejectment suit.

30 Cal. 237–242, BICKNELL v. AMADOR COUNTY.

County is not Liable for Fees of Clerk of court, unless made so by some express statutory provision.

Approved in Jefferson County v. Young, 120 Ky. 464, 86 S. W. 987, fiscal court, having no authority over assessor, cannot buy plats for his use.

30 Cal. 242–244, PEOPLE v. LARDNER.

Money Belonging to Litigants, in hands of county treasurer, is subject to taxation.

Approved in In re Sims, 118 Fed. 357, funds of bankrupt estate in hands of trustee, subject to taxation.

Distinguished in In re Assignment of Boyd, 138 Iowa, 590, 116 N. W. 703, 17 L. R. A. (n. s.) 1220, commissioner to sell property in partition proceedings is not, in absence of statute, personally liable for taxes thereon.

30 Cal. 244–247, CARIAGA v. DRYDEN.

Application for Writ of Prohibition. See note, 111 Am. St. Rep. 973.

30 Cal. 253–280, 89 Am. Dec. 93, SHERMAN v. STORY.

Enrolled Statute is Conclusive Evidence of passage of act.

Approved in State v. Wheeler, 172 Ind. 581, 583, 89 N. E. 2, 3, reaffirming rule; State v. Erickson, 39 Mont. 285, 287, 102 Pac. 338, 339, court will not go beyond enrolled bill except to journals of houses to determine whether names of those voting on final passage were entered therein; Home Telegraph Co. v. Nashville, 118 Tenn. 10, 101 S. W. 772, act will be treated as properly passed, though journal of house does not show that it was signed by speaker in open session.

Conclusiveness of Enrolled Bill. See note, 23 L. R. A. 341, 348.

Legislative Journals are Inadmissible to show that act properly enrolled and authenticated did not become a law as enrolled.

Reaffirmed in De Loach v. Newton, 135 Ga. 751, 68 S. E. 713.

30 Cal. 280–290, HIHN v. PECK.

The "Facts" Which the Court is to find and the "facts" which a pleader is to state lie in the same plane.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, finding that plaintiff is "owner in fee" sufficient.

Miscellaneous.—Cited in Catron v. Laughlin, 11 N. M. 635, 72 Pac. 33, to point that mere breach of conditions subsequent does not ipso facto work reverter of title.

30 Cal. 290–301, DOUGHERTY v. CREARY.

Mining Partnerships. See notes, 81 Am. St. Rep. 785; 91 Am. St. Rep. 857; 98 Am. St. Rep. 1021.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 899.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 266.

30 Cal. 301–309, SALMON v. SYMONDS.

Where Mexican Land Grant is confirmed to wrong person and patent issued to him, he holds land in trust for proper person.

Cited in Tonopah & Goldfield R. R. Co. v. Fellanbaum, 32 Nev. 295, 107 Pac. 887, arguendo.

30 Cal. 309–312, HOUGH v. WATERS.

Judgment for Plaintiff in Action of ejectment does not estop defendant from urging equitable defense in separate action.

Approved in McMahan v. Whelan, 44 Or. 406, 75 Pac. 716, judgment in justice court in forcible entry and detainer does not bar defendant from suit for specific performance of verbal lease; Allis v. Hall, 76 Conn. 329, 56 Atl. 640, arguendo.

30 Cal. 312–316, PEOPLE v. CAMPBELL.

If the Court Gives an Instruction correctly stating the law, and afterward another nullifying the first, the judgment will be reversed.

Approved in People v. Maughs, 149 Cal. 261, 86 Pac. 190, and Price v. State, 1 Okl. Cr. 389, 98 Pac. 460, both reaffirming rule.

Assaulted Person is Justified in Using so much force as is necessary to his defense.

Approved in People v. Shimonaka, 16 Cal. App. 123, 116 Pac. 330, upholding instructions as to right of assaulted party to kill person assaulting him.

Standpoint of Determination as to Danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 544.

30 Cal. 316–317, PEOPLE v. FARRELL.

A Feigned Accomplice does not require corroboration.

Approved in People v. Bunkers, 2 Cal. App. 209, 84 Pac. 370, upholding device by which legislator who had offered to accept bribe was entrapped in receiving it.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 160.

30 Cal. 318–322, STRINGER v. DAVIS.

To Render Chattel Mortgage given to secure purchase money of furniture in hotel valid, it must appear that furniture was actually used in hotel.

Approved in Bank of Ukiah v. Gibson (Cal.), 39 Pac. 1070, 1071, chattel mortgage of sheep not validated by amendment permitting sheep to be chattel mortgaged.

Complaint Should Allege Material Facts by direct averment.

Approved in dissenting opinion in Stainer v. San Luis Valley Land etc. Co., 166 Fed. 228, 92 C. C. A. 128, majority upholding allegation of want of probable cause in action for malicious prosecution.

Where Testimony is Objected to because allegation of complaint not properly denied, defendant should be allowed to amend answer.

Approved in Rose v. Doe, 4 Cal. App. 685, 89 Pac. 137, permitting defendant to amend answer by setting up special defenses.

Amendments Should be Allowed in furtherance of substantial justice.

Approved in Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 318, 90 Pac. 210, no error to refuse permission to amend, five years after issue joined, to plead novation of note and mortgage barred as against subsequent lienholder.

30 Cal. 325–343, **COUNTY OF CALAVERAS v. BROCKWAY.**

Board of Supervisors in Canvassing election returns does not act in judicial capacity.

Approved in Cerini v. De Long, 7 Cal. App. 403, 94 Pac. 584, commissioners under act to fix boundary lines between Kings and Fresno counties could not declare election void.

Mandamus will Lie to Compel county officers to keep their offices at county seat.

Approved in Cerini v. De Long, 7 Cal. App. 411, 94 Pac. 588, granting mandamus to compel commissioners to canvass returns of election to fix county boundaries.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 890.

Act of 1850, Relating to Contesting Elections of county officers, relates only to persons and does not apply to county seat elections.

Approved in Bradburn v. Wasco County, 55 Or. 542, 106 Pac. 1019, B. & C. Comp., section 2839, does not authorize determination of local option election.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 853.

Bribery by Gift to Public. See note, 14 L. R. A. 63.

30 Cal. 344–348, **MORRISON v. WILSON.**

Grantor has Right, by clause inserted in deed, to change sense of general words used.

Approved in Pavkovich v. Southern Pacific R. R. Co., 150 Cal. 47, 87 Pac. 1099, upholding limitation in deed to quarry that stone is to be used only for railroad purposes.

Words Importing Conveyance in Fee Simple absolute will not pass after-acquired title, where claim declares instrument to be quitclaim deed.

Approved in Burnett v. Piercy, 149 Cal. 190, 86 Pac. 607, holding granting clause so qualified as to pass only life estate.

Distinguished in Bermardy v. Colonial etc. Mortgage Co., 17 S. D. 642, 106 Am. St. Rep. 791, 98 N. W. 167, where entryman on public

land conveys it by deed purporting to pass fee simple, patent subsequently issued inures to benefit of grantee.

Quitclaim Deeds. See note, 105 Am. St. Rep. 857.

30 Cal. 349–359, HESS v. WINDER.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 774.

30 Cal. 360–366, PATTERSON v. KEYSTONE MINING CO.

Verbal Power to Execute Bill of Sale of mining claim is sufficient.

Approved in Cascaden v. Dunbar, 2 Alaska, 412, upholding oral grubstake contract.

30 Cal. 367–371, HEYMAN v. BABCOCK.

Order of Sale on Judgment is essential to valid sheriff's sale on foreclosure.

Cited in Hibernia Savings etc. Soc. v. Boyd, 155 Cal. 199, 100 Pac. 241, arguendo.

Reformation of Sheriff's Deeds. See note, 109 Am. St. Rep. 40.

30 Cal. 379–393, PEOPLE ex rel. TESCHEMACHER v. DAVIDSON.

The Equity Jurisdiction of District Courts is that administered in the high court of chancery in England.

Approved in Bacon v. Bacon, 150 Cal. 485, 89 Pac. 320, court may vacate decree of distribution on ground of mistake; Pasadena v. Superior Court, 157 Cal. 788, 109 Pac. 623, court may amend injunction order so as to maintain appellant's rights pending appeal.

Court of Equity has Ordinarily No Jurisdiction to enjoin purpresture created by erection of wharf in tide waters.

Approved in Pearl Oyster Co. v. Heuston, 57 Wash. 535, 135 Am. St. Rep. 1007, 107 Pac. 350, deed of tide lands does not convey anything below line of mean low tide.

Right to Erect Wharves. See note, 40 L. R. A. 641.

Disapproved in Territory v. Kerr, 16 Haw. 373, enjoining concrete wall between high and low water.

The Words "Tide Lands," as used in act of May 14, 1861, mean such lands only as are covered and uncovered by the tide.

Approved in People v. Kerber, 152 Cal. 733, 125 Am. St. Rep. 93, 93 Pac. 879, reaffirming rule.

When Wharf is Built on Tide Lands without public authority, wharf and land may be recovered in ejectment.

Approved in City of Providence v. Comstock, 27 R. I. 557, 65 Atl. 314, city may bring ejectment for land covered by tide.

Whether a Wharf Erected in Tide Waters is a nuisance is a question of fact.

Distinguished in Twenty-second Corporation etc. v. Oregon etc. R. R. Co., 36 Utah, 252, 103 Pac. 249, interference with religious services by noise from rightful operation of railroad and train yards is not actionable.

30 Cal. 393–401, NORWOOD v. KENFIELD.

Error in Admitting Evidence will not justify reversal if evidence is not prejudicial.

Approved in Union Transportation Co. v. Bassett (Cal.), 46 Pac. 911, where court finds that order of harbor commissioners is unreasonable, hearsay evidence impugning good faith of commissioner is harmless.

In Election Contest Each Party must furnish the other, three days before trial, a list of persons alleged to have voted illegally.

Approved in Smith v. Thomas (Cal.), 52 Pac. 1080, plaintiff not allowed to give evidence of illegality of vote included in defendant's list.

No Particular Form of Citation is required in contested election case, nor is it necessary that statement contain prayer for relief.

Approved in McGregor v. Board of Trustees, 159 Cal. 446, 114 Pac. 568, town trustees may adopt, in election contest, any form of procedure which preserves essentials of notice and hearing.

Right to Impeach One's Own Witness. See note, 21 L. R. A. 421, 424.

30 Cal. 401–402, **ANTHONY v. NYE.**

In Action of Foreclosure Allegation that codefendant has or claims to have some interest in or claim upon the mortgaged premises is sufficient.

Reaffirmed in Wardlow v. Middleton, 156 Cal. 586, 105 Pac. 738.

30 Cal. 402–408, 89 Am. Dec. 124, **MILLER v. STEEN.**

Where Vendor Retakes Property After Default, without rescinding, vendee becomes entitled to property by paying or tendering amount due.

Approved in Liver v. Mills, 155 Cal. 462, 463, 101 Pac. 300, reaffirming rule; Muncy v. Brain, 158 Cal. 307, 110 Pac. 947, construing contract in form of lease and final sale of automobile and providing for installment payments.

Rights and Liabilities of Parties to conditional sale on default. See note, 32 L. R. A. 468, 469.

Effect of Default in Payment followed by rescission, as forfeiture of payments already made. See note, 3 L. R. A. (n. s.) 486.

Real Estate Broker's Commissions as affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 604.

30 Cal. 408–419, **BOREL v. ROLLINS.**

In Order to Support Adverse Possession, fence must be a real and substantial one.

Approved in Johnston v. Albuquerque, 12 N. M. 29, 72 Pac. 11, fence not inclosing entire property and allowed to go to decay insufficient.

30 Cal. 419–425, **TROY v. CLARKE.**

Miscellaneous.—Cited in Miller v. Waddingham (Cal.), 25 Pac. 690, to point that in case of nonperformance vendor is not compelled to foreclose lien, but may rescind or retake possession.

30 Cal. 425–427, **HENRY v. EVERTS.**

Purchaser at Sheriff's Sale is Entitled to rents and profits during period allowed for redemption.

Approved in Webster v. Cook, 38 Cal. 425, reaffirming rule.

30 Cal. 427–430, **PEOPLE ex rel. FRICK v. JACKSON.**

Two Laws Passed on the Same Day, in relation to the same subject matter, are to be read together.

Approved in Estate of Lander, 6 Cal. App. 746, 93 Pac. 203, semble, that act passed same day may have effect of saving clause in repealing act; Blackwell v. Bank of Albuquerque, 10 N. M. 566, 63 Pac. 47, construing together acts passed at same session relating to tax sales.

30 Cal. 435–439, NAPA VALLEY R. R. CO. v. BOARD OF SUPERVISORS OF NAPA CO.

The Action of the Legislature in authorizing county subscription to stock of railroad company is not open to judicial review.

Distinguished in Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 674, 87 Pac. 29, defendant in eminent domain proceeding may show that condemnation for railroad is, in fact, for private use.

30 Cal. 439–448, CARPENTER v. OAKLAND.

An Equitable Cause of Action, in Order to be available as a defense, must be one that has not been barred by the statute of limitations.

Disapproved in McColgan v. Muirland, 2 Cal. App. 12, 82 Pac. 1115, statute inapplicable to fraud as equitable defense to judgment sued upon.

A Judgment cannot be Impeached for want of jurisdiction not appearing on its face.

Approved in Seaboard National Bank v. Ackerman, 16 Cal. App. 59, 116 Pac. 93, reaffirming rule; Guardianship of Treadwell, 3 Cof. Prob. 316, where superior court of one county granted letters of guardianship, order refusing to vacate same on ground that minors are nonresidents of county is conclusive on application for letters in another county.

Distinguished in Aldrich v. Barton, 153 Cal. 494, 95 Pac. 903, certificate of discharge from state hospital open to collateral attack for want of authority to make it.

Fact That Attorney Appeared without authority cannot be shown, as defense at law, to suit upon judgment of court of general jurisdiction.

Approved in Chambers v. Gallup, 30 Tex. Civ. 426, 70 S. W. 1010, action to vacate judgment for want of authority in attorney to file answer was properly dismissed, where unaccompanied by affidavit of merits.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 850, 854.

30 Cal. 448–455, PEOPLE v. DODGE.

Court may Modify Requested Instructions, even though they state the law correctly so far as they go.

Approved in People v. Sherman (Cal.), 32 Pac. 880, and Dimmick v. United States, 135 Fed. 271, 70 C. C. A. 141, reaffirming rule.

30 Cal. 455–458, 89 Am. Dec. 129, McPHERSON v. PARKER.

All Who are Interested in Subject Matter of equitable suit should be made parties thereto.

Approved in Mitau v. Roddan, 149 Cal. 7, 8, 84 Pac. 147, 6 L. R. A. (n. s.) 275, beneficiaries are necessary parties to suit which involves their relations with each other or with the trustees.

30 Cal. 458–467, ARGENTI v. SAN FRANCISCO.

The Appellate Court may Direct a new trial upon a particular issue.

Reaffirmed in Robinson v. Muir, 151 Cal. 125, 90 Pac. 524.

Where Appellate Court Directs What Judgment shall be rendered, new trial in court below is unauthorized.

Approved in Hall v. Blackman, 9 Idaho, 559, 75 Pac. 609, questions in issue held to have been determined on former appeal.

Party Responsible for Erroneous Proceedings after remittitur has been sent down must pay costs thereof.

Approved in Cahill v. Colgan (Cal.), 31 Pac. 618, expenses of void receivership may constitute valid claim against state.

Where Plaintiff Sells Demanded Premises pending ejectment, action may be continued in his name.

Approved in Burns v. Kennedy, 49 Or. 591, 90 Pac. 1103, applying rule to suit to quiet title.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 330.

30 Cal. 467–481, MOSS v. SHEAR.

New Matter must be Specially Pleaded.

Approved in Grunwald v. Freese (Cal.), 34 Pac. 75, release must be specially pleaded; Bush v. Pioneer Mining Co., 3 Alaska, 615, title acquired by plaintiff after filing original complaint can only be made available by supplemental complaint.

30 Cal. 481–485, GOLLER v. FETT.

A Verbal Sale of a Mining Claim does not pass the legal title, even if accompanied by delivery of possession.

Distinguished in Cascaden v. Dunbar, 2 Alaska, 412, upholding oral grubstake contract.

Damages for Removing Gold-bearing Earth are value of gold less expense of digging it.

Approved in Texas etc. Ry. Co. v. White, 25 Tex. Civ. App. 279, 62 S. W. 134, damages for removing sand are market value of sand, irrespective of effect of such removal on market value of land.

Cotenancy in Mines. See note, 91 Am. St. Rep. 889.

30 Cal. 486–489, BARRON v. FRINK.

The Court will not Presume After Verdict that a material fact not stated in complaint has been proved.

Approved in dissenting opinion in Gulling v. Washoe County Bank, 29 Nev. 277, 89 Pac. 33, majority admitting extrinsic evidence to show issues litigated in former action.

Complaint on Executory Contract must aver performance, offer to perform or readiness to perform on part of plaintiff.

Distinguished in Alaska Salmon Co. v. Standard Box Co., 158 Cal. 573, 112 Pac. 457, where insolvency of plaintiff is not charged and where defense is not based on inability of plaintiff to perform contract of sale, very slight proof of readiness to perform is necessary.

30 Cal. 490–498, SETTEMBRE v. PUTNAM.

Member of Mining Partnership, who located claim, holds interests of other partners in trust.

Approved in Eisenberg v. Goldsmith, 42 Mont. 579, 113 Pac. 1131, evidence held not to show constructive trust in mining property; Shea v. Nilima, 133 Fed. 213, 66 C. C. A. 263, upholding oral contract to explore public domain and to locate mining claims for joint benefit; Hendrichs v. Morgan, 167 Fed. 108, 92 C. C. A. 558, imposing resulting trust on locator, though agreement did not extend to working claim.

Validity of Parol Partnership to Deal in real property. See note, 4 L. R. A. (n. s.) 429.

Equity may Establish Right of mining partner to share in mine without decreeing account and dissolution.

Approved in Doyle v. Burns, 123 Iowa, 495, 99 N. W. 198, partner may recover his share in mining property without asking for dissolution or accounting; Dortch v. Gear, 11 Haw. 554, equity will secure to partner benefit arising from partnership transaction, though general accounting not prayed for.

30 Cal. 498–508, STEINBACH v. MOORE.

When a Survey or Judicial Possession by competent authority was requisite in order to attach a Mexican grant of land to any specific tract, the grant was inchoate or imperfect.

Approved in Ohm v. San Francisco (Cal.), 25 Pac. 156, such grant will not be aided by possession taken thereunder.

30 Cal. 511–520, BODLEY v. FERGUSON.

Rule That Fee Simple Does not Pass without words of limitation does not apply to contracts to convey.

Approved in Conroy v. Woodcock, 53 Fla. 584, 43 So. 694, where written memorandum for sale of lands does not specify interest to be conveyed, it is presumed to be a fee simple.

30 Cal. 527–529, MOULTON v. ELLMAKER.

No Appeal Lies from an Order sustaining or overruling a demurrer.

Reaffirmed in Litch v. Kearns, 8 Cal. App. 748, 97 Pac. 898.

Filing of Notice of Appeal must precede or be contemporaneous with service.

Approved in State v. District Court, 34 Mont. 115, 115 Am. St. Rep. 522, 85 Pac. 872, rule applicable to appeal from justice of the peace to district court.

30 Cal. 530–536, BOND v. PACHECO.

Judgment by Default in Sum greater than demanded in prayer is not void, but simply erroneous.

Approved in Cohen v. Cohen, 150 Cal. 102, 88 Pac. 269, judgment for alimony on complaint containing only prayer for divorce and general relief not open to collateral attack.

Default Judgments Beyond Scope of relief asked. See note, 11 L. R. A. (n. s.) 807.

30 Cal. 536–539, SMITH v. DAVIS.

Street Assessment Made to Deceased Person is void.

Approved in Houser & Haines Mfg. Co. v. Hargrove (Cal.), 59 Pac. 949, assessment of harvester to "B. and wife and H.," is void.

Assessment of Tax on Property of decedent's estate. See note, 56 L. R. A. 635.

To Render Street Assessment Valid, the various acts prescribed by statute must, in all essential particulars, be strictly performed.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 216, 82 Pac. 619, power of swamp land commissioners to condemn land could not be exercised by city constructing levee.

30 Cal. 539–545, 89 Am. Dec. 131, CALDWELL v. CENTER.

Although Parties to Deed may Describe Property by reference to another deed or map, yet the instruments taken together must be as certain as a description in the deed itself.

Approved in Rankin v. Amazon Ins. Co. (Cal.), 25 Pac. 261, semble, that reference in insurance policy to survey not yet prepared does not incorporate latter; Donnelly v. Tregaskis, 154 Cal. 264, 97 Pac. 423, map referred to must be properly identified.

Map Copied in Pencil and pasted within leaves of book is not sufficiently recorded.

Distinguished in Hager v. Melton, 66 W. Va. 68, 66 S. E. 15, ordinances imposing assessments, fines, etc., are sufficiently recorded by pasting printed copies thereof on leaves of book.

Miscellaneous.—Cited in Snooks v. Wingfield, 52 W. Va. 445, 44 S. E. 278, map referred to in deed may be identified by parol evidence.

30 Cal. 547–560, LUCKHART v. OGDEN.

When Agreement to Extend Time for performance of contract is silent as to duration of extension, law implies reasonable time.

Approved in Salinas Lumber Co. v. Magne-Silica Co., 159 Cal. 185, 112 Pac. 1090, party contracting to deliver lumber held only bound to fulfill contract by reasonable effort within reasonable time.

Question of Reasonable Time is for the jury when it depends upon disputed facts extrinsic to the contract.

Approved in Hagerman v. Cowls, 14 N. M. 425, 94 Pac. 947, applying rule to contract for boring of artesian well.

Burden of Proving Want of consideration. See note, 135 Am. St. Rep. 765.

An Executory Contract Need be Signed only by the party to perform in future.

Approved in National Cash Register Co. v. Lesko, 77 Conn. 280, 58 Atl. 968, order for cash register signed by buyer, when acknowledged and recorded, was sufficient contract within statute.

In Action to Recover Money Payable at fixed time, bringing of suit is sufficient demand.

Approved in Hewett v. Dean (Cal.), 25 Pac. 755, rule applicable where mortgage fell due on failure to pay annual interest.

The Question of Reasonable Time, depending upon a variety of circumstances, is for the jury to determine under proper instructions.

Approved in Willard v. Tatum (Cal.), 31 Pac. 914, delay of eight months in returning engines from San Francisco to Chicago not unreasonable as matter of law.

30 Cal. 560–569, LARCO v. CASANEUAVA.

A Will Which Expressly Empowers executor to sell land without reference to probate court is like a power of attorney, and is to be consulted as source of power to convey.

Approved in Goodell v. Sanford, 31 Mont. 171, 77 Pac. 525, such sale held to be not judicial sale, but sale under power.

Sham Pleadings. See note, 113 Am. St. Rep. 641, 646.

30 Cal. 573–586, COURTWRIGHT v. BEAR RIVER ETC. MIN. CO.

Action to Abate Nuisance is case in equity.

Approved in Evans v. Ross (Cal.), 8 Pac. 89, suit to restrain diversion of stream is equitable; Meek v. De Latour, 2 Cal. App. 263, 83 Pac. 301, trial by jury in action to abate nuisance not matter of right.

Distinguished in Learned v. Castle (Cal.), 4 Pac. 192, under Constitution of 1879, action to abate nuisance is action at law.

In Action to Abate a Nuisance, the claim for damages is regarded as a mere incident.

Approved in Meek v. De Latour, 2 Cal. App. 263, 83 Pac. 301, no right to jury on question of damages unless jury demanded for that specific purpose.

Grant in Constitution to County Courts of original jurisdiction over actions to abate nuisance does not deprive district courts of concurrent jurisdiction under their equity powers.

Approved in Higgins v. Tax Assessors of Pawtucket, 27 R. I. 406, 63 Atl. 36, constitutional grant to supreme court of power to issue prerogative writs does not exclude similar power in lower courts; Memphis etc. Ry. Co. v. Byrne, 119 Tenn. 338, 104 S. W. 475, dissenting opinion holding that act of 1907, conferring limited appellate jurisdiction upon court of civil appeals did not deprive supreme court of any of its jurisdiction, majority declining to pass upon point.

30 Cal. 586–596, 89 Am. Dec. 134, JENKINS v. FRINK.

Where Several Parties are Interested in purchase of land made by one by mutual agreement, the latter becomes a trustee for the common benefit.

Approved in Lomita Land and Water Co. v. Robinson, 154 Cal. 51, 97 Pac. 16, 18 L. R. A. (n. s.) 1106, one who procures subscriptions to corporation knowing that promoters are to receive secret profits is jointly liable with them; Reed v. Schmidt, 115 Ky. 82, 72 S. W. 369, 61 L. R. A. 270, all railroad bondholders entitled to membership in pool to buy railroad at foreclosure sale; Eisenberg v. Goldsmith, 42 Mont. 579, 113 Pac. 1132, resulting trust held not to arise from agreement to transfer one-eighth interest in mining lease and option bond on payment of one-eighth of operating expenses.

Neither Sufficiency of Complaint nor of findings can be reviewed on appeal from order denying new trial.

Approved in Raskin v. Robarts (Cal.), 35 Pac. 764, Hayford v. Wallace (Cal.), 46 Pac. 302, and Merced Bank v. Price, 9 Cal. App. 179, 98 Pac. 385, all reaffirming rule.

Law of Auction Sales. See note, 131 Am. St. Rep. 486.

Effect of Preventing or Checking Bids upon validity of auction sales. See note, 20 L. R. A. 553.

30 Cal. 596–610, **MIDDLETON v. LOW.**

Mandamus will Issue to Compel Governor to sign patent.

Approved in State v. Brooks, 14 Wyo. 414, 84 Pac. 491, 6 L. R. A. (n. s.) 750, mandamus will issue to compel governor to grant certificate of election.

Mandamus to Governor. See note, 6 L. R. A. (n. s.) 752.

The State has No Title in school lands until they have been surveyed.

Approved in Clemmons v. Gillette, 33 Mont. 326, 114 Am. St. Rep. 814, 83 Pac. 880, reaffirming rule.

30 Cal. 610–621, **BRALY v. SEAMAN.**

If Affidavit for Publication of Summons is insufficient, court acquires no jurisdiction.

Approved in Estate of Hancock, 156 Cal. 810, 811, 134 Am. St. Rep. 177, 106 Pac. 61, affidavit that plaintiff "has good cause of action" insufficient.

Affidavit for Publication of Summons must state facts to show that due diligence to find defendant has been used.

Approved in Harding v. Gillett, 25 Okl. 208, 107 Pac. 669, reaffirming rule; Nicoll v. Midland Sav. & L. Co., 21 Okl. 596, 96 Pac. 746, applying rule to service upon foreign corporation.

Assessment of Real Estate, in Which Value is represented by figures without the dollar-mark, is void.

Reaffirmed in Fox v. Townsend, 152 Cal. 53, 91 Pac. 1007.

Distinguished in Carter v. Osborn, 150 Cal. 622, 89 Pac. 609, omission of dollar-mark from delinquent tax list did not invalidate assessment.

Miscellaneous.—Cited in Slocum v. McLaren, 106 Minn. 391, 119 N. W. 408, upholding return of sheriff that "after diligent search I have been unable to find such person within my county."

30 Cal. 627–630, **MENDOCINO CO. v. LAMAR.**

Action upon Recognizance Given in criminal case is properly commenced in name of county.

Approved in Malheur County v. Carter, 52 Or. 619, 98 Pac. 490, reaffirming rule; Curry v. County of Gila, 6 Ariz. 54, 53 Pac. 5, county may sue on bond given for payment of taxes, though bond runs to territory.

30 Cal. 630–644, **DAVIS v. PERLEY.**

Actual Possession of Part of Tract under color of title by deed gives constructive possession of the remainder.

Approved in Owsley v. Matson, 156 Cal. 404, 104 Pac. 984, rule applicable to possession under decree of distribution.

Nonpayment of Taxes is not evidence of abandonment.

Approved in Sowles v. Minot, 82 Vt. 355, 137 Am. St. Rep. 1010, 73 Atl. 1029, mere nonuser of water power will not justify inference of abandonment.

30 Cal. 645–661, **PEOPLE v. SHEARER.**

Land is Liable to Taxation after issuance of certificate of purchase by government, though patent may not have issued.

Approved in Topeka Commercial Security Co. v. McPherson (Okl.), 52 Pac. 397, 400, title of occupant of lot on government townsite subject to taxation after entry of land at government land office.

Distinguished in Blakeley v. Kingsbury, 6 Cal. App. 713, 93 Pac. 132, mandamus will not lie to compel surveyor general to issue patent pending contest as to right to purchase reclaimed state swamp lands.

Exemption from Taxation or assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 294, 309, 334, 340, 348.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

What Constitutes Real Estate for purposes of taxation. See note, 15 L. R. A. 297.

Possessory Interest in Public Lands is subject to taxation by state.

Approved in Harvey Coal etc. Co. v. Dillon, Tax. Comm., 59 W. Va. 614, 53 S. E. 932, 6 L. R. A. (n. s.) 628, mining lease of coal lands at stated royalty per ton is taxable to lessee.

Before Settler on Public Lands has complied with statutory requirements, Congress may withdraw land.

Approved in Messenger v. Kingsbury, 158 Cal. 618, 112 Pac. 68, applicant for purchase of tide lands, who merely files affidavit and application to purchase, without paying part of price, acquires no such vested right as prevents repeal of law authorizing sale.

Discovery of Mineral on Mining Claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 193.

30 Cal. 662–663, **CROOK v. FORSYTH.**

In Action to Determine Adverse Claim, where the particulars of defendant's alleged claim are set forth in answer, burden of proof is upon defendant.

Reaffirmed in Dorris v. McManus, 4 Cal. App. 152, 87 Pac. 289.

Miscellaneous.—Cited in Hyde v. Redding, 74 Cal. 498, 16 Pac. 383, to point that, in action under section 738, Code of Civil Procedure, it is not necessary for complaint to set forth nature of defendant's claim.

30 Cal. 666–675, **KENT v. SNYDER.**

General Demurrer Need not Contain specifications unless defense is of the nature of a special privilege.

Approved in Burke v. Maguire, 154 Cal. 463, 98 Pac. 24, want of presentation of claim against estate may be raised by general demurrer.

Party Relying upon Fraud must set up facts which constitute it.

Approved in Thomason v. De Greayer (Cal.), 31 Pac. 567, mere allegation that name was omitted from contract through fraud of defendant is insufficient; Virginia etc. Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 260, 90 Pac. 49, fraud cannot be shown under complaint merely alleging conversion.

Pleading or Immunity Claimed by defendant must be pleaded in demurrer or answer.

Approved in California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 698, 112 Pac. 278, defendant may plead limitations by answer though defect appears on face of complaint.

30 Cal. 676–680, ROBERTS v. UNGER.

Unauthorized Alteration of written instruments. See note, 86 Am. St. Rep. 113.

Possession of Land as notice of title. See note, 13 L. R. A. (n. s.) 85.

30 Cal. 685–688, POLHEMUS v. TRAINER.

Assignment of Lease for Years absolute on its face but made as security for loan, is mortgage of leasehold.

Distinguished in Onomea Sugar Co. v. Austin, 5 Haw. 560, vendee of stock has right to vote same, though vendor has reserved right to repurchase.

Independent of Debt It is Given to secure, mortgage has no assignable quality.

Approved in Miller v. Berry, 19 S. D. 630, 104 N. W. 313, reaffirming rule; Cornish v. Woolverton, 32 Mont. 476, 108 Am. St. Rep. 598, 81 Pac. 10 arguendo.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 31 CALIFORNIA.

31 Cal. 17-26, 89 Am. Dec. 141, LATHROP v. BAMPTON.

Equity will Enforce Trust Against All who with notice thereof come into possession of trust property.

Approved in Thompson v. Bank of California, 4 Cal. App. 667, 88 Pac. 989, reaffirming rule; Coombs v. Barker, 31 Mont. 560, 79 Pac. 12, one joining with directors knowing they were directors, in redemption of corporate property, is charged with knowledge that redemption is constructively fraudulent.

Effect of Legal Remedy to Defeat equitable jurisdiction to follow trust funds. See note, 6 L. R. A. (n. s.) 794.

Trust Assured by Testator will not be enforced against executor when identity of trust fund is entirely lost.

Approved in Austin v. Wilcoxson, 149 Cal. 28, 84 Pac. 418, holding parol evidence herein insufficient to enforce trust against executor in moneys delivered to one uncle of plaintiff by another to be held in trust for plaintiff.

Cestui Que Trust cannot Claim specific property in enforcement of trust unless he shows it is the identical property.

Approved in Miller v. Ash, 156 Cal. 565, 105 Pac. 608, applying rule in suit to establish claim against guardian and in favor of ward for money belonging to ward and converted by guardian.

Where Trust Fund can be Identified, cestui que trust may elect to sue for property or to hold trustee personally liable, but if property cannot be identified, he must rely on personal liability.

Approved in Snyder v. Parmalee, 80 Vt. 499, 68 Atl. 650, and Harrigan v. Gilchrist, 121 Wis. 252, 99 N. W. 942, both following rule; Title Ins. etc. Co. v. Ingersoll, 158 Cal. 484, 111 Pac. 364, applying rule where wife gave husband money on his agreement to invest it for her use in his name; Ober & Sons Co. v. Cochran, 118 Ga. 405, 98 Am. St. Rep. 118, 45 S. E. 386, where collecting bank collected note and used money in own business, its funds in hands of receiver in insolvency are not trust fund for payment of such money; Benson v. Battey, 70 Kan. 295, 78 Pac. 847, cause of action for equitable

accounting against two of defendants cannot be joined with cause of action at law for damages in tort against another defendant not affected by first cause of action; Holderman v. Hood, 70 Kan. 285, 78 Pac. 843, upholding action for damages against trustee who fraudulently conspired with others to make sale of trust property at less than its value.

Claim of Cestui Que Trust Against Estate of trustee for trust funds, which latter has mingled and cannot be identified after his death, must be presented to executor.

Approved in Reiter v. Rothschild (Cal.), 33 Pac. 851, where plaintiff gave R. $500 as security for lease and latter died before expiration of lease, his executor was liable for such sum without presentation of claim against estate of R.; Franklin v. Trickey, 9 Ariz. 285, 80 Pac. 353, where after partner's death firm assets passed to survivor, who died prior to adjustment of firm affairs, administrator of first partner could sue second for accounting without presenting claim.

Executor Coming into Possession of Trust Fund so that it can be identified is chargeable as trustee same as his testator.

Reaffirmed in Burke v. Maguire, 154 Cal. 470, 471, 98 Pac. 27.

31 Cal. 26–29, PEOPLE v. SWIFT.

Ratification of Contract Within Contractual Power of municipality binds as effectually as if contracted in first instance.

Approved in Moore v. Hupp, 17 Idaho, 242, 105 Pac. 212, where mayor authorizes person to employ detectives for city and such detectives were employed and served, and such person presented claim to city, which council allowed and ordered warrant issued, acts of council were ratification of mayor's acts.

Distinguished in Meuser v. Risdon, 36 Cal. 245, so far as lot owner is concerned, city cannot, by its act, ratify proceedings taken to grade a street and impose an assessment on lot for same so as to validate an invalid assessment.

31 Cal. 33–46, PEOPLE v. BROADWAY WHARF CO.

Limitations must be Pleaded.

Approved in Pryal v. Pryal (Cal.), 71 Pac. 804, objection of bar of amendment of 1897 to Civil Code, section 164, cannot be first raised on appeal.

Right to Erect Wharves. See note, 40 L. R. A. 645.

31 Cal. 46–66, 89 Am. Dec. 147, WHEELER v. SAN FRANCISCO & ALAMEDA R. R. CO.

Demurrer Admits All Facts well pleaded which are legally provable.

Approved in Iowa Mut. etc. Ins. Assn. v. Gilbertson, 129 Iowa, 661, 106 N. W. 154, reaffirming rule.

Right of Carrier at Common Law to discriminate between passengers or shippers. See note, 18 L. R. A. 105.

Right of Carrier to Discriminate with respect to special or unusual service. See note, 12 L. R. A. (n. s.) 514.

31 Cal. 66–78, SACRAMENTO COUNTY v. BIRD.

Action Against Defaulting Treasurer for moneys belonging to county may be brought in name of county instead of that of people of state.

Approved in Curry v. County of Gila, 6 Ariz. 54, 53 Pac. 5, county interested in payment thereof may sue on bond to secure payment of taxes, notwithstanding bond is made to territory.

Official Bond Paper in Form and Substance, signed and sealed, and approved and filed, is delivered to people of state.

Approved in Hendry v. Cartwright, 14 N. M. 89, 89 Pac. 313, bond against injunction perfect and complete on face and executed and acknowledged by sureties, whose names appear in body thereof, and filed and approved by clerk, is binding on sureties, though one of sureties executed bond on secret agreement with cosurety that it was not to be used until indemnity bond given him.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 189.

31 Cal. 82–94, KNOWLES v. YATES.

Supreme Court has Appellate Jurisdiction over election contests.

Approved in Keech v. Joplin, 157 Cal. 5, 106 Pac. 224, upholding appellate jurisdiction of district court of appeals in mandamus to compel payment of warrant out of general fund of protection district organized under act of 1907, though legality of tax incidentally involved.

Appellate Jurisdiction of Supreme Court extends to cases which are not susceptible of pecuniary estimation.

Approved in dissenting opinion in Sharon v. Sharon, 67 Cal. 214, 7 Pac. 476, majority holding action for divorce is case in equity within constitutional provision conferring appellate jurisdiction on supreme court.

If Election Officers Open Polls and hold election at place distant from place appointed by supervisors, votes of precinct cannot be counted.

Approved in Elvick v. Groves, 17 N. D. 566, 118 N. W. 229, holding void election held by resolution of majority voters of precinct at place three miles distant from voting place established by county commissioners.

Irregularities Avoiding Election. See note, 90 Am. St. Rep. 76.

31 Cal. 95–98, HASTINGS v. HASTINGS.

Case is not Considered Tried until decision has been entered in minutes or written and signed by judge and filed with clerk.

Approved in Harris v. Careaga (Cal.), 2 Pac. 42, when cause referred to referee, who returns his decision and judgment to court, date of their filing is date of their rendition for purpose of moving for new trial.

31 Cal. 101–103, PEOPLE v. McCLELLAN.

Rule of Court Which Deprives Party of statutory right is void.

Approved in dissenting opinion in Smith v. Guckenheimer, 42 Fla. 32, 27 So. 909, majority upholding rule of court for submission of civil causes on abstracts of record; Stivers v. Byrkett, 56 Or. 574, 109 Pac. 387, arguendo.

31 Cal. 107–108, BOSTON v. HAYNES.

Filing of Notice of Appeal must Precede or be contemporaneous with service of same.

Approved in State v. District Court, 34 Mont. 115, 115 Am. St. Rep. 522, 85 Pac. 872, applying rule to appeals from justices of peace.

Supreme Court cannot Correct Records of lower courts.

Approved in Mendocino Co. v. Peters, 2 Cal. App. 27, 82 Pac. 1123, supreme court will not order diminution of record to amend bill of exceptions on motion of respondent.

31 Cal. 108–115, EX PARTE HEDLEY.

Elements of Embezzlement by agent stated.

Approved in People v. Hemple, 4 Cal. App. 125, 87 Pac. 229, holding evidence insufficient to convict theater ticket agent of embezzlement.

Embezzlement. See note, 87 Am. St. Rep. 21, 35, 38, 43.

Agent Receiving Principal's Money as Agent but in unauthorized manner, and converting it to own use with intent to steal, receives it in course of employment.

Approved in People v. Robertson, 6 Cal. App. 516, 92 Pac. 499, deputy assessor accused of embezzlement cannot defend on ground that money received was part payment of tax and that he received money as bailee taxpayer; People v. Gallagher (Cal.), 33 Pac. 892, upholding sufficiency of evidence to convict of aiding in embezzlement by secretary of corporation who drew funds out of bank by check; Smith v. State, 53 Tex. Cr. 122, 130, 109 S. W. 121, 125, 17 L. R. A. (n. s.) 531, where accused was in charge of house in which owner had placed pianos for sale by accused and another, and latter with consent of accused took piano and sold it and gave accused proceeds to deliver to owner, accused is guilty of embezzlement in appropriating money though it was duty of each salesman to settle personally with owner.

Embezzlement as Affected by Want of Authority to receive money or property in first instance. See note, 17 L. R. A. (n. s.) 534.

When One Receives a Thing under claim of agency, he is estopped to deny he was an agent.

Approved in dissenting opinion in Johnson v. State, 46 Tex. Cr. 417, 80 S. W. 623, majority holding one who, under pretense that he is employee of hotel, obtains money from guest to keep over night, and steals it, is guilty of theft and not embezzlement.

31 Cal. 115–118, BLOOD v. LIGHT.

Compound Allegations in Verified Complaint denied as whole in language of complaint are deemed admitted.

Approved in Duckworth v. Watsonville Water etc. Co., 150 Cal. 530, 89 Pac. 343, applying rule in water right case.

Power to Grant Mandatory Injunctions. See note, 20 L. R. A. 163.

31 Cal. 118–122, 89 Am. Dec. 164, DANA v. JACKSON STREET WHARF CO.

Owner of San Francisco Waterfront Lot below low-water mark is not "riparian owner."

Approved in Southern Pac. Co. v. Western Pac. Ry. Co., 144 Fed. 198, determining rights in Oakland waterfront.

Relative Rights of State and riparian owner in navigable waters. See note, 127 Am. St. Rep. 53.

"Shore" is the Space Between High and Low water mark.

Approved in Mobile Dry Docks Co. v. Mobile, 146 Ala. 207, 40 So. 208, 35 L. R. A. (n. s.) 822, applying rule in construing act of 1866, granting Mobile tide lands.

Establishment of Dock Lines. See note, 14 L. R. A. 498.

Right to Erect Wharves. See note, 40 L. R. A. 643.

31 Cal. 122–127, McMINN v. BLISS.

Repeal of Statute Under Which Alone a right of action exists extinguishes pending actions unless there is law enabling court to try them.

Approved in People v. Bank of San Luis Obispo, 159 Cal. 76, 112 Pac. 870, repeal of banking act of 1903 does not destroy right of bank to hearing on appeal from order adjudging it insolvent.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 398.

31 Cal. 132–140, PEOPLE v. SAN FRANCISCO SAVINGS UNION.

Assessment is Void Where Roll has Figures under heading "valuation" without anything to indicate whether figures are dollars or cents.

Approved in Fox v. Townsend, 152 Cal. 53, 91 Pac. 1007, following rule; Allen v. McKay (Cal.), 70 Pac. 10, applying rule in holding unsigned memorandum of property with figures without dollar-mark did not constitute assessment.

Qualified in Washington Timber etc. Co. v. Smith, 34 Wash. 633, 76 Pac. 270, upholding tax judgment without marks to show whether numerals were for dollars or cents.

Distinguished in Carter v. Osborn, 150 Cal. 622, 623, 89 Pac. 609, upholding sufficiency of delinquent tax list omitting dollar-mark where under heading amount figures "4 00" had space between four and ciphers.

Assessor and not Legislature must Make valuation of property for taxing purposes.

Approved in Pratt v. Breckinridge, 112 Ky. 15, 65 S. W. 139, holding void act of 1898, regulating elections, to extent that it provided for appointment of election commissioners by legislature; dissenting opinion in Purnell v. Mann, 105 Ky. 121, 50 S. W. 267, majority upholding election act of 1898.

31 Cal. 146–148, PEOPLE v. FRISBIE.

Term "Claim to Any Land" in Revenue Act of 1861, means actual possession of land claimed.

Approved in Slade v. County of Butte, 14 Cal. App. 459, 112 Pac. 487, determining taxability of certificates of purchase of lieu lands.

What Constitutes Real Estate for purposes of taxation. See note. 15 L. R. A. 297.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

31 Cal. 148–154, BOWMAN v. CUDWORTH.

Effect of Destruction or Cancellation, or redelivery to grantor for that purpose, of delivered but unrecorded deed. **See note, 18 L. R. A. (n. s.) 1170.**

31 Cal. 154–160, **KIMBALL v. LOHMAS.**

Title by Accession to Crops, Fruit, and timber, wrongfully severed. See note, 32 L. R. A. 423, 428.

Replevin by or Against One in Adverse Possession of land for things severed. See note, 69 L. R. A. 734.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1218, 1233.

31 Cal. 160–167, **BIERCE v. RED BLUFF HOTEL CO.**

Notice to Agent of Facts Connected with subject matter of agency is constructive notice to principal where notice comes to agent while he is acting for principal.

Approved in Vietor v. Spaulding, 199 Mass. 54, 127 Am. St. Rep. 472, 84 N. E. 1017, holding knowledge obtained by attorney not continuously retained is not imputable to client.

Notice to Attorney is Constructive Notice to client.

Approved in Wheatland Grain & Lumber Co. v. Dowden, 26 Okl. 448, 110 Pac. 901, where four defendants served and their attorney without authority appeared also for parties not served, and default entered against all, parties served, having knowledge of unauthorized appearance, cannot set judgment aside as to all parties.

31 Cal. 170–173, **SANCHEZ v. CARRIAGA.**

Staying of Execution otherwise than by statutory proceedings. See note, 127 Am. St. Rep. 708.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 328.

Injunctions Against Judgments for want of jurisdiction or invalidity. See note, 31 L. R. A. 201, 203.

Injunctions Against Judgments for errors and irregularities. See note, 30 L. R. A. 706, 709, 712.

31 Cal. 173–176, **SPRAGUE v. NORWAY.**

Mere Irregularities Which Do not Affect final result do not vitiate election.

Distinguished in Johnstone v. Robertson, 8 Ariz. 366, 76 Pac. 466, where place of election changed and no new place designated by written notice as provided by statute, votes cast cannot be counted.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 72, 89.

31 Cal. 180–185, 89 Am. Dec. 167, **SMITH v. YULE.**

If Possession is Consistent With Record Title, purchaser need not inquire into title beyond record.

Approved in Sanguinetti v. Rossen, 12 Cal. App. 633, 107 Pac. 564, following rule; Biggs v. Hoffman, 60 Wash. 499, 111 Pac. 577, purchaser of lots with actual notice of lien thereon has burden of proving that one of his predecessors in interest was bona fide purchaser without notice.

Effect of Possession of Real Property as notice. See notes, 104 Am. St. Rep. 344; 13 L. R. A. (n. s.) 56, 58, 59, 60, 69, 78, 87, 112, 114, 130.

Record as Notice of Title. See note, 87 Am. St. Rep. 446.

Possession by Vendee Under Unrecorded Deed is not notice to subsequent vendee whose deed is first recorded.

Approved in Stockton v. National Bank, 45 Fla. 600, 34 So. 900, where grantor's tenant attorned to grantee when unrecorded deed given and remained in possession until after attachment, such possession is not notice of conveyance.

31 Cal. 185–196, FISH v. REDINGTON.

Answer Attempting to Answer as whole conjunctive allegations in verified complaint is deemed an admission.

Approved in Duckworth v. Watsonville Water etc. Co., 150 Cal. 530, 89 Pac. 343, applying rule in water right case.

Appellate Court on Reversal may Permit Lower Court to amend answer where latter had sustained defendant's view that he had denied all material allegations.

Reaffirmed in Campbell v. Grennan, 13 Cal. App. 483, 110 Pac. 157.

31 Cal. 207–210, PECK v. COURTIS.

Time for Appeal Runs from Rendition of judgment and not from its entry.

Approved in Brownell v. Superior Court, 157 Cal. 706, 109 Pac. 93, construing time when order for partial distribution was "taken" within Code of Civil Procedure, section 473; People v. Schmitz, 7 Cal. App. 345, 94 Pac. 409, an appeal in criminal case is not premature because taken after rendition of judgment and before its entry.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 627.

Judgment is "Rendered" When It is Pronounced and ordered entered.

Approved in Mears v. Shaw, 32 Mont. 578, 81 Pac. 339, holding complaint alleging parties were adjudged bankrupts did not sufficiently allege rendition of adjudication.

Miscellaneous.—Cited in Camp Phosphate Co. v. Anderson, 48 Fla. 234, 111 Am. St. Rep. 77, 37 So. 725, decree for partition of lands ascertaining interests of parties and appointing commissioners in partition is interlocutory.

31 Cal. 211–214, JAMES v. WILLIAMS.

Right of Prior Appropriation of Water. See note, 30 L. R. A. 672.

31 Cal. 215–217, LAKE MERCED WATER CO. v. COWLES.

Court cannot, in Condemnation Suit, take judicial notice of pendency of another condemnation suit against same person.

Approved in Stanley v. McElrath (Cal.), 22 Pac. 674, court cannot take judicial notice of its judgment in another case.

Judicial Notice of Court's Own Records in other actions. See note, 11 L. R. A. (n. s.) 616.

Corporation First Starting Condemnation Proceedings acquires land.

Approved in Atlanta etc. Ry. Co. v. Southern Ry. Co., 131 Fed. 666, 66 C. C. A. 601, upholding priority of later unrecorded deed from owner over rights under condemnation proceedings.

Miscellaneous.—Cited in Toledo etc. Traction Co. v. Toledo Ry. Co., 171 Ind. 226, 86 N. E. 59, as to right of another railroad to condemn lands held by individuals under contract for right of way for railroad which they were promoting.

31 Cal. 218–220, POPE v. DALTON.

Where Answer in Ejectment Puts Defendant's Possession in issue, plaintiff must prove such possession.

Reaffirmed in Ozark Land Co. v. Leonard, 20 Fed. 881.

31 Cal. 220–225, PEOPLE v. DOE.

Sheriff's Power to Sell must be Proved by the judgment and execution.

Approved in State Finance Co. v. Beck, 15 N. D. 384, 109 N. W. 361, majority holding furnishing of sheriff with original instead of certified copy of judgment on which to make tax sale is not jurisdictional defect.

Filing of Justice Court Transcript with and its docketing by county clerk do not make it judgment of district court.

Approved in Farmers' State Bank v. Bales, 64 Neb. 873, 90 N. W. 946, filing of justice's transcript with clerk of district court does not keep judgment alive for five years after such filing.

31 Cal. 231–233, LEFFINGWELL v. GRIFFING.

If Complaint Contains Two Counts and Answer takes issue on one only, plaintiff is entitled to judgment on other.

Approved in Oberndorffer v. Moyer, 30 Utah, 332, 84 Pac. 1105, where complaint contains count on open account and another on account stated for same cause of action, motion to elect is properly denied.

Denial of Allegation of Value in form of negative pregnant is no denial.

Reaffirmed in Schroeder v. Mauzy, 16 Cal. App. 446, 118 Pac. 461.

31 Cal. 233–238, BLYTHE v. POULTNEY.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

31 Cal. 240–260, TAYLOR v. PALMER.

Motion for Judgment on Pleadings is in nature of demurrer to answer.

Approved in Bergerow v. Parker, 4 Cal. App. 172, 87 Pac. 249, upholding grant of privilege to permit filing of verified amended answer where after filing of unverified answer to verified complaint plaintiff moved for judgment on pleadings.

Where Contract for Street Work is assigned, warrant may issue to original contractor.

Approved in Berkeley Development Co. v. Marx, 10 Cal. App. 413, 414, 102 Pac. 279, omission of contractor's name from street assessment warrant and its issuance in name of assignee does not avoid it.

Contract for Street Work is assignable.

Approved in Swarts v. Narragansett Elec. Lighting Co., 26 R. I. 391, 59 Atl. 78, contract for installation of electric apparatus, providing that construction of circuits shall be done under supervision of contractor, is nonassignable.

Assignability of Construction or building contracts. See note, 21 L. R. A. (n. s.) 361.

Property not Benefited by Street Improvement cannot be assessed for it.

Approved in dissenting opinion in Stevens v. Port Huron, 149 Mich. 555, 113 N. W. 299, majority holding void statute authorizing city to assess cost of street sprinkling in proportion to frontage without reference to benefits.

Necessity of Special Benefit to sustain assessments for local improvements. See note, 14 L. R. A. 759.

Statute Making Abutting Owner personally liable for street assessment is void.

Approved in City of Brookings v. Natwick, 22 S. D. 324, 133 Am. St. Rep. 927, 117 N. W. 377, holding void act of 1883, incorporating town of Brookings and making abutting owner personally liable for sidewalk assessments.

As to Whether a Personal Liability may be created for an assessment. See notes, 133 Am. St. Rep. 931, 932, 937, 938; 35 L. R. A. 61.

Where Two Sections of Law Relate to same matter, both are read together, in order to ascertain intent of legislature.

Approved in Estate of Griffiths, 3 Cof. Prob. 555, construing Code of Civil Procedure, sections 1365, 1383, as authorizing surviving husband or wife to nominate an administrator.

Assessments for Improvements by front-foot rule. See notes, 17 L. R. A. 338; 28 L. R. A. (n. s.) 1129, 1134, 1135, 1138.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 33.

31 Cal. 261-264, DAY v. JONES.

How Far Right to Vote Absolute. See note, 25 L. R. A. 482.

31 Cal. 271-273, MILES v. McDERMOTT.

Ultimate Facts Only Should be stated in pleading.

Approved in Zany v. Rawhide Gold Min. Co., 15 Cal. App. 377, 114 Pac. 1027, allegations in complaint as to assignment and reassignment of claim sued on are immaterial as being mere matters of proof; Estate of Goodspeed, 2 Cof. Prob. 151, applying rule to will contest; Lincoln School Tp. v. Union Trust Co., 36 Ind. App. 115, 73 N. E. 624, in action against school township on note given by trustee to secure loan, allegation that note was authorized by advisory board was statement of fact.

Surplus Words in Pleading should be stricken out.

Approved in Estate of Goodspeed, 2 Cof. Prob. 150, striking out parts of will contest.

31 Cal. 273-288, 89 Am. Dec. 172, JOYCE v. McAVOY.

Judgment Against an Infant is voidable only.

Approved in Wilson v. Hubbard (Wilson v. Wilson), 39 Wash. 681, 82 Pac. 157, infant not making application within statutory time cannot obtain relief from judgment obtained by fraud.

31 Cal. 288-293, PEOPLE v. KNEELAND.

Unauthorized Alteration of Written Instruments. See note, 86 Am St. Rep. 96.

31 Cal. 293–321, PAGE v. ROGERS.

Purchaser of Realty on Execution Sale acquires equitable estate in land on receipt of sheriff's certificate.

Approved in Hardin v. Kelley, 144 Fed. 354, 75 C. C. A. 355, attaching creditor whose claim is not reduced to judgment cannot redeem from execution sale of realty.

Nature of Title or Estate of Holder of sheriff's certificate before obtaining deed. See note, 15 L. R. A. 69.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 33.

Purchaser at Execution Sale has an Estate in land purchased which may be levied on under execution.

Approved in Pogue v. Simon, 47 Or. 7, 114 Am. St. Rep. 903, 81 Pac. 567, following rule; Estate of Johnson, 4 Cof. Prob. 508, purchaser at executor's sale is entitled to rents of property between time of confirmation and delivery of deed.

Purchaser of Realty on Execution has, before expiration of redemption period, an equitable conditional estate which becomes absolute on expiration of period.

Approved in North Dakota etc. Cattle Co. v. Serumgard, 17 N. D. 490, 138 Am. St. Rep. 717, 117 N. W. 462, reaffirming rule; Pogue v. Simon, 47 Or. 9, 114 Am. St. Rep. 903, 81 Pac. 567, holding interest of purchaser of realty at execution may be levied on under execution after expiration of redemption period but before execution of sheriff's deed.

31 Cal. 321–328, DAGGETT v. RANKIN.

Written Agreement to Give Mortgage or Mortgage defectively executed creates equitable mortgage.

Approved in Baltimore etc. R. Co. v. Berkeley Springs etc. R. Co., 168 Fed. 773, and Lohmeyer v. Durbin, 206 Ill. 580, 69 N. E. 525, both following rule; Quinton v. Neville, 152 Fed. 884, 81 C. C. A. 673, construing contract with attorneys as creating equitable lien; Garrison v. Vermont Mills, 154 N. C. 7, 69 S. E. 745, where factor's contract gave factor exclusive sale of cotton-mill's product and provided for advances by him, goods advanced on being stored separately for factor by mills, factor has equitable lien on goods on which it had made advances; Harrigan v. Gilchrist, 121 Wis. 360, 99 N. W. 981, mortgage defectively executed takes priority over subsequently acquired rights of creditors in judicial administration of mortgagor's property for benefit of creditors and is good consideration for formal mortgage.

Distinguished in Smith v. Rainey, 9 Ariz. 365, 83 Pac. 464, construing agreement and holding intention to create equitable mortgage not disclosed.

31 Cal. 333–338, CALDERWOOD v. PYSER.

If Referee Reports Facts upon All Issues but draws erroneous conclusion of law and also reports judgment in accordance with conclusions, court prior to entry may set aside conclusions and order proper judgment.

Approved in United States v. Ramsey, 158 Fed. 493, under Idaho statute court cannot, on exceptions to referee's findings of fact, review the evidence.

31 Cal. 338–341, HOLMAN v. TAYLOR.

Under Constitutional Provision Giving District Court jurisdiction where title or possession of realty is an issuable fact, title nor possession need not be put in issue.

Approved in Dungan v. Clark, 159 Cal. 32, 112 Pac. 719, answer in justice's court action on note alleging failure of consideration because payee did not own pumping plant on land which he assumed to sell in consideration for note raised question of title.

31 Cal. 342–356, FORBES v. HYDE.

Affidavit for Publication of Summons must state facts showing due diligence in searching for defendant.

Approved in Hoffman v. Superior Court, 151 Cal. 390, 90 Pac. 940, affidavit accompanying complaint in "McEnerney suit" need not show what inquiry made to determine existence of adverse claims.

Judgment not Void on Face cannot be collaterally attacked.

Approved in Ex parte Haase, 55 Cal. App. 543, 90 Pac. 947, applying rule on habeas corpus where conviction on plea of guilty attacked.

Statute Providing for Constructive Service must be strictly construed.

Approved in Livermore v. Ratti, 150 Cal. 465, 89 Pac. 328, applying rule to notice of posting of hearing of guardian's final accounts.

Affidavit for Publication of Summons must show existence of cause of action.

Approved in Estate of Hancock, 156 Cal. 810, 811, 134 Am. St. Rep. 177, 106 Pac. 61, applying rule in divorce suit under Colorado statute; D'Autremont v. Anderson Iron Co., 104 Minn. 171, 124 Am. St. Rep. 615, 116 N. W. 359, 17 L. R. A. (n. s.) 236, publication of summons to "George H. Leslie" confers no jurisdiction over "George W. Leslie"; Crane Co. v. Epworth Hotel etc. Real Estate Co., 121 Mo. App. 223, 98 S. W. 799, affidavit on information and belief as to who is owner of premises is sufficient to support mechanic's lien.

Judgment by Publication is Void where affidavit for publication is fatally defective.

Approved in Estate of McNeil, 155 Cal. 342, 100 Pac. 1090, divorce judgment not void on face, obtained on service by publication, cannot be collaterally attacked on ground that complaint was so defective as not to give jurisdiction of person; Cohen v. Portland Lodge, 144 Fed. 269, upholding sufficiency of affidavit for publication to uphold jurisdiction on collateral attack.

Power of Defendant's Attorney to Withdraw Answer or appearance and permit default judgment. See note, 33 L. R. A. 520.

31 Cal. 359–365, PINA v. PECK.

Statutes Providing Procedure for Making Bastard Heir of father must be strictly construed.

Approved in Estate of Jessup, 2 Cof. Prob. 493, 494, 496, construing Civil Code, section 230, relating to legitimization of children by public acknowledgment by father; Thomas v. Estate of Thomas, 64 Neb. 589, 90 N. W. 633, under Compiled Statutes, chapter 23, section 31, no intention to make child an heir and no distinct statement that it is illegitimate need appear in writing.

Written Acknowledgment of Paternity of Bastard not made for purpose of making child heir of father will not make child such heir.

Distinguished in Estate of Blythe, 4 Cof. Prob. 158, construing Civil Code, section 1387, relating to written acknowledgment by father of illegitimate child.

Denied in Thomas v. Estate of Thomas, 64 Neb. 587, 90 N. W. 633, under Compiled Statutes, chapter 23, section 31, no intention to make child an heir and no distinct statement that it is illegitimate need appear in writing.

31 Cal. 365–367, **KETCHUM v. CRIPPEN.**

Order Refusing to Strike Out Statement on motion for new trial is not appealable.

Distinguished in Magee v. Superior Court, 10 Cal. App. 161, 101 Pac. 535, order made after judgment in action in which execution sale of money was made, directing payment of the money to the purchaser, is appealable, and certiorari does not lie to annul same.

31 Cal. 367–376, **SAN FRANCISCO ETC. R. R. CO. v. CALDWELL.**

Railroads are Public Highways.

Approved in McLucas v. St. Joseph etc. Ry. Co., 67 Neb. 610, 93 N. W. 929, reaffirming rule.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 7, 8, 119.

Right to Set Off Benefits against damages on condemnation. See note, 9 L. R. A. (n. s.) 789, 828.

31 Cal. 376–383, **McGLYNN v. BRODIE.**

Employee Assumes Risk of Unsafe Machinery where he has knowledge or means of knowledge of its condition.

Approved in Bush v. Wood, 8 Cal. App. 655, 97 Pac. 712, denying recovery to sawmill foreman for injuries caused by unsafe appliances which he used with knowledge of their unsafety; Branco v. Ill. Cent. R. R. Co., 119 Iowa, 214, 93 N. W. 98, section-hand unloading ties from box-car assumed risk of injury from ties sliding off by reason of sudden jerk of train.

As to Whether Servant may Assume Risk of dangers created by master's negligence. See note, 28 L. R. A. (n. s.) 1223.

Contributory Negligence in Entering or remaining in an employment. See note, 49 L. R. A. 56.

Duty as to Defective Appliance which servant is employed to repair. See note, 25 L. R. A. (n. s.) 331.

Volenti Non Fit Injuria as Defense to actions by injured servants. See note, 47 L. R. A. 173.

31 Cal. 387–395, **TABLE MOUNTAIN TUNNEL CO. v. STRANAHAN.**

Where Claim Defined by Physical Marks, possession for mining purposes embraces whole claim though occupancy or work done be only on part.

Approved in North Noonday Min. Co. v. Orient Min. Co., 11 Fed. 128, 6 Saw. 503, person in actual possession of mining claim of no greater extent than law allows, who is working same, may sue trespasser, though his claim not taken up in all particulars in mode required by law.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 773, 849.

31 Cal. 395–398, 89 Am. Dec. 193, BARROILHET v. HATHAWAY.

Docketing Judgments. See note, 87 Am. St. Rep. 666.

Priority of Judgment Over Conveyance made after beginning of term. See note, 38 L. R. A. 248.

31 Cal. 398–405, HIHN v. COURTIS.

Court is Justified in Overruling Decisions in cases erroneously decided, where no valuable rights can grow up under them.

Approved in Frick Co. v. Oats, 20 Okl. 488, 94 Pac. 687, upholding power of court to overrule prior decision of territorial supreme court.

31 Cal. 406–409, GRIGSBY v. BURNETT.

Injunction Against Trespass on realty. See note, 99 Am. St. Rep. 745.

Injunctive Relief as to Fences or Gates. See note, 7 L. R. A. (n. s.) 61.

31 Cal. 409–412, PEOPLE v. BAGNELL.

In Determining Correctness of Charge, whole charge is construed together.

Approved in Nash v. Kreling (Cal.), 56 Pac. 262, applying rule in action for wages.

31 Cal. 416–418, PEOPLE v. DE LA GUERRA.

Indictment Against Tax Collector for embezzlement of tax collections alleging he received certain sum for state licenses and another sum for county taxes does not state two offenses.

Approved in State v. Steers, 12 Idaho, 180, 85 Pac. 106, upholding information charging sheriff with willfully and fraudulently appropriating to own use certain money paid to him in his official capacity.

31 Cal. 418–420, McKEE v. GREENE.

Nonsuit Should not be Granted if there is evidence tending to prove all material allegations of complaint.

Reaffirmed in Later v. Haywood, 12 Idaho, 83, 85 Pac. 496.

31 Cal. 420–440, WILSON v. CASTRO.

Bill in Equity is Multifarious when relief is demanded against several defendants of several matters of a distinct and independent nature.

Approved in Stewart v. Smith, 6 Cal. App. 157, 91 Pac. 669, where all of surviving children and children of deceased child, who conveyed to mother their interest in father's estate, join in suit to enforce agreement under which conveyance was made, there is no misjoinder of parties.

If One Mistakenly Believing Himself to be Heir of Mexican land grantee obtains confirmation and patent to land, he holds in trust for true heir.

Cited in Tonopah & Goldfield R. R. Co. v. Fellanbaum, 32 Nev. 295, 107 Pac. 887, arguendo.

Real Property Granted by Government to citizen as separate or community property. See notes, 96 Am. St. Rep. 916; 26 L. R. A. (n. s.) 1119.

What is Community Property. See notes, 126 Am. St. Rep. 116; 4 Cof. Prob. 58.

Estoppel from Pleading Statute of Frauds in actions on contracts not to be performed within one year. See note, 134 Am. St. Rep. 177.

31 Cal. 440–451, 89 Am. Dec. 195, PECK v. BRUMMAGIM.

Where Husband Makes Gift of Common Property to wife, it becomes her separate property.

Approved in Nilson v. Sarment, 153 Cal. 530, 126 Am. St. Rep. 91, 96 Pac. 317, where prior to amendment of 1889 to Civil Code, section 164, deed taken in wife's name, presumption is that she held it as community property; Wheeler v. Armstrong, 164 Ala. 451, 51 So. 271, holding evidence as to husband's gift of notes to wife insufficient to show that delivery to her was made with intent to devest himself of title and possession.

What is Community Property. See notes, 126 Am. St. Rep. 107, 111, 121; 4 Cof. Prob. 49, 53, 63.

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 378.

If Husband Buys Land and Pays for It out of community property and directs conveyance to be made to wife as gift, it vests title in her.

Approved in Wright v. Wright (Cal.), 41 Pac. 696, following rule.

If Husband Expends Common Money in improvements on land which is separate property of wife, he has no lien therefor.

Approved in Carlson v. Carlson, 10 Cal. App. 303, 101 Pac. 925, following rule.

Burden of Proof as to Community Property. See note, 82 Am. St. Rep. 365.

Recital of Money Consideration in deed as contractual. See note, 68 L. R. A. 925.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 112.

31 Cal. 451–455, PEOPLE v. AH YE.

Indictment for Entering House With Intent to Steal need not aver value of property intended to be stolen.

Approved in Bloch v. State, 161 Ind. 277, 68 N. E. 288, following rule.

Correction of Verdict in criminal cases. See note, 23 L. R. A. 724, 728.

31 Cal. 455–458, 89 Am. Dec. 205, KIRKALDI v. LARRABEE.

One in Possession of Public Lands, who mortgages fee and afterward acquires title under homestead act, is estopped from denying mortgage lien.

Approved in Tilton v. Flormann, 22 S. D. 339, 117 N. W. 383, following rule; Jones v. Chalfant (Cal.), 31 Pac. 258, upholding title under sheriff's deed on foreclosure of mortgage given prior to obtaining patent for government land; Hafemann v. Gross, 199 U. S. 346, 26 Sup. Ct. 80, 50 L. Ed. 224, upholding contract by which pre-emptor gave other benefit of pre-emption in consideration of advances of part of expenses of pre-emption; Bernardy v. Colonial etc. Mort-

gage Co., 17 S. D. 642, 106 Am. St. Rep. 791, 98 N. W. 167, applying principle where entryman conveyed land by fee simple deed before patent issued.

Mortgage upon Public Lands Executed by homesteader prior to patent of final proof. See note, 6 L. R. A. (n. s.) 936.

Conveyance Recorded Before Grantor obtained title, as notice. See note, 23 L. R. A. 563.

Inurement of After-acquired Title. See note, 106 Am. St. Rep. 802.

31 Cal. 466–467, PEOPLE v. SMITH.

Where Defense in Murder Case is Insanity and there is any evidence tending to prove personal insanity of defendant, evidence of insanity of parents is admissible.

Approved in Pringle v. Burroughs, 185 N. Y. 381, 78 N. E. 152, in absence of any proof of insane conduct on part of testator, his insanity cannot be inferred from evidence of insanity of relatives.

31 Cal. 471–476, HENDRICK v. CROWLEY.

Parol Evidence is Admissible to Show that true consideration is other than expressed in written instrument.

Distinguished in Nobles v. Hutton, 7 Cal. App. 25, 93 Pac. 294, upholding admission of evidence to fact that no consideration was paid for deed to show it was void because obtained without consideration by fraud.

31 Cal. 487–497, LOVE v. SHARTZER.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 176, 177.

31 Cal. 500–526, DONNER v. PALMER.

Alcaldes' Grants of Pueblo Lands Made while Mexican laws in force in California were required to be first entered of record and then to be signed and attested.

Reaffirmed in Ohm v. San Francisco (Cal.), 25 Pac. 156.

Alcalde's Grant to Infant is Valid.

Approved in Watson v. White, 26 Tex. Civ. 446, 64 S. W. 829, minor who is an actual settler may purchase additional lands.

31 Cal. 526–537, McQUADE v. WHALEY.

Conveyance of Homestead by Husband Alone is valid but is subject to right of spouses to hold property as homestead while it exists as homestead.

Approved in Jerdee v. Furbush, 115 Wis. 280, 91 N. W. 662, conveyance of homestead by husband alone conveys equitable right to legal title enforceable on extinguishment of homestead.

Abandonment of Homestead. See note, 102 Am. St. Rep. 393.

31 Cal. 538–563, FOX v. WESTERN PACIFIC R. R. CO.

Land is not "Taken for Public Use" until last act has been performed which is required to transfer title or subject it to the servitude.

Approved in California Southern R. Co. v. Colton Land & Water Co. (Cal.), 2 Pac. 40, reaffirming rule.

As to When Title Passes in condemnation proceedings. See note, 16 L. R. A. (n. s.) 538.

Statute Permitting Taking of Land for public use while condemnation proceedings are pending and before compensation made is valid.

Approved in Buckwalter v. School District, 65 Kan. 608, 70 Pac. 607, upholding proceedings by school district to condemn land for school site under General Statutes of 1901, section 6131.

31 Cal. 563–565, PEOPLE v. YOUNG.

Grand Jurors Before Whom False Testimony is given may testify as to such testimony before grand jury bringing in indictment.

Approved in State v. Campbell, 73 Kan. 713, 85 Pac. 793, 9 L. R. A. (n. s.) 533, admitting statements made by accused in denial of guilt while a witness before grand jury.

Competency of Evidence Before Grand Jury. See note, 28 L. R. A. 322.

Witness Testifying Before Grand Jury cannot take advantage of obligation of secrecy imposed on grand jurors in prosecution against him.

Approved in Wisdom v. State, 42 Tex. Cr. 582, 61 S. W. 927, admitting admissions of accused made before grand jury.

31 Cal. 565–576, PEOPLE v. JONES.

Extrajudicial Confessions of Prisoners alone are insufficient to prove fact that crime has been committed.

Approved in People v. Saunders, 13 Cal. App. 747, 110 Pac. 827, People v. Grill, 3 Cal. App. 516, 86 Pac. 614, and State v. Keller, 8 Idaho, 704, 70 Pac. 1052, all following rule; People v. Frank, 2 Cal. App. 285, 83 Pac. 579, applying rule in murder case; People v. Chadwick, 4 Cal. App. 73, 87 Pac. 388, holding charge of prior conviction not sustained by testimony of official reporter of admission of defendant at prior trial that he had been convicted; In re Kelly, 28 Nev. 498, 83 Pac. 226, holding evidence of physician who examined prosecutrix soon after alleged rape and of other witnesses who saw marks of violence on her person, coupled with defendant's admission shortly after offense, justified commitment.

Proof of Corpus Delicti. See note, 68 L. R. A. 56.

Prosecution cannot Give Evidence to show prisoner committed another offense, for purpose of raising inference that he is guilty of crime of which he is charged.

Approved in State v. Crofford, 121 Iowa, 405, 96 N. W. 893, in prosecution for murder by abortion, evidence that defendant had produced abortion on other women is inadmissible.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 98; 62 L. R. A. 197.

Order of Proof of Corpus Delicti and confessions of accused is immaterial.

Approved in People v. Wilkins, 158 Cal. 536, 111 Pac. 615, following rule; People v. Rollins, 14 Cal. App. 138, 111 Pac. 125, applying rule where declarations of co-conspirator were admitted before conspiracy shown.

When There is Entire Want of Proof of corpus delicti, court should direct jury to acquit.

Approved in dissenting opinion in State v. Wright, 20 N. D. 224, 126 N. W. 1026, majority holding it is not error for court at close of state's case to refuse to advise acquittal.

31 Cal. 576–585, PEOPLE v. FARRELL.

If Suggestion is Made That Accused is Insane and there is reason to suspect that he is insane, question of his insanity must be submitted to a jury.

Approved in Steward v. State, 124 Wis. 631, 102 N. W. 1081, holding it error to refuse demand for inquisition made immediately after trial on special issue of insanity against accused and as soon as council was informed of probability that accused was insane.

Verdict of Jury Called to Try Question of insanity of accused, that he is insane is not conclusive that he was insane when offense committed.

Approved in State v. Grendahl, 131 Iowa, 604, 109 N. W. 121, admitting testimony that when accused was admitted to asylum after finding of insanity, he was not insane.

Insanity After Commission of criminal act. See note, 38 L. R. A. 577, 581, 590.

In Proof of Insanity Under Plea of not guilty, evidence of insanity both before and after crime is admissible.

Reaffirmed in People v. Kirby, 15 Cal. App. 271, 114 Pac. 797.

Accused may Testify as to His Meaning by words spoken.

Approved in State v. Johnson, 17 N. D. 560, 118 N. W. 233, one accused of offering to bribe another may testify as to his intent or meaning in writing letter.

Right of One to Testify as to his intent. See note, 23 L. R. A. (n. s.) 373, 374.

31 Cal. 585–591, 91 Am. Dec. 542, SAN FRANCISCO v. CALDERWOOD.

Dedication of Portion of City Waterfront, in harbor, for public use as free public dock gives public only an easement and not any estate in land.

Approved in San Francisco v. Canavan, 42 Cal. 557, discussing nature of tenure of San Francisco pueblo lands.

Grantee of Easement has No Right of Entry upon nor any right to possess land as such.

Approved in San Francisco v. Grote (Cal.), 47 Pac. 939, city cannot maintain ejectment for recovery of possession of street dedicated to public by user, without showing ownership in fee.

What Title or Interest will support ejectment. See notes, 116 Am. St. Rep. 574; 18 L. R. A. 786.

31 Cal. 591–595, GREEN v. CLARK.

Interest of Purchaser at Execution Sale is all estate of execution defendant in land excepting legal title and right of possession prior to expiration of time for redemption.

Approved in Hardin v. Kelley, 144 Fed. 354, 75 C. C. A. 355, attaching creditor whose claim is not reduced to judgment cannot redeem from execution sale of realty.

Nature of Title or Estate of Holder of sheriff's certificate before obtaining deed. See note, 15 L. R. A. 69.

Interest Acquired by Purchaser at Sheriff's Sale may be conveyed by him by deed any time before sheriff's deed is given.

Approved in Bernardy v. Colonial etc. Mortgage Co., 17 S. D. 642, 106 Am. St. Rep. 791, 98 N. W. 167, where entryman conveyed by deed, before patent, fee passed to grantee on subsequent issuance of patent to grantor.

Conveyance Recorded Before Grantor obtained title, as notice. See note, 23 L. R. A. 561.

31 Cal. 595–619, ESTATE OF WOODWORTH.

A Specific Bequest of Personalty is bequest of particular thing specified.

Reaffirmed in In re Campbell, 27 Utah, 366, 75 Pac. 853.

Specific, Demonstrative and General Bequests. See note, 140 Am. St. Rep. 579, 580, 603.

In Case of Doubt Legacy is not construed as specific.

Approved in Noon's Estate, 49 Or. 293, 88 Pac. 676, construing will as making specific bequest.

It Requires Express Words in Will or an intent clearly manifest to disturb legal order of marshaling assets to pay debts.

Approved in Estate of Heydenfeldt, 4 Cof., Prob. 511, phrase "all my debts" used in direction to executors to pay "all debts which I may owe at my decease" includes debt secured by mortgage.

Right of Devisee of Encumbered Property to exoneration at expense of legatee. See note, 3 L. R. A. 899, 902.

Ejectment by Executor or Administrator. See note, 136 Am. St. Rep. 86.

Right to Rents on Lease of intestate's property. See note, 40 L. R. A. 323.

31 Cal. 619–629, 91 Am. Dec. 546, EX PARTE GIBSON.

Habeas Corpus Does not Lie because of mere errors and irregularties in judgment.

Approved in Ex parte Monckros Von Vetsera, 7 Cal. App. 137, 93 Pac. 1036, refusing to discharge one on habeas corpus held under judgment reciting he has been convicted of "felony" without designating particular felony; In re Johnson, 6 Cal. App. 736, 93 Pac. 200, holding habeas corpus does not lie where complaint for violation of liquor ordinance is alleged to charge two offenses; In re Collins, 135 Mich. 94, 97 N. W. 152, where circuit judge makes insufficient indorsement on commitment of juvenile prisoner is not entitled to discharge; In re Talley, 4 Okl. Cr. 400, 112 Pac. 37, refusing to discharge on habeas corpus one convicted of misdemeanor, on information which was not verified.

Distinguished in Ex parte Roquemore, 60 Tex. Cr. 283, 131 S. W. 1102, arguendo.

Any Illegality Which Renders Criminal Judgment void is such illegality as is contrary to principles of law as distinguished from rules of procedure.

Approved in Sache v. Wallace, 101 Minn. 172, 118 Am. St. Rep. 612, 112 N. W. 387, 11 L. R. A. (n. s.) 803, judgment in action to determine adverse claims to realty awarding relief beyond prayer of complaint or scope of its allegations is void.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 170, 191, 197, 198.

Effect of Excessive Sentence. See note, 45 L. R. A. 150.

31 Cal. 629–657, DOW v. GOULD AND CURRY ETC. MINING CO.

In Reviewing Grant of Nonsuit, supreme court will consider as proven every fact which evidence tended to prove and which was essential to be proven, to entitle plaintiff to recover.

Approved in Cook v. Klonos, 164 Fed. 535, 90 C. C. A. 403, applying rule in equity.

"Owner" of Property Defined.

Cited in Clark v. McClaugherty, 53 W. Va. 380, 44 S. E. 271, discussing who is owner having right to redeem for tax sale.

Right to Dividends on Transfer of Stock. See note, 45 L. R. A. 392.

Conflict of Laws as to Rights and obligations of married women. See notes, 85 Am. St. Rep. 566; 57 L. R. A. 366.

Power of Attorney by Married Woman. See note, 84 Am. St. Rep. 764, 765.

Enforceability of Contracts of Married Women outside of state in which legally made. See note, 25 L. R. A. 180.

31 Cal. 657–665, KIMBALL v. SEMPLE.

Miscellaneous.—Cited in Calderwood v. Peyser, 42 Cal. 114, 115, 117.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 32 CALIFORNIA.

32 Cal. 11–15, BEGAN v. O'REILLY.

Judgment will not be Reversed on Ground of variance between pleadings and proofs when appellant is not misled to his prejudice.

Reaffirmed in Bollinger v. Bollinger, 154 Cal. 702, 99 Pac. 199.

32 Cal. 15–23, POLACK v. McGRATH.

Party Bringing Action in Ejectment must show right of possession.

Approved in Froman v. Madden, 13 Idaho, 144, 88 Pac. 895, holding plaintiff in ejectment who established his own title, and withholding premises from him by defendant in possession, was entitled to recover.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1189, 1192.

32 Cal. 26–36, 91 Am. Dec. 554, DAVIS v. GALE.

Change of Place and Character of Use of water does not affect right of appropriator of same.

Approved in Barton v. Riverside Water Co., 155 Cal. 517, 101 Pac. 793, 23 L. R. A. (n. s.) 331, holding water company deriving water from wells could sink new wells at different point in same basin to maintain supply of water when former wells failed; Union Mill etc. Co. v. Dangberg, 81 Fed. 95, 115, holding party entitled to given quantity of water may take same at any place on stream; Farmers' etc. Irr. Co. v. Gothenburg Water Power Co., 73 Neb. 227, 102 N. W. 488, holding appropriator could extend ditch to places beyond where first use of water was made.

Nonuser of Water Right After Completion of original object of appropriation is evidence of abandonment.

Approved in Chicago etc. R. R. Co. v. Clapp, 201 Ill. 427, 66 N. E. 225, holding nonuser of right of way of railroad and removal of track shows abandonment.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

Change of Use or Channel of water appropriated. See note, 30 L. R. A. 385.

Use of Natural Stream to Convey appropriated water. See note, 51 L. R. A. 931.

Five Years' Limitations Applies to water rights.

Approved in Evans v. Ross (Cal.), 8 Pac. 90, following rule.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 717.

32 Cal. 36–39, PEOPLE v. SHABER.

Indictment for Burglary is Sufficient if in language of statute.

Approved in People v. Miles, 9 Cal. App. 317, 101 Pac. 527, holding sufficient indictment for rape in language of statute; State v. Golden, 86 Minn. 209, 90 N. W. 400, indictment for burglary for breaking into warehouse need not allege there were any goods in warehouse.

32 Cal. 40–48, PEOPLE v. ARCEO.

Court may Excuse Qualified Juror for good reason, on its own motion.

Approved in People v. Lee, 1 Cal. App. 171, 81 Pac. 970, and State v. White, 48 Or. 423, 87 Pac. 140, both following rule; The King v. Macfarlane, 7 Haw. 354, upholding right to exclude from body, without separate examination, jurors who had sat in prior parallel case; Stevens v. Union R. R. Co., 26 R. I. 106, 58 Atl. 498, 66 L. R. A. 465, error in granting peremptory challenges in excess of statutory number, in absence of showing of prejudice thereby, is not reversible.

32 Cal. 48–49, MATTER OF BROWN.

Judgment in Criminal Action is not Nullity where degree of crime is not specified in indictment, for court is presumed to have determined degree.

Approved in Ex parte Haase, 5 Cal. App. 545, 90 Pac. 948, holding court presumed to have determined degree of crime, where record does not affirmatively show contrary; Marx v. People, 204 Ill. 252, 253, 68 N. E. 437, holding court presumed to have determined age of accused as necessary to reformatory sentence when record is silent.

32 Cal. 49–55, BLAIR v. HAMILTON.

Record in Certiorari must Show Evidence to establish jurisdictional facts.

Approved in Golden Gate File Co. v. Superior Court, 159 Cal. 481, 114 Pac. 981, applying rule and granting mandamus to compel superior court to try appeal from justice court when it had jurisdiction; Thomas, Jr., v. Hawkins, 12 Cal. App. 334, 107 Pac. 581, holding evidence may be taken to establish jurisdictional facts and certified upon certiorari; Griffiths v. Justice's Court, 35 Utah, 450, 100 Pac. 1067, whether justice of peace pursued statutory mode in setting cause for trial and giving notice not reviewable on certiorari; Reymert v. Smith, 5 Cal. App. 382, 90 Pac. 471, holding on certiorari that findings do not preclude appellate court from examining record to determine jurisdictional facts.

Party Excepting to Sufficiency of Sureties on appeal bond may waive their justification.

Approved in Budd v. Superior Court of Los Angeles County, 14 Cal. App. 258, 111 Pac. 629, justification waived by failure of except-

ing party to appear at time set; La Dow v. National Bldg. etc. Co., 11 Cal. App. 309, 104 Pac. 839, holding justification waived by failure to except to surety bond given after failure of former surety to justify; Snyder v. Wooden, 11 Idaho, 156, 81 Pac. 378, justification of sureties on new bond, given in lieu of former bond, sureties on which failed to qualify, could be waived.

32 Cal. 55–60, HILL v. GRIGSBY.

Law of Foreign State in Absence of Proof is presumed to be same as that of this state.

Approved in Wilhite v. Skelton, 5 Ind. Ter. 630, 82 S. W. 935, following rule; O'Sullivan v. Griffith, 153 Cal. 507, 95 Pac. 875, holding presumption applies to statutory as well as common law.

Presumption as to Law of other states. See note, 21 L. R. A 470.

Oral Proof of Foreign Laws. See note, 25 L. R. A. 449.

How Case Determined When Proper Foreign Law not proved. See note, 67 L. R. A. 43.

32 Cal. 60–64, PEOPLE v. TI.

Objection That in Indictment for Stealing Money money is not sufficiently described must be taken by demurrer, as it is deemed waived.

Approved in Shivers v. Territory, 13 Okl. 475, 74 Pac. 902, objection that indictment was not presented in statutory mode cannot be raised for first time on appeal.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 777, 805.

32 Cal. 68–73, PEOPLE v. MANAHAN.

In Trial on Charge of Rape on Child under age of consent, evidence of acts similar to that charged is admissible.

Approved in State v. King, 117 Iowa, 490, 91 N. W. 770, holding admissible in such case evidence of a second act.

Qualification of Grand Jurors. See note, 28 L. R. A. 201.

32 Cal. 75–80, CONGER v. GILMER.

Appointment to Office is not Complete until person has received certificate of election.

Reaffirmed in Holtan v. Beck, 20 N. D. 12, 125 N. W. 1051.

32 Cal. 80–82, PEOPLE v. JONES.

On Trial of Defendant Charged With One Crime, testimony is not admissible to show he had been engaged in plans for other crimes.

Reaffirmed in State v. Berger, 121 Iowa, 587, 96 N. W. 1096.

Evidence of Other Crimes in criminal cases. See note, 62 L. R. A. 197.

32 Cal. 82–91, CORCORAN v. DOLL.

Promissory Note Which is Separate Property of wife may be sued on by her alone or by her jointly with husband.

Approved in Normile v. Wheeling Traction Co., 57 W. Va. 135, 49 S. E. 1031, 68 L. R. A. 901, in action for damages for personal injuries to wife she may or may not, at her election, join husband as coplaintiff.

32 Cal. 91–92, **PEOPLE v. MARTIN.**

Bill of Exceptions or Statement to be used on appeal must be signed and settled by trial court.

Reaffirmed in People v. Schultz, 14 Cal. App. 108, 111 Pac. 272.

32 Cal. 93–97, 91 Am. Dec. 560, **BLUMENBERG v. MYERS.**

When Lessee Holds Over and Landlord receives rent after expiration of term, a new tenancy arises by implication on same terms as original lease.

Approved in Byxbee v. Blake, 74 Conn. 610, 51 Atl. 536, 57 L. R. A. 222, following rule; White v. Sohn, 65 W. Va. 413, 64 S. E. 443, where tenant holds under lease for term of years, rent payable monthly, acceptance of monthly rent by landlord after close of term creates renewal for month only.

Landlord and Tenant. See note, 113 Am. St. Rep. 791.

Rent Period as Criterion of Term implied by holding over. See note, 25 L. R. A. (n. s.) 856, 857.

32 Cal. 98–101, **PEOPLE v. McCREA.**

Admission and Confessions of Guilt may be implied from acquiescence of accused in statements made to him by others.

Approved in People v. Ayhens, 16 Cal. App. 623, 117 Pac. 791, reaffirming rule; People v. Rollins, 14 Cal. App. 138, 111 Pac. 124, holding in trial for larceny conduct of defendant when certain letters were read to him was competent to prove admission against interest; People v. Sullivan, 3 Cal. App. 510, 511, 86 Pac. 837, admitting evidence of statements to accused on ground reply was called for; State v. Record, 151 N. C. 696, 65 S. E. 1010, statements of accused's wife made in his presence in regard to stolen property are competent against him in prosecution for larceny.

Uncontradicted Statement in Presence of accused as confession. See note, 25 L. R. A. (n. s.) 544, 551, 561, 571.

What Circumstances may be Given in evidence. See note, 97 Am. St. Rep. 783.

32 Cal. 102–105, **WILKINSON v. PARROTT.**

Exception must be Taken to Instructions of court to jury to take advantage of error on appeal.

Approved in Randall v. Freed, 154 Cal. 301, 97 Pac. 671, following rule though law now changed by statute.

Court may Refuse Continuance for absence of party unless good cause is shown.

Approved in McConnell v. Fox, 2 Cal. App. 330, 83 Pac. 260, sustaining refusal of continuance for absence of party when necessity for such absence was not shown.

32 Cal. 106–109, **WETHERBEE v. DUNN.**

Courts will Take Judicial Notice of whatever ought to be generally known within limits of their jurisdiction.

Approved in Kellog v. Finn, 22 S. D. 582, 133 Am. St. Rep. 945, 119 N. W. 547, state court will take judicial notice of inferior federal officers located within state.

32 Cal. 109–111, **REED v. CALDERWOOD.**

When Several Averments are Conjunctively Stated, a conjunctive denial does not raise an issue.

Approved in Duckworth v. Watsonville Water etc. Co., 150 Cal. 530, 89 Pac. 343, following rule.

Effect of Legal Remedy upon Equitable Jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 71.

32 Cal. 111-131, 91 Am. Dec. 566, FOX v. MINOR.

Probate Court has Chancery Jurisdiction over persons and estates of minors who have no testamentary guardians.

Approved in Foran v. Healy, 73 Kan. 641, 86 Pac. 470, holding probate courts, except as limited by statutes, have chancery jurisdiction over person and estate of lunatics.

Action to Recover Money Due Infant must be brought in name of infant by his guardian.

Approved in Meek v. Aswan, 7 Haw. 753, following rule; dissenting opinion in McGrew v. McGrew, 9 Haw. 486, majority holding bill for divorce might be prosecuted in behalf of insane person by his guardian.

Guardian cannot Dispute Legality of his own appointment in action on his bond.

Approved in Nash v. Sawyer, 114 Iowa, 745, 87 N. W. 708, applying rule to administrator.

Guardian is not Trustee of express trust.

Reaffirmed in Campbell v. Fichter, 168 Ind. 650, 81 N. E. 662.

Whatever Binds Guardian binds surety.

Approved in Bell v. Wilson, 159 Cal. 64, 112 Pac. 1103, refusal by agent of nonresident distributee to comply with decree settling his accounts and directing payment was breach of bond rendering sureties liable.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 523.

32 Cal. 131-139, MULFORD v. ESTUDILLO.

Admission of Ultimate Fact on Record dispenses with necessity to consider probative facts.

Reaffirmed in Horn v. Martinho, 7 Cal. App. 205, 94 Pac. 80.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324, 344.

32 Cal. 140-144, PEOPLE v. McGUIRE.

To Constitute a County Something More is required than defining its boundaries. A local government must be provided.

Approved in Pope v. State, 124 Ga. 804, 110 Am. St. Rep. 197, 53 S. E. 385, holding territory embraced in limits of new county did not become county until organization was perfected; Commrs. Big Horn Co. v. Woods, 18 Wyo. 332, 106 Pac. 927, statute creating and forming new county under given name out of described territory, part of existing county, is not special legislation.

32 Cal. 145-158, MENDOCINO CO. v. MORRIS.

Question of Variance Between Allegations of complaint and exhibit annexed can only be raised by special demurrer, and in absence of such complaint controls.

Approved in San Francisco Sulphur Co. v. Aetna Indemnity Co., 11 Cal. App. 698, 106 Pac. 112, following rule.

Official Bond of County Treasurer is not void because approved by county judge instead of supervisors.

Approved in Reid v. Commonwealth, 123 Ky. 245, 94 S. W. 642, upholding bond of school book publisher though not acknowledged as required before ex officio members of state board of education; Deer Lodge Co. v. United States Fidelity & G. Co., 42 Mont. 328, 112 Pac. 1064, holding defect in approval of official bond did not release surety.

Complaint on Official Bond Considered and held good as against general demurrer.

Approved in Curry v. County of Gila, 6 Ariz. 54, 53 Pac. 5, upholding complaint on bond for payment of taxes.

32 Cal. 159–160, GENELLA v. RELYEA.

Time for Appeal Runs from Entry of order for judgment on minutes, not from time of entry of judgment by clerk on judgment-book.

Approved in Brownell v. Superior Court, 157 Cal. 706, 109 Pac. 93, holding entry of decree by clerk on "rough minutes" is not official and does not start time for appeal; People v. Schmitz, 7 Cal. App. 345, 94 Pac. 410, holding appeal may be taken at any time after rendition of judgment although before entry thereof; Kinsley v. New Vulture Mining Co., 11 Ariz. 73, 90 Pac. 440, striking out cost bill filed more than ten days after date of ordering judgment.

Judgment is Duly Rendered when pronounced and ordered to be entered.

Approved in Mears v. Shaw, 32 Mont. 578, 81 Pac. 339, holding "duly given and made" not equivalent to "duly rendered."

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 627.

32 Cal. 160–166, PEOPLE v. SCHWARTZ.

Indictment for Burning Insured Building with intent to defraud insurance company should aver that such company is a corporation, if such be true, and that act was done to defraud.

Approved in Ex parte Goldman (Cal. App.), 88 Pac. 821, holding that when act may fall within definition of several offenses, purpose of act must be stated in indictment; Commonwealth v. Asherouski, 196 Mass. 345, 82 N. E. 14, holding to warrant conviction for burning insured goods, it must be proven that someone burned goods with intent to injure insurer.

Where Indictment Avers Company Injured by burning of insured property is corporation, proof of its existence as de facto corporation will support averment.

Approved in State v. Stevens, 16 S. D. 313, 92 N. W. 421, in prosecution of bank cashier for receiving deposits after insolvency under indictment alleging bank to be corporation, proof of de facto corporate existence will support allegation.

Mere Averment of Company Name in Indictment for burning insured building with intent to defraud amounts in legal sense to entire absence of any averment as to party intended to be injured.

Disapproved in People v. Mead, 200 N. Y. 16, 140 Am. St. Rep. 616, 92 N. E. 1051, holding indictment for embezzling money from "People's

Mutual Insurance Association and League" need not allege it to be corporation or association.

Crime of Arson, and who may commit same. See note, 101 Am. St. Rep. 27.

Arson in Setting Fire to one's own building. See note, 32 L. R. A. 648.

32 Cal. 166–168, **HILL v. SMITH.**

Where a Number of Persons Each Contribute a small amount to defiling stream, no one can defend on ground that his act alone did not materially affect water.

Approved in Pittsburgh etc. R. Co. v. Town of Crothersville, 159 Ind. 335, 64 N. E. 915, holding plaintiff in suit to enjoin abatement of stock-pens as nuisance could not show existence of hog-pens in immediate vicinity, from which stench arose.

Pollution of Stream by Mining. See note, 24 L. R. A. 66.

Right of Prior Appropriation of water. See note, 30 L. R. A. 673.

32 Cal. 168–171, 91 Am. Dec. 571, **MAHLER v. NEWBAUR.**

Effect of Unaccepted Tender on Lien of mortgage or pledge. See note, 33 L. R. A. 233.

32 Cal. 172–176, **ABADIE v. CARRILLO.**

Common Counts may be Used in pleading.

Approved in Miller v. Abrahamson, 9 Cal. App. 397, 99 Pac. 535, holding common count in assumpsit proper pleading for money had and received; Castagnino v. Balletta (Cal.), 21 Pac. 1098, holding assumpsit lies to recover balance due on special contract to erect building; Truro v. Passmore, 38 Mont. 550, 100 Pac. 968, common-law count for money had and received insufficient to state cause of action for fraud, where facts creating indebtedness are not alleged.

Allegation of Express Promise to pay in action on assumpsit is not essential.

Approved in Brown v. Crown Gold Milling Co., 150 Cal. 382, 89 Pac. 89, holding promise not essential in action for services; Bates v. Capital State Bank, 18 Idaho, 435, 110 Pac. 279, holding promise in terms need not be alleged when it arises by implication from facts pleaded.

When Record Does not Show What Disposition was made of demurrer, appellate court will presume it was properly disposed of.

Reaffirmed in Smith v. Clyne, 16 Idaho, 470, 101 Pac. 820.

32 Cal. 176–200, **MARSHALL v. SHAFTER.**

In Ejectment Title of Plaintiff is principal fact to be determined as ground for recovery.

Approved in Hayden v. Collins, 1 Cal. App. 262, 81 Pac. 1122, admitting evidence of plaintiff's title when complaint stated cause in ejectment; Holmes v. Salamanca Gold Min. etc. Co., 5 Cal. App. 663, 91 Pac. 162, holding under general denial in ejectment either party may show evidence of title.

Allegation in Complaint in Ejectment that plaintiff on day named "was possessed" of lands described, which premises plaintiff claims in fee simple absolute, is allegation of title in fee simple.

Approved in Dugas v. Hammond, 130 Ga. 89, 60 S. E. 269, allegations in statutory complaint for land that plaintiff "claims title" to land is equivalent of allegation of title.

Distinguished in dissenting opinion in Dugas v. Hammond, 130 Ga. 99, 60 S. E. 273, majority holding allegations in statutory complaint for land that plaintiff "claims title" to land is equivalent of allegation of title.

Averment of Wrongful Holding of premises in ejectment suit is sufficient allegation of ouster.

Approved in Moore v. Moore (Cal.), 34 Pac. 92, holding answer in ejectment denying plaintiff's right is sufficient evidence of ouster when evidence shows defendant in possession at commencement of action.

Ultimate Facts upon Which Recovery is had in ejectment—facts which if found the other way recovery must have been different—are facts in issue.

Approved in Caseday v. Lindstrom, 44 Or. 315, 75 Pac. 224, holding finding as to conveyance of land which influenced decree in divorce to be conclusive in subsequent action to recover price of land.

32 Cal. 205–208, **STORY v. ROBINSON.**

Extent of Trespasser's Liability for consequential injuries. See notes, 53 L. R. A. 628, 629.

32 Cal. 208–213, **BROOKS v. DOUGLASS.**

Where Both Issues of Law and Fact are joined in same case, it will be presumed on appeal that issue of law was first disposed of.

Reaffirmed in Smith v. Clyne, 16 Idaho, 470, 101 Pac. 820.

32 Cal. 213–216, **PEOPLE v. DICK.**

For Conviction on Circumstantial Evidence Alone, circumstances must all concur to show guilt, and be inconsistent with and exclude to moral certainty any other hypothesis.

Approved in People v. Cain, 7 Cal. App. 167, 93 Pac. 1039, instructions as to circumstantial evidence considered and held proper.

Circumstantial Evidence. See note, 97 Am. St. Rep. 776.

32 Cal. 219–230, 91 Am. Dec. 573, **FRATT v. WOODWARD.**

Law will not Declare in Favor of straight line between monuments when language of deed shows different line was intended.

Approved in Clayton v. County Court of Gilmer, 58 W. Va. 260, 52 S. E. 106, 2 L. R. A. (n. s.) 598, following rule.

Distinguished in Haskell v. Friend, 196 Mass. 203, 81 N. E. 964, holding boundary line described as running to given point, for a given distance, parallel to shore, which is curved, runs in straight line to point when curved line parallel to shore would exceed given distance.

32 Cal. 241–256, 91 Am. Dec. 577, **SHERMAN v. BUICK.**

Whether a Way be Public or Private Depends upon fact that everyone may lawfully use it, not upon the number who do use it.

Approved in Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 677, 87 Pac. 30, sustaining eminent domain for construction of spur track.

Uses for Which Power of Eminent Domain cannot be exercised. See note, 102 Am. St. Rep. 826, 827, 828.

Law Providing for Opening of Road from farm or residence of one person through land of another to public road is not taking private property for private use.

Approved in Los Angeles County v. Reyes (Cal.), 32 Pac. 234, following rule; Latah County v. Hasfurther, 12 Idaho, 804, 88 Pac. 435, holding private roads could be opened in same manner as public roads; Clark v. Mitchell County, 69 Kan. 549, 77 Pac. 286, 66 L. R. A. 965, holding void chapter 112, page 179, Laws of 1874, providing for opening private roads; Chesapeake Stone Co. v. Moreland, 126 Ky. 664, 104 S. W. 765, 16 L. R. A. (n. s.) 479, upholding act providing for taking of land for private tram road to reach railroad switches.

Constitutionality of Condemnation Proceedings to establish private road. See note, 16 L. R. A. 81.

Personal Liability of Highway Officers for acts in excess of authority. See note, 13 L. R. A. (n. s.) 233.

Courts must Look to True Object of law in passing upon its constitutionality.

Approved in State v. Bd. of Commrs. Polk Co., 87 Minn. 337, 92 N. W. 218, 60 L. R. A. 161, upholding chapter 258, General Laws of 1901, providing for drainage of wet and overflowed lands.

Whether a Given Road will Subserve Public Convenience is for legislature and not for court to determine.

Approved in Otto v. Conroy, 76 Neb. 519, 107 N. W. 753, holding county board had exclusive right to determine necessity for road, and their decision was not subject to review by courts.

Existence of Public Use as question for courts. See note, 88 Am. St. Rep. 933, 939.

Judicial Power Over Eminent Doman. See note, 22 L. R. A. (n. s.) 7, 31, 54, 99, 100, 103, 104, 106, 107, 108, 172.

32 Cal. 257–260, McGRAW v. McGLYNN.

Appeal to Federal Supreme Court from State Supreme Court is taken in time when writ of error is sued out and filed and security given within ten days from time of denying petition for rehearing.

Approved in City of Lincoln v. First Nat. Bank of Lincoln, 64 Neb. 731, 90 N. W. 877, time for error proceedings in law action began to run when motion for new trial was decided.

32 Cal. 260–265, STEWART v. THOMPSON.

Rule Limiting Actions for Fraud to three years from discovery does not apply to action to cancel conveyance which is cloud on title, although asked to be set aside on ground it was in fraud of creditor.

Approved in Ziska v. Ziska, 20 Okl. 641, 95 Pac. 256, 23 L. R. A. (n. s.) 1, setting aside fraudulent conveyance after eighteen years when plaintiff's right of action did not accrue until recovery of judgment, which was within statutory time before suit was brought.

32 Cal. 265–269, ANDERSON v. PENNIE.

A Trial is the Examination Before Competent tribunal according to law of land of facts or question of law put in issue in a cause, for purpose of determining such issue.

Approved in People v. Stokes, 5 Cal. App. 214, 89 Pac. 1000, approving definition and holding judgment not a part of the trial; State v. District Court, 32 Mont. 41, 79 Pac. 547, holding argument and submission to court of motion for judgment on pleadings on ground that defendant's answer containing new matter was admitted by failure to reply is a trial within section 1009, Code of Civil Procedure.

32 Cal. 269–280, **BEAUDRY v. VALDEZ.**

Personal Liability to Pay Assessment for local improvement. See notes, 133 Am. St. Rep. 932; 35 L. R. A. 61.

32 Cal. 280–289, **PEOPLE v. WILLIAMS.**

Court may Modify or Suspend its own rules at any time in interests of justice.

Approved in Pickett v. Wallace, 54 Cal. 148, and Chielovich v. Krauss (Cal.), 9 Pac. 946, both following rule.

Party has Right to Submit Instructions to jury at any time before leaving box in absence of court rule in regard thereto.

Distinguished in Fujise v. Los Angeles Ry. Co., 12 Cal. App. 214, 107 Pac. 321, holding submission of special interrogatories not governed by rules as to special instructions, and such cannot be refused because of late submission.

Where Additional Instruction is Desired after jury has been instructed on law on given issue, such must be requested by counsel.

Approved in People v. Smith, 3 Cal. App. 67, 84 Pac. 451, holding defendant should have requested instruction that intent to defraud was element of crime, in prosecution for obtaining money under false pretenses.

Defendant Charged With Homicide is justified if circumstances were such as to excite fears of reasonable person, and he acted under influence of such fears.

Approved in Hoard v. State, 80 Ark. 92, 95 S. W. 1004, approving instruction to same effect.

Standpoint of Determination as to Danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 536, 542, 544.

32 Cal. 289–296, **MORENHOUT v. HIGUERA.**

Judgment in Partition is Binding on all parties to the action, and bars new action.

Approved in Lorenz etc. v. Jacobs (Cal.), 3 Pac. 656, following rule.

Effect of Compulsory Partition. See note, 101 Am. St. Rep. 873.

Disputes Between Parties as to Title in action for partition may be determined therein.

Approved in Snyder v. Arn, 187 Mo. 178, 86 S. W. 199, following rule; Boca v. Anaya, 14 N. M. 393, 94 Pac. 1020, holding parties in possession under earlier Spanish grant could intervene in action for partition affecting same land pending between cotenants under later grant.

Right of One Out of Possession to partition. See note, 20 L. R. A. 629.

32 Cal. 296–302, **PEOPLE ex rel. GALVIN v. DORSEY.**

Right of Disbarred or Suspended Attorney or unlicensed person to transact legal business for another. See note, 24 L. R. A. (n. s.) 753.

32 Cal. 304–328, **QUIVEY v. GAMBERT.**

Appeal Does not Lie from Order striking out statement on motion for new trial.

Overruled in Mayer v. Superior Court, 10 Cal. App. 161, 101 Pac. 535, holding order made after judgment in action in which execution sale of money made, directing payment of money to purchaser, is appealable.

Distinguished in Desmond v. Faus (Cal.), 33 Pac. 458, holding order denying motion for new trial properly made on hearing of motion to dismiss for failure to prosecute; Descalso v. Duane (Cal.), 33 Pac. 328, sustaining order denying and dismissing motion for new trial when motion was not brought to hearing through neglect of moving party.

Miscellaneous.—Cited in Gambert v. Hart, 44 Cal. 550, 551, referring historically to principal case.

32 Cal. 328–332, **BLATNER v. DAVIS.**

Assessment on Property for Street Improvement to person by name who is not owner is void.

Approved in Houser & Haines Mfg. Co. v. Hargrove (Cal.), 59 Pac. 949, holding void sale of property for taxes when assessed jointly to several parties, of whom owner is one, under sections 3820, 3821, Political Code.

32 Cal. 332–339, **KILE v. TUBBS.**

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324.

32 Cal. 339–346, 91 Am. Dec. 589, **VALENCIA v. COUCH.**

New Trial will not be Granted where there is some evidence to sustain verdict although verdict is against weight of evidence.

Approved in Nishkian v. Chisholm, 2 Cal. App. 499, 84 Pac. 312, sustaining verdict when there was some evidence to support it.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 372, 387, 393, 397.

32 Cal. 347–353, **SAVINGS & LOAN SOCIETY v. THOMPSON.**

Publication of Summons Beginning January 10th, and ending April 9th, is for three full calendar months.

Approved in Reclamation Dist. v. McPhee, 13 Cal. App. 385, 109 Pac. 1107, holding insufficient publication for four weeks beginning March 11th, and ending April 3d; Silva v. Lopez, 5 Haw. 270, holding invalid sale under mortgage on twentieth day after first publication when mortgage required three weeks' publication; Harpold v. Doyle, 16 Idaho, 683, 688, 102 Pac. 160, 162, and Forsman v. Bright, 8 Idaho, 471, 69 Pac. 474, both holding publication for five consecutive weeks once each week to be for one month.

First and Last Days in computation of time. See note, 49 L. R. A. 219.

32 Cal. 354–365, **RONDELL v. FAY.**

Tide Lands are Those Covered and Uncovered by ordinary tides which state owns by virtue of its sovereignty.

Approved in People v. Kerber, 152 Cal. 733, 125 Am. St. Rep. 93, 93 Pac. 879, following rule.

Title to Land Between High and Low water mark. See note, 45 L. R. A. 239.

32 Cal. 365–373, WARD v. MULFORD.

State Holds in Trust for People, by virtue of its sovereignty, land covered and uncovered by ordinary tides.

Approved in People v. Kerber, 152 Cal. 733, 125 Am. St. Rep. 93, 93 Pac. 879, and Eichelberger v. Mills Land etc. Co., 9 Cal. App. 639, 99 Pac. 122, all following rule.

Title to Land Between High and Low water mark. See note, 45 L. R. A. 239.

Mexican Government Could Make Private Grants of tide lands, and when confirmed by federal government state is deprived of all title therein.

Approved in De Guyer v. Banning (Cal.), 25 Pac. 255, following rule; People v. San Francisco (Cal.), 15 Pac. 750, holding as not conclusive Mexican patent to tide lands, although confirmed by federal government, when grant described them as being above high-water mark; United Land Assn. v. Knight (Cal.), 23 Pac. 270, holding decree of district court prevails over terms of Mexican grant which it confirms, as to boundaries described therein.

State may Dispose of Tide Lands for purpose of promoting navigation or for reclamation.

Approved in Messenger v. Kingsbury, 158 Cal. 613, 112 Pac. 66, and City of Oakland v. Oakland Water Front Co., 118 Cal. 184, 50 Pac. 286, both following rule.

Right of State to Grant Tide Lands. See note, 22 L. R. A. (n. s.) 338.

32 Cal. 376–397, RACOUILLAT v. SANSEVAIN.

Right of Alien to Hold Property, both under common and civil law, was matter between alien and government alone, and could not be questioned collaterally by individuals.

Approved in Omnium Investment Co. v. North Am. Trust Co., 65 Kan. 53, 68 Pac. 1090, foreign corporation which had not filed articles with Secretary of State as required could sue for specific performance of contract of purchase of land; Louisville etc. Co. v. Mayor etc. of Nashville, 114 Tenn. 221, 84 S. W. 812, foreign corporation which had not filed articles with Secretary of State could sue for damages caused to its real property by change of grade of street.

Effect of State Constitutions and Statutes upon inheritance by or from alien. See note, 31 L. R. A. 87.

Alien's Right to Inherit. See note, 31 L. R. A. 179.

Conflict of Laws as to rights and obligations of married women. See note, 85 Am. St. Rep. 557, 573.

What is Community Property. See notes, 126 Am. St. Rep. 110; 4 Cof. Prob. 52.

32 Cal. 402–406, DOUGHERTY v. FOLEY.

Where Street Contractor Fails to Begin Work in contract time, board of supervisors may readvertise and relet contract without again taking jurisdictional steps.

Approved in Lexington v. Commercial Bank, 130 Mo. App. 694, 108 S. W. 1096, following rule.

32 Cal. 414–416, ARGENTI v. SAWYER.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324.

32 Cal. 425–431, BRUCK v. TUCKER.

Will can Only Operate upon such property as equitably belongs to testator at time of his death.

Reaffirmed in In re Tillman's Estate (Cal.), 31 Pac. 563.

32 Cal. 432–433, PEOPLE v. GOLDSTEIN.

Plea of Guilty Entered of Record is a Conviction, although judgment is never pronounced, and bars another indictment for same offense.

Approved in Marx v. People, 204 Ill. 250, 68 N. E. 437, holding plea of guilty confesses all facts charged in indictment; State v. Henson, 66 N. J. L. 607, 50 Atl. 470, holding "conviction" distinct from "judgment" and witness properly asked whether he had ever been convicted; Hollibaugh v. Hehn, 13 Wyo. 277, 79 Pac. 1047, plea of guilty admits material facts pleaded, and leaves nothing to be tried by jury.

32 Cal. 436–444, KIDWELL v. BRUMMAGIM.

Powers of Sale in Wills, and who may execute them. See note, 80 Am. St. Rep. 114, 119.

32 Cal. 467–471, BENKERT v. BENKERT.

Willful Desertion Means Intentional Desertion and does not imply malice.

Approved in Kupka v. Kupka, 132 Iowa, 192, 109 N. W. 610, and Bordeaux v. Bordeaux, 43 Mont. 111, 115 Pac. 29, both following rule.

Offer of One Spouse to Return to Other after desertion for longer period than that required to give cause of action does not defeat action unless accepted and acted upon.

Approved in Howard v. Howard, 134 Cal. 349, 66 Pac. 368, and Stoneburner v. Stoneburner, 11 Idaho, 612, 83 Pac. 941, both following rule; Walker v. Walker, 14 Cal. App. 492, 112 Pac. 481, holding evidence did not show condonation after statutory period of desertion; Bovaird v. Bovaird, 78 Kan. 319, 96 Pac. 667, holding wife not guilty of desertion because she refused to live with husband after he had been guilty of adultery with a number of other women.

Loss of Right to Divorce after it is perfected. See note, 84 Am. St. Rep. 138.

Desertion is Established by Showing That Absence of spouse commenced and continued for two years without consent and against objections of other party.

Approved in Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 Pac. 853, holding desertion sufficiently established to justify decree of divorce.

What Constitutes Desertion as ground for divorce. See note, 138 Am. St. Rep. 151, 152, 154.

Desertion as Ground for Divorce. See note, 119 Am. St. Rep. 621, 626.

32 Cal. 472–475, ROBBINS v. OMNIBUS R. R. CO.

Liability of Street Railway for passing assessment. See note, 46 L. R. A. 195.

32 Cal. 475–476, DOLL v. SMITH.

Affidavit of Service of Notice of Appeal must show personal service on attorney, or that notice was left in office with his clerk, or person in charge, or if no one was in charge, that it was left there in conspicuous place between 8 A. M. and 6 P. M.

Approved in Peter v. Kalez, 11 Idaho, 560, 83 Pac. 528, discussing sufficiency of proof of service of notice of motion for new trial.

32 Cal. 477–481, 91 Am. Dec. 595, MAYO v. AH LOY.

When Judgment is Obtained in manner prescribed by law, it is never absolutely void, but voidable or amendable on appeal.

Approved in Lemon v. Hubbard, 10 Cal. App. 475, 102 Pac. 556, holding error in judgment could be corrected on motion under section 473, Code of Civil Procedure.

32 Cal. 481–484, SEATON v. SON.

Homestead cannot be Selected from lands held in joint tenancy or tenancy in common.

Reaffirmed in Schoonover v. Birnbaum, 148 Cal. 549, 83 Pac. 999.

Distinguished in Swan v. Walden, 156 Cal. 198, 134 Am. St. Rep. 118, 103 Pac. 932, holding land held in joint tenancy by husband and wife may be impressed with homestead at instance of wife.

32 Cal. 488–492, DIMICK v. DERINGER.

Tenant is Proper Party Defendant in ejectment.

Reaffirmed in Carter v. Wing Chong Wai Co., 12 Haw. 295.

32 Cal. 493–499, EWALD v. CORBETT.

Judgment Rendered in Favor of or Against a party after his death is a nullity.

Approved in More v. Miller (Cal.), 53 Pac. 1079, holding invalid judgment rendered against administrator as such after his removal.

32 Cal. 499–529, APPEAL OF NORTH BEACH ETC. R. R. CO.

Interest in Street of Street Railroad authorized to lay track in street is an easement in the land, and company's estate in such land is real property.

Approved in Lobdell v. City of Chicago, 227 Ill. 240, 81 N. E. 361, reaffirming rule; Stockton Gas etc. Co. v. San Joaquin Co., 148 Cal. 321, 83 Pac. 57, 5 L. R. A. (n. s.) 174, holding gas company laying mains in street under franchise has easement in street which is real property; County of Santa Clara v. Southern Pacific R. R. Co., 118 U. S. 413, 6 Sup. Ct. 1132, 30 L. Ed. 118, holding fences along right of way could not be assessed by state board of equalization under law requiring assessment of roadbed and franchise, such being improvements; Consolidated Gas Co. v. Baltimore City, 101 Md. 549, 109 Am. St. Rep. 584, 61 Atl. 535, 1 L. R. A. (n. s.) 263, right of gas company, actually used, to lay mains in streets is taxable as realty; Mayor etc. v. State Board of Taxation, 66 N. J. L. 469, 49 Atl. 527, holding interest of street railway in land over which it passes taxable as realty.

Creation and Conveyance of Easements appurtenant. See note, 136 Am. St. Rep. 686.

What Constitutes Real Estate for purposes of taxation. See note, 15 L. R. A. 298.

Liability of Railway Occupying Street to assessment for improvements. See note, 15 L. R. A. (n. s.) 487.

What Use of Street or Highway constitutes additional burden. See note, 17 L. R. A. 474.

32 Cal. 530–558, **APPEAL OF PIPER.**

Statute Authorizing Board of Supervisors of San Francisco to determine what part of city will be benefited by widening street and to assess cost thereon is valid.

Approved in Wolfe v. City of Moorhead, 98 Minn. 117, 107 N. W. 730, holding municipal corporation had power to order and levy local assessment without preliminary petition by property owners affected by such improvement.

32 Cal. 565–567, **APPEAL OF LEFEVRE.**

Appeal Lies from Decision of Commissioners determining who as owner of lot shall receive compensation for widening of street.

Approved in dissenting opinion in Appeal of Houghton, 42 Cal. 68, majority holding acts of 1868 and 1870 modifying street grades in San Francisco do not allow appeal from decision of commissioners.

32 Cal. 567–569, **APPEAL OF REESE.**

Appeal Lies from Decision of Commissioners determining assessment of expenses in widening street.

Approved in dissenting opinion in Houghton's Appeal, 42 Cal. 68, majority holding no appeal lies from decision of commissioners under acts of 1868 and 1870, changing street grades in San Francisco.

32 Cal. 569–574, **WEDDERSPOON v. ROGERS.**

In Action on Note Averment in Answer that plaintiff is not owner or holder is but legal conclusion and raises no issuable fact.

Approved in Berry & Berry v. Barton, 12 Okl. 245, 71 Pac. 1082, 66 L. R. A. 513, following rule.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 552.

Sham Pleadings. See note, 113 Am. St. Rep. 644.

Miscellaneous.—Cited in dissenting opinion in McGuffin v. Coyle, 16 Okl. 702, 86 Pac. 968, 6 L. R. A. (n. s.) 524, to point that defendant, having received consideration of note, could not, in absence of fraud, question right of payees to recover.

32 Cal. 574–577, **SHRIVER v. LOVEJOY.**

Extrinsic Evidence to Show Who is Liable as maker of note. See note, 20 L. R. A. 712.

32 Cal. 578–582, **PICO v. COLIMAS.**

One Who has Easement upon Land of another may enter to keep easement in repair.

Approved in Reed v. Bd. of Park Commrs., 100 Minn. 173, 117 Am. St. Rep. 684, 110 N. W. 1121, following rule.

32 Cal. 585–589, GHIRADELLI v. BOURLAND.

Complaint in Action Against Officer and Bondsmen, which alleges only cause of action in tort against him and against sureties as signers of bond, shows misjoinder of parties.

Reaffirmed in Sanders v. Cline, 22 Okl. 164, 101 Pac. 271.

32 Cal. 590–596, MORE v. MASSINI.

Injunction Lies to Prevent Threatened Injury to real property in nature of waste.

Approved in Hutton v. Gregg, 4 Cal. App. 545, 88 Pac. 595, following rule; Pavkovich v. Southern Pacific R. R. Co., 150 Cal. 50, 87 Pac. 1100, granting injunction to prevent taking of stone from quarry for any other purpose than that stipulated in deed thereto; Phenix v. Frampton, 29 Nev. 318, 124 Am. St. Rep. 926, 90 Pac. 4, granting injunction to prevent erection of permanent building on plaintiff's land; Waskey v. McNaught, 163 Fed. 933, 90 C. C. A. 289, sustaining injunction to prevent operation pendente lite of placer mine on land in dispute on ground that injury would be irreparable; Trade Dollar Consol. Min. Co. v. Fraser, 148 Fed. 593, 79 C. C. A. 37, granting injunction to prevent encroachment on water rights of prior appropriator.

Injunction Against Trespass on realty. See note, 99 Am. St. Rep. 733, 747, 748.

32 Cal. 597–608, VASSAULT v. AUSTIN.

When Denials on Information and Belief are permissible. See notes, 133 Am. St. Rep. 107, 124; 30 L. R. A. (n. s.) 761.

32 Cal. 609–619, BARR v. SCHROEDER.

Interest of Attorney in Property is necessary to make power irrevocable, not merely interest in proceeds of sale of property.

Approved in Frink v. Roe (Cal.), 7 Pac. 484, holding evidence did not show such interest of attorney in property placed under his control as to render power irrevocable; Wilmington v. Bryan, 141 N. C. 671, 54 S. E. 545, holding employment by city of counsel to collect back taxes on percentage without limit as to time to be terminable at will of either party; State v. McCafferty, 25 Okl. 10, 105 Pac. 994, holding contract of county board with person to assist in discovery of property not listed for taxation, and to receive twenty-five per cent of all taxes so recovered as compensation, did not confer on him a power coupled with an interest which makes contract irrevocable.

Distinguished in Brown v. Skotland, 12 N. D. 451, 97 N. W. 545, where party applied for loan and in application appointed lender's agent as his attorney to execute note and mortgage, agent's death prior to acceptance of application or advancing of loan revoked power.

Revocation of Power of Attorney. See note, 110 Am. St. Rep. 857.

Void Deed cannot be Confirmed by Giving of subsequent deed for purpose of correcting mistake which rendered it void.

Approved in Bowers v. Cottrell, 15 Idaho, 240. 96 Pac. 942, following rule.

Conveyances to Persons not in Being. See note, 84 Am. St. Rep. 238.

When Broker Earns Commission. See note, 139 Am. St. Rep. 231.

Use of Fictitious Name as Affecting Validity of instrument. See note, 39 L. R. A. 424.

32 Cal. 620–632, AYRES v. BENSLEY.

Defense of Pendency of Another Action is not available, unless causes of action and plaintiffs at least are same in both actions.

Approved in Helfrich v. Romer, 16 Cal. App. 436, 118 Pac. 459, reaffirming rule; Colburn v. Dortic, 49 Colo. 95, 111 Pac. 839, holding pendency of ejectment suit in which parties were different not bar to quiet title suit; Rodney v. Gibbs, 184 Mo. 10, 82 S. W. 189, where party is plaintiff in one action and defendant in another relating to same subject matter, and sets up same matters as defense in one as for cause of action in other, plea of prior action pending is not available against defense.

Possession of Part as possession of whole. See note, 125 Am. St. Rep. 304.

32 Cal. 632–633, AYRES v. BENSLEY.

Equal Division of Justices on Question of rehearing is denial of rehearing asked for.

Approved in Luco v. De Toro, 88 Cal. 28, 25 Pac. 983, 11 L. R. A. 543, holding judgment of affirmance follows from necessity of case upon equal division of appellate court.

32 Cal. 639–654, 91 Am. Dec. 602, LOVE v. SIERRA NEVADA ETC. MINING CO.

Where Complaint on Foreclosure Avers Mortgage was executed, and also sets out copy which appears on face to be equitable mortgage, averment will be rejected as surplusage.

Approved in Horner v. Beasley, 105 Md. 196, 65 Atl. 822, holding where sealed contract was good as simple contract, seal was mere surplusage.

Imperfect Attempt to Give a Mortgage is binding in equity as mortgage.

Approved in Harrigan v. Gilchrist, 121 Wis. 360, 99 N. W. 981, following rule; Standorf v. Shockley, 16 N. D. 76, 111 N. W. 623, 11 L. R. A. (n. s.) 869, holding instrument in form chattel mortgage but evidently intended as security on realty will be construed as equitable mortgage.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 866.

32 Cal. 659–669, SEMPLE v. WRIGHT.

Defense of Res Adjudicata must be Pleaded in equity or it will be deemed waived.

Approved in Ortiz v. First Nat. Bank of Las Vegas, 12 N. M. 528, 78 Pac. 531, following rule.

Party to Action Who Consents to Judgment cannot afterward attack it collaterally.

Reaffirmed in Borden v. Graves, 20 N. D. 236, 127 N. W. 108.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 33 CALIFORNIA.

33 Cal. 11–24, 91 Am. Dec. 607, GASHWILER v. WILLIS.

Corporate Powers of Corporation can only be exercised by board of directors.

Approved in Northwestern Packing Co. v. Whitney, 5 Cal. App. 108, 89 Pac. 982, holding president of corporation has no power by virtue of his office to buy or sell property of corporation; Deepwater Council v. Renick, 59 W. Va. 350, 53 S. E. 554, holding deed, not ultra vires, executed in corporate name, under corporate seal by proper officers, and duly delivered, carries with it presumption of authority in such officers to execute it and affix corporate seal.

33 Cal. 25–31, MUDGETT v. HORRELL.

Stock-book of Corporation is not Admissible against one alleged to be stockholder to prove he is stockholder.

Approved in Chesapeake etc. Ry. Co. v. Deepwater Ry. Co., 57 W. Va. 679, 50 S. E. 906, books of corporation not admissible in its favor, in action against it by stranger, respecting title to property directly in issue, to prove acts therein recited were done in time and manner stated.

33 Cal. 38–45, MANDEVILLE v. SOLOMON.

A Constructive Trust Arises When One Takes Title to property in violation of equitable rights of another.

Approved in Ruddick v. Albertson, 154 Cal. 643, 98 Pac. 1047, holding where deed of land to trustees fails by reason of illegality of trust, legal title remains in grantor charged with resulting trust in favor of those who gave consideration for deed.

33 Cal. 45–55, 91 Am. Dec. 617, TOWNSEND v. TALLANT.

Publication for Twenty-six Days is Insufficient when order for sale requires publication for four weeks.

Approved in Silva v. Lopez, 5 Haw. 270, holding sale on mortgage on twentieth day after commencement of publication invalid when three weeks' publication was required.

Void Probate Sale cannot be Confirmed by any act of court.

Approved in Jenkins Land & Live Stock Co. v. Attwood, 80 Neb. 810, 115 N. W. 306, following rule.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 682.

Administrator Who is Also Guardian of Infant Heir cannot represent heir in proceeding to sell decedent's estate to pay debts, but guardian ad litem should be appointed.

Approved in Carraway v. Lassiter, 139 N. C. 153, 51 S. E. 971, following rule; Estate of Harris, 3 Cof. Prob. 8, where mother of minors who is their general guardian has no interest adverse to them, guardian ad litem to represent them in will contest is unnecessary; In re Wickersham's Estate (Cal.), 70 Pac. 1079, holding executors of husband's will could not represent wife in sale of community property under will.

Estoppel of Heirs to Deny Validity of administrator's sale. See note, 98 Am. St. Rep. 502.

33 Cal. 55–60, PEOPLE ex rel. ELLSWORTH v. LAINE.

If Supervisors Neglect to Divide County into election districts and to appoint board of registration, election is void.

Approved in Fitzmaurice v. Willis, 20 N. D. 382, 127 N. W. 99, Revised Codes of 1905, section 738, prohibiting reception of votes from persons not on registration list, is mandatory.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 50, 57.

33 Cal. 60–74, WILSON v. CROSS.

Rule That Appellate Court will not Grant new trial on conflict of evidence does not retain full force when all evidence was in form of depositions.

Distinguished in Rounthwaite v. Rounthwaite (Cal.), 68 Pac. 304, and Meyerink v. Barton (Cal.), 62 Pac. 506, both refusing to disturb verdict on conflicting evidence where evidence was largely in favor of depositions.

Miscellaneous.—Cited in Crisman v. Lanterman, 149 Cal. 655, 117 Am. St. Rep. 167, 87 Pac. 92, to point that rule that no presumptions will be indulged in favor of findings when all evidence was written is not well founded.

33 Cal. 74–92, MEGERLE v. ASHE.

Party may Waive Benefit of Estoppel to which he is entitled by taking issue upon the facts on which adjudication is based.

Criticised in Harding v. Harding, 148 Cal. 401, 402, 83 Pac. 436, holding judgment valid as bar to action is not waived by taking issue on the facts alleged.

33 Cal. 92–97, SITER v. JEWETT.

Admission Made in One Separate Defense Pleaded cannot destroy effect of another defense pleaded.

Approved in Johnson v. Sherwood, 34 Ind. App. 504, 73 N. E. 185, holding inconsistent defenses properly pleaded together in answer; Rudd v. Dewey, 121 Iowa, 458, 96 N. W. 974, holding qualified admission following general denial to be for purposes of pleading only and not finding at trial.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 201, 203, 205.

33 Cal. 111–117, MASTEN v. GRIFFING.

Miscellaneous.—Cited in Blumenthall v. Goodall (Cal.), 25 Pac. 132, to point that authority of agent to sell land may be revoked at any time before sale is effected.

33 Cal. 117–120, HAMER v. HATHAWAY.

Measure of Damages in Conversion is Value of property at time of conversion with interest from that date.

Approved in Austin v. Vanderbilt, 48 Or. 211, 120 Am. St. Rep. 800, 85 Pac. 521, 6 L. R. A. (n. s.) 298, following rule; Lynch v. McGhan, 7 Cal. App. 134, 93 Pac. 1044, holding interest allowed on value of converted property is in lieu of value of use; Wallingford v. Kaiser, 191 N. Y. 394, 123 Am. St. Rep. 600, 84 N. E. 295, 15 L. R. A. (n. s.) 1126, where property in custody of common carrier is converted by stranger, measure of damages is market value at destination, less cost of conveyance and selling expense.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 29.

33 Cal. 121–129, WORMOUTH v. HATCH.

Averment in Complaint not Essential to make out cause of action may be treated as surplusage and need not be answered.

Reaffirmed in Noyes v. Young, 32 Mont. 237, 79 Pac. 1065.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 554.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 591.

33 Cal. 129–134, MINTURN v. BAYLIS.

Equity will not Decree Specific Performance of uncertain contract.

Approved in Kirkpatrick v. Pettis, 127 Iowa, 612, 103 N. W. 957, refusing specific performance of contract for conveyance of land which was not clearly described and located.

When Only One of Two Defendants Appeals, judgment may be reversed as to him and allowed to stand as to other.

Approved in St. John v. Andrews Institute, 192 N. Y. 386, 85 N. E. 144, applying rule on appeal from judgment construing will.

33 Cal. 134–150, HERZO v. SAN FRANCISCO.

Municipal Corporation has Only Such Powers as are conferred by statute.

Reaffirmed in City of Arcata v. Green, 156 Cal. 763, 106 Pac. 87.

Power of Municipality to Compel Change of grade of railway in street. See note, 70 L. R. A. 850.

33 Cal. 150–157, PEOPLE v. CROCKETT.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 340.

83 Cal. 161–170, **HATHAWAY v. DAVIS.**

Undertaking on Appeal is Express Contract for direct payment of money in sense of statute relating to attachments.

Approved in State v. Brown, 208 Mo. 620, 106 S. W. 632, holding attachment bond to be agreement for payment of money within meaning of statute providing limitation of ten years on actions upon instrument in writing for payment of money; Ross v. Gold Ridge Min. Co., 14 Idaho, 694, 95 Pac. 824, holding contract in question to be for direct payment of money.

Disapproved in Ancient Order of Hibernians v. Sparrow, 29 Mont. 134, 135, 136, 101 Am. St. Rep. 563, 74 Pac. 198, 199, 64 L. R. A. 128, holding attachment could not issue in action on appeal bond.

Sureties are Liable on Appeal Bond although appeal was not taken in time and bond thus without consideration, when respondent has forborne execution on his doubtful right.

Approved in Farley v. Moran (Cal.), 31 Pac. 159, holding sureties liable on bond in condemnation proceedings although not statutory bond, when principals had entered upon the land sought to be condemned.

Attachment cannot be had on unliquidated claim for damages.

Approved in De Leonis v. Etchepare, 120 Cal. 410, 52 Pac. 719, holding attachment in action for money had and received by agent not defeated by prayer in complaint for further and equitable relief.

Attachment will not be Discharged on motion where complaint is amendable so as to state cause of action which will support attachment.

Approved in Pajaro Valley Bank v. Scurich, 7 Cal. App. 733, 95 Pac. 912, following rule; Pinkiert v. Kornblum, 5 Cal. App. 525, 90 Pac. 970, holding complaint must be amended before decision of motion to dissolve attachment, when amendment is necessary to support attachment.

When Damages are Sought by Respondent in Action on appeal bond, he must aver they were awarded by appellate court.

Approved in Buggeln v. Cameron, 11 Ariz. 212, 90 Pac. 327, holding defective complaint on injunction bond which did not aver any sum was adjudged against principal.

If Complaint on Which Attachment is Issued does not state cause of action to support attachment, but can be amended to do so, leave to amend should be given upon hearing motion to dissolve attachment.

Approved in Ross v. Gold Ridge Min. Co., 14 Idaho, 691, 95 Pac. 823, holding leave should have been given to amend complaint to support attachment.

Payment is Delivery of Money by one person from whom it is due to another to whom it is due.

Approved in Oneida Co. v. Tibbits, 125 Wis. 16, 102 N. W. 899, holding county certificates of audited expenses could not be received in payment of taxes.

83 Cal. 171–175, **PEOPLE v. EMPIRE GOLD ETC. CO.**

Dollar-marks Need not be Attached to every item in column of figures. If attached to some, all standing in same column will be considered dollars.

Approved in Swamp Land Reclamation Dist. No. 407 v. Wilcox (Cal.), 14 Pac. 846, following rule.

33 Cal. 183–202, 91 Am. Dec. 623, PIXLEY v. WESTERN PACIFIC R. R. CO.

Same Presumptions Apply to Corporations as to private persons.

Approved in Kelly v. Ning Yung Benevolent Assn., 2 Cal. App. 466, 84 Pac. 323, and Gurnsey v. Antelope Creek etc. Water Co., 6 Cal. App. 392, 92 Pac. 328, both following rule.

Corporation may Ratify Contract of employment made by president by accepting services with knowledge of terms and without disaffirmance by directors.

Approved in Brown v. Crown Gold Milling Co., 150 Cal. 387, 89 Pac. 91, holding contract of employment by corporation ratified by knowledge of terms and service and neglect to disaffirm by directors; Bank of Yolo v. Weaver (Cal.), 31 Pac. 160, holding stockholders of corporation liable for money actually borrowed and used in pursuance of resolution of board of directors not entered on minutes; Jones v. Stoddart, 8 Idaho, 218, 67 Pac. 651, holding president of business corporation had implied power to transfer negotiable paper so as to enable purchaser to take same free from equities of which he had no notice; Pac. Mill Co. v. Inman, 50 Or. 28, 90 Pac. 1101, unauthorized act of directors to increase capital stock may be ratified by corporation.

33 Cal. 202–208, McNEIL v. SHIRLEY.

Miscellaneous.—Cited in Bacon v. Davis, 9 Cal. App. 93, 98 Pac. 75, in support of proposition that each case of powers of agent under power of attorney to sell land must be decided upon its own peculiar circumstances.

33 Cal. 208–212, ROUSSIN v. STEWART.

Unless Contrary Appears from Record, it will be presumed notice of intention to move for new trial was served in time.

Reaffirmed in State v. District Court, 38 Mont. 124, 99 Pac. 141.

Miscellaneous.—Cited in Hooper v. Patterson (Cal.), 32 Pac. 514, to point that attorneys' fees cannot be recovered in action for damages on injunction bond unless they have been paid.

33 Cal. 212–215, REED v. OMNIBUS RAILROAD CO.

Action Against Railroad for Penalty imposed for charging excessive fare must be brought in justice's court.

Distinguished in Risse v. Collins, 12 Idaho, 693, 87 Pac. 1007, holding district courts have concurrent original jurisdiction with justices' courts in actions for penalty for unlawful grazing of sheep.

Purely Statutory Forfeiture can Only be Enforced in manner provided in statute creating it.

Reaffirmed in State v. Southern Ry. Co., 145 N. C. 539, 59 S. E. 585.

33 Cal. 220–230, 91 Am. Dec. 637, GREGG v. BOSTWICK.

Homestead is not Limited to Actual Dwelling-house but includes whatever is actually used as accessory thereto.

Approved in In re Allen (Cal.), 16 Pac. 319, 320, holding lot adjacent to dwelling part of homestead when used for workshop and sleeping

quarters of family; Smith v. Guckenheimer & Sons, 42 Fla. 49, 27 So. 904, upholding decree dividing building, used as rented stores below and partly as family residence above, perpendicularly to set off homestead; Calmer v. Calmer, 15 N. D. 125, 106 N. W. 686, holding store with family dwelling above and surrounding lot to be homestead; Morse v. Morris, 57 Wash. 45, 135 Am. St. Rep. 968, 106 Pac. 469, holding adjacent lots, separated by alley from residence, but used as garden, to be part of homestead.

Particular Land, and None Other, Actually Occupied by claimant at time of making declaration will be exempt.

Approved in Ball v. Houston, 11 Okl. 238, 66 Pac. 360, holding mere intention to occupy premises as homestead did not make them such; Hanley v. Hanley, 4 Cof. Prob. 474, arguendo.

Distinguished in Estate of Green, 1 Cof. Prob. 451, where testator had domicile and legal residence in California and was only temporarily in England, his widow, a resident of California, was entitled to homestead out of local property suitable for homestead.

Homestead in Respect to Quantity is unlimited.

Distinguished in Estate of Grisel, 3 Cof. Prob. 300, premises consisting of detached tracts will not be set aside as probate homestead though value of tracts does not exceed five thousand dollars.

Abandonment of Homestead. See note, 102 Am. St. Rep. 389.

Revaluation or Reassignment of Homestead for appreciation or depreciation. See note, 44 L. R. A. 401.

33 Cal. 230–237, ENRIGHT v. SAN FRANCISCO ETC. R. R. CO.

Opinion of Experts is not Admissible on sufficiency of fence to turn cattle.

Approved in Parkin v. Grayson-Owen Co., 157 Cal. 45, 106 Pac. 212, holding inadmissible expert testimony as to proper method of hitching team.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 349.

33 Cal. 237–255, TEWKSBURY v. MAGRAFF.

Whether Tenant can Dispute Landlord's Title depends upon a variety of circumstances.

Approved in Richmond v. Superior Court, 9 Cal. App. 64, 98 Pac. 58, holding action in unlawful detainer lies although defendant sets up possession under contract of purchase from plaintiff; Teich v. Arms, 5 Cal. App. 479, 90 Pac. 964, holding lessee may show landlord's title extinguished after making of lease; Scott-Hyman v. Grant, 50 Tex. Civ. 42, 114 S. W. 856, holding tenant could resist suit of landlord by interposing superior title acquired by purchase from landlord or at judicial sale; Illinois Steel Co. v. Budzisz, 139 Wis. 310, 119 N. W. 942, holding purchaser from tenant without notice of relation who holds for ten years acquires title as against landlord.

Estoppel to Dispute Landlord's Title continues until end of tenant's occupation, not merely to end of term.

Approved in Millett v. Lagomarsino (Cal.), 38 Pac. 309, and Sawyer v. Sargent (Cal.), 7 Pac. 120, both following rule.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 69, 70, 81, 95, 98, 99, 111.

Issues as to Title in Unlawful Detainer. See note, 120 Am. St. Rep. 56, 59.

Right of Tenant to Acquire Title not inconsistent with landlord's at commencement of tenancy. See note, 53 L. R. A. 937, 941.

Right of Tenant in Possession before taking lease to dispute lessor's title. See note, 1 L. R. A. (n. s.) 1183.

Findings Should Contain All Facts material to judgment.

Approved in dissenting opinion in Kerns v. Dean (Cal.), 6 Pac. 706, majority granting new trial on contradictory findings.

33 Cal. 255–265, BLUDWORTH v. LAKE.

When Patent for State Land is Issued to one not holding beneficial interest, he is trustee for one holding such estate.

Approved in Tonopah & Goldfield R. R. Co. v. Fellanbaum, 32 Nev. 295, 107 Pac. 887, following rule.

Distinguished in Blakely v. Kingsbury, 6 Cal. App. 713, 93 Pac. 132, holding trust in favor of applicant to purchase reclaimed lands who has paid in full does not arise as against state when right to convey title is attached before surveyor general, and cause has been transferred to superior court but is undecided.

Where Selection and Location of Lands Granted to state by Congress were made pursuant to legal directions, the general gift of quantity became particular gift of specific lands located, and vested perfect title to same.

Approved in State v. Tanner, 73 Neb. 119, 102 N. W. 240, holding state acquired perfect title to lieu lands selected under act of Congress.

33 Cal. 266–279, PETERSON v. HORNBLOWER.

Objection that Complaint Did not Allege that claim against estate was presented for allowance cannot be raised for first time on appeal.

Distinguished in Burke v. Maguire, 154 Cal. 463, 98 Pac. 24, holding failure to allege claim was presented to administrator subject to general demurrer.

"Forced Sale" as Used in Article II, Section 15, Constitution, means sale against will of owner.

Approved in Towle v. Towle, 81 Kan. 688, 107 Pac. 232, holding sale of homestead in partition not forced sale under section 9, article XV, Constitution.

33 Cal. 279–287, EX PARTE SCHRADER.

Municipal Corporation may Under Legislative Authority prohibit carrying on of a particular business within municipality.

Approved in Ex parte Murphy, 8 Cal. App. 443, 445, 97 Pac. 200, 201, sustaining city ordinance suppressing poolrooms.

Legislative Power Prescribes Rules of conduct for government of citizen, while judicial power punishes or redresses wrongs growing out of rules previously established.

Approved in In re O'Shea, 11 Cal. App. 575, 105 Pac. 779, holding act authorizing trial judge to make violation of racetrack law a felony or misdemeanor not delegation of legislative power.

Power to Regulate Under Police Power extends to everything expedient for preservation of public health and prevention of contagious diseases.

Approved in Goytins v. McAleer, 4 Cal. App. 657, 658, 88 Pac. 991, 992, holding police power extends to regulation of pool-selling.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 648, 657.

Power of Municipal Corporations to define, prevent, and abate nuisances. See note, 36 L. R. A. 597.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

33 Cal. 288–289, CADIZ v. MAJORS.

Equitable Title must be Pleaded to avail defendant in ejectment.

Reaffirmed in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987.

Quitclaim Deed Does not Pass Title subsequently acquired.

Distinguished in Bernardy v. Colonial etc. Mortgage Co., 17 S. D. 642, 106 Am. St. Rep. 791, 98 N. W. 167, where entryman on public land gave deed purporting to convey fee simple, subsequently acquired patent passed under deed.

33 Cal. 290–292, HEBBARD v. JEFFERSON ETC. MINING CO.

Cotenants in Mines. See note, 91 Am. St. Rep. 868.

33 Cal. 292–298, GUERIN v. REESE.

Whether a Personal Liability may be created for an assessment. See notes, 133 Am. St. Rep. 932; 35 L. R. A. 61.

Personal Liability to Pay Assessment for local improvement. See note, 35 L. R. A. 61.

33 Cal. 299–308, LEVITZKY v. CANNING.

Counsel Fees Incurred in Defending Title are proper damages against lessor who breaks covenant in lease.

Approved in Madden v. Caldwell Land Co., 16 Idaho, 72, 100 Pac. 362, 21 L. R. A. (n. s.) 332, vendee entitled to counsel fees incurred in defending his title against breach of covenant of warranty by vendor, which defeated his title.

Where There is an Issue of Fact to be Determined by jury, it is error for court to direct verdict, but if such verdict was the only one possible, error is immaterial.

Approved in White v. Hoster Brewing Co., 51 W. Va. 264, 41 S. E. 182, following rule.

Where Lessor Covenants for Quiet Possession of grantee, any disturbance of possession gives lessee right of action against lessor.

Reaffirmed in Agour v. Lewis, 15 Cal. App. 76, 113 Pac. 884.

Miscellaneous.—Cited in Mendocino Co. v. Peters, 2 Cal. App. 28, 82 Pac. 1124, to point that when denial is made on want of information and belief and defendant has means of knowledge, allegations so denied are confessed; Whalen v. Manley, 68 W. Va. 331, 69 S. E. 844, holding over and paying rent by lessee under lease for year with privilege of renewal for term, without execution of new lease or notice of election to renew, renders lessee tenant from year to year.

33 Cal. 309–310, ROHR v. McCAIG.

Where Plaintiff in Replevin Recovers only part of property sued for, court may allow him full costs.

Approved in Freed Furniture & C. Co. v. Sorensen, 28 Utah, 436, 107 Am. St. Rep. 731, 79 Pac. 569, holding costs in such case should be allowed as matter of course.

33 Cal. 310–317, GIBSON v. PUCHTA.

Rule That One's Property must be so Used as not to injure others applies to water rights for irrigation.

Approved in Anderson v. Bassman, 140 Fed. 26, holding excessive quantity of water may not be withdrawn by prior appropriator to injury of later appropriators; Hill v. Standard Min. Co., 12 Idaho, 235, 244, 85 Pac. 910, 913, holding complaint stated cause of action for injury to lands from deposit of mining waste in river; Fleming v. Lockwood, 36 Mont. 389, 122 Am. St. Rep. 375, 92 Pac. 963, 14 L. R. A. (n. s.) 628, holding owner of irrigation ditch not liable for injury due to seepage therefrom except when caused by his negligence.

Liability for Escape of Dangerous Substance stored on premises. See note, 15 L. R. A. (n. s.) 543.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 773.

33 Cal. 317, FAY v. DOMEC.

Filing of Notice of Appeal must Precede or be contemporaneous with service thereof.

Approved in State v. District Court, 34 Mont. 115, 115 Am. St. Rep. 532, 85 Pac. 872, following rule.

33 Cal. 318–323, KING v. RANDLETT.

Void Judgment of Justice Court and sale of mining claim thereunder do not show color of title in one holding adversely under assignment of constable's deed.

Distinguished in Packard v. Johnson (Cal.), 4 Pac. 634, holding decree that party's grantor was owner of some estate in land in controversy is color of title to support limitations.

Search for Lost Deed Held Insufficient to lay foundation for introduction of oral evidence of contents.

Approved in State v. Denny, 17 N. D. 529, 117 N. W. 873, holding sufficient foundation not laid for introduction of secondary evidence of contents of letter.

33 Cal. 326–333, SEARS v. DIXON.

Mortgage on Homestead if Given to Secure Loan is void, under act of 1860.

Approved in Bushnell v. Loomis, 234 Mo. 395, 137 S. W. 264, mortgagors are not estopped to sue to cancel mortgage on homestead which is void because wife was mentally incapacitated when she executed it, because suit not brought until three or four years after she regained mental capacity.

33 Cal. 334–341, CARSON RIVER LUMBER CO. v. PATTERSON.

Note Given for Release of Property Seized for Toll under void state law imposing tax on logs floated down stream into another state is without consideration and void.

Approved in Foote v. De Poy, 126 Iowa, 372, 106 Am. St. Rep. 365, 102 N. W. 114, 68 L. R. A. 302, holding void, as made under duress, contract of decrepit divorced husband conveying property for benefit of child, made to secure dismissal of suit brought by wife.

Use of Navigable Stream. See note, 70 L. R. A. 274.

33 Cal. 341-347, BREWSTER v. DE FREMERY.

Lessor is Under No Obligation to make repairs, except by virtue of express agreement to that effect.

Approved in Stevens v. Wadleigh, 6 Ariz. 357, 57 Pac. 624, and Glenn v. Hill, 210 Mo. 296, 109 S. W. 28, 16 L. R. A. (n. s.) 699, both following rule; Hatch v. McCloud River Lumber Co., 150 Cal. 113, 88 Pac. 355, holding tenant assumed risk from wire rope imbedded in premises when he took with full knowledge; Stevens v. Wadleigh, 5 Ariz. 94, 46 Pac. 71, lessor not liable for damages to lessee caused by breaking of ditch on land leased which supplied water for irrigation; Eagan v. Brewer, 9 Haw. 200, warranty not implied in lease that building leased is safe and well built; Smith v. Walsh, 92 Md. 530, 48 Atl. 93, 51 L. R. A. 772, landlord not liable for injury to tenant caused by defective balustrade in leased premises.

Implied Covenant in Lease as to Fitness of property for purpose intended. See note, 33 L. R. A. 452.

Liability of Landlord for Injury to tenant from defect in premises. See note, 34 L. R. A. 825.

Individual Liability for Falling Walls or buildings. See note, 34 L. R. A. 562.

33 Cal. 348-353, WEBSTER v. KING.

Judgment Sustained by Record will not be reversed on appeal because one of reasons on which it is based is erroneous.

Approved in Stanley v. McElrath (Cal.), 22 Pac. 674, following rule.

33 Cal. 353-356, MILLER v. MILLER.

Where Divorce is Granted for Adultery, court may award all common property to prevailing party.

Reaffirmed in Aston v. Aston, 14 Cal. App. 324, 111 Pac. 1036.

33 Cal. 356-384, HARDENBERGH v. BACON.

An Agent may not Act in Relation to the subject matter of his agency for his own benefit.

Approved in Curry v. King, 6 Cal. App. 576, 92 Pac. 665, holding fraudulent purchase of property by agent for himself by use of fictitious purported purchasers; American Circular Loom Co. v. Wilson, 198 Mass. 207, 126 Am. St. Rep. 409, 84 N. E. 137, holding employee who learned in course of employment of master's desire to purchase patent could not secretly purchase same for purpose of selling it to master at increased price.

Instance Where Partners Hold Realty as tenants in common.

Cited in Grant v. Bannister, 160 Cal. 782, 118 Pac. 256, holding deed of realty to partners individually, if unexplained, vests in them undivided interests as tenants in common.

Specific Performance of Contracts for sale of corporate stock. See notes, 135 Am. St. Rep. 699; 50 L. R. A. 513.

33 Cal. 394–399, HAWLEY v. BRUMAGIM.

Where Certificates of Corporation Stock are issued to one person and surrendered to another, to whom they had been assigned, and new certificates issued to assignee, identity of stock is not affected.

Reaffirmed in Sherwood v. Wallin, 1 Cal. App. 538, 82 Pac. 568.

33 Cal. 401–407, KOWER v. GLUCK.

Holding Over After Expiration of Lease as unlawful detainer. See note, 120 Am. St. Rep. 40.

33 Cal. 408–425, COPPINGER v. RICE.

Person Under Obligation to Pay Taxes on property cannot acquire any title thereto by tax sale.

Approved in Brooks v. Garner, 20 Okl. 257, 94 Pac. 702, following rule; Smith v. Smith, 150 N. C. 83, 63 S. E. 178, holding tenant in common could not strengthen his title to lands held in common by purchase at tax sale.

Collateral Attack on **Right** of acting administrators. See note, 81 Am. St. Rep. 543.

Effect of Tax Sale on **Land** held by life tenant. See note, 32 L. R. A. 805.

33 Cal. 425–447, 91 Am. Dec. 644, KISLING v. SHAW.

Attorney Who Bargains With Client in a matter of advantage to himself is bound to show transaction to be equitable.

Approved in Cooley v. Miller & Lux, 156 Cal. 524, 105 Pac. 986, following rule; Donaldson v. Eaton, 136 Iowa, 656, 125 Am. St. Rep. 275, 114 N. W. 21, 14 L. R. A. (n. s.) 1168, holding void contract between attorney and client for conveyance of property for securing settlement which was already effected but terms not disclosed to client; Keenan v. Scott, 64 W. Va. 144, 61 S. E. 810, holding purchase of outstanding interest by attorney to be for benefit of client.

Contracts Between Attorneys and Client. See note, 83 Am. St. Rep. 185.

Erroneous Exclusion of Evidence is not ground for reversal when such exclusion could not have injured party complaining thereof.

Approved in Union Transportation Co. v. Bassett (Cal.), 46 Pac. 911, holding harmless error in admitting hearsay testimony.

Findings upon Affirmative Case, which are necessarily complete negative to case pleaded in answer, are sufficient.

Reaffirmed in Bowers v. Cottrell, 15 Idaho, 240, 96 Pac. 943.

Rental Value of Property may be Considered to determine value of property rented.

Approved in Town of Eutaw v. Botnick, 150 Ala. 435, 43 So. 741, upholding admission of testimony as to rental value of property before and after construction of sidewalk in action for damages caused by grading for walk.

33 Cal. 448–459, MAHONEY v. VAN WINKLE.

Judgment in Ejectment is not **Estoppel** as to matters occurring after its rendition, giving defendant title.

Approved in Nemo v. Farrington, 7 Cal. App. 446, 94 Pac. 875, holding inadmissible on question of title former judgment for rents and possession; Carr v. Dist. Court of Van Buren County, 147 Iowa, 674, 126 N. W. 795, change of conditions may be considered in determining question of guilt or innocence in contempt.

Miscellaneous.—Cited in De Guyer v. Banning (Cal.), 25 Pac. 255, in discussing title to land by Mexican grant and confirmed by federal court.

33 Cal. 459–468, BOLLO v. NAVARRO.

It is Competent to Try Title in Action for partition of lands.

Approved in Snyder v. Arn, 187 Mo. 178, 86 S. W. 199, following rule; Baca v. Anaya, 14 N. M. 392, 94 Pac. 1020, holding claimants in possession under earlier Spanish grant could intervene to show title in action for partition pending between cotenants under later grant.

Right of One Out of Possession to partition. See note, 20 L. R. A. 629.

33 Cal. 468–474, BURNETT v. STEARNS.

Findings Contradictory to Admission of pleadings will not be regarded on appeal.

Approved in Lambert v. Lambert, 1 Cal. App. 115, 81 Pac. 716, following rule; Cummings v. Cummings (Cal.), 17 Pac. 445, holding decree in divorce ordering division of property must be consistent with pleadings; Gulling v. Washoe Co. Bank, 29 Nev. 277, 279, 89 Pac. 33, holding finding not properly made when no averment in pleadings on which to base it.

Failure to Deny Under Oath Execution of note annexed to complaint admits execution.

Approved in San Bernardino Nat. Bank v. Andreson (Cal.), 32 Pac. 169, following rule.

Notice of New Trial is Timely if Served within ten days after receipt of notice of filing decision except where case was tried by jury.

Approved in State v. District Court, 38 Mont. 124, 99 Pac. 141, when record is silent, notice of intention to move for new trial presumed to have been served in time.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 521.

Form of Judgment and Procedure in Case of liability to make payment in coin. See note, 29 L. R. A. 593.

33 Cal. 480–484, LEVISTON v. SWAN.

Where Judgment in Foreclosure Fails to designate defendants personally liable, but record showed who such persons were, court can amend judgment to accord with facts at any time.

Approved in Estate of Willard, 139 Cal. 503, 73 Pac. 241, 64 L. R. A. 554, holding court could amend decree by striking out void allowance to broker and insert allowance to administrator under petition and original proof.

Section 246 of Practice Act Sets Forth all requisites of judgment in foreclosure.

Approved in Hooper v. McDade, 1 Cal. App. 739, 82 Pac. 1118, holding extra-official statement of sheriff that order of sale and

decree of foreclosure are fully satisfied does not render him liable to plaintiff for full amount of judgment.

33 Cal. 495–497, BELLEAU v. THOMPSON.

Counterclaim is Cause of Action in Favor of defendant upon which he might have sued plaintiff and obtained affirmative relief.

Approved in Le Breton v. Stanley Contracting Co., 15 Cal. App. 432, 114 Pac. 1029, in action by bank receiver on note executed by defendant to bank, defendant cannot set off check drawn by depositor which had not been presented to nor accepted by bank.

33 Cal. 497–503, BARBER v. REYNOLDS.

Amended Complaint may be Filed in support of injunction already granted.

Approved in County of Tehama v. Sisson, 152 Cal. 179, 92 Pac. 69, Collins v. Gray, 3 Cal. App. 726, 86 Pac. 985, and Shipman v. Superior Court (Cal.), 12 Pac. 788, all following rule.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 128.

Amended Complaint Supersedes the original complaint.

Approved in Lane v. Choctaw Okl. etc. R. Co., 19 Okl. 328, 91 Pac. 884, following rule; Link v. Jarvis (Cal.), 33 Pac. 207, holding amended complaint relates back to time of filing original complaint when it does not bring in new parties or state new cause of action.

Relation of New Pleadings to statutes of limitations. See note, 3 L. R. A. (n. s.) 268, 269.

Miscellaneous.—Miscited in Le Breton v. Stanley Contracting Co., 15 Cal. App. 432, 114 Pac. 1029, for preceding case.

33 Cal. 505–515, SHARP v. DAUGNEY.

Collateral Attack on Judgment can only be sustained when judgment is void on its face.

Approved in Emery v. Kipp, 154 Cal. 85, 129 Am. St. Rep. 141, 97 Pac. 19, 19 L. R. A. (n. s.) 983, following rule.

33 Cal. 515–521, 91 Am. Dec. 653, HARLAN v. PECK.

Action cannot be Maintained to Recover Realty sold by executor after three years from sale whether sale be void or valid.

Approved in O'Keefe v. Behrens, 73 Kan. 477, 85 Pac. 558, 8 L. R. A. (n. s.) 354, following rule.

Effect of Void Proceedings for Sale of Realty to start statute running in favor of purchaser in possession. See note, 8 L. R. A. (n. s.) 355.

33 Cal. 522–525, HALL v. BARK EMILY BANNING.

Order Granting or Denying New Trial will not be disturbed where evidence is conflicting.

Reaffirmed in Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486.

Inadequacy of Damages as Ground for setting aside verdict. See note, 47 L. R. A. 33, 38.

33 Cal. 549–557, WETHERBEE v. CARROLL.

Stipulation to Correctness of Transcript does not preclude respondent from denying correctness or sufficiency of bill of exceptions.

Reaffirmed in Carver v. San Joaquin Cigar Co., 16 Cal. App. 765, 118 Pac. 94.

33 Cal. 557–608, 91 Am. Dec. 657, PINKERTON v. WOODWARD.

Distinction Between Inn and Boarding-house is that keeper of latter is at liberty to choose his guests.

Approved in Atlantic City v. Hemsley, 76 N. J. L. 356, 70 Atl. 323, reaffirming rule; Holstein v. Phillips, 146 N. C. 370, 59 S. E. 1039, holding summer resort to be inn, and keeper liable for loss of guest's property, although she had contracted for board by the week.

Who are Guests at Inn. See note, 105 Am. St. Rep. 939.

An Inn is a Public Place of entertainment for all travelers who chose to visit.

Approved in Judell v. Goldfield Realty Co., 32 Nev. 351, 108 Pac. 457, corporation authorized to do general hotel business may take over catering business of one operating cafe in hotel building.

Furnishing Food to Guests as Essential characteristic of hotel or inn. See note, 17 L. R. A. (n. s.) 1261.

Innkeeper is Bound to Safely Keep property of guests.

Approved in Clancy v. Barker, 71 Neb. 87, 115 Am. St. Rep. 559, 98 N. W. 442, 69 L. R. A. 642, holding innkeeper liable for trespass committed on guest by servant of inn, whether or not done while in discharge of duty.

Liability of Innkeepers for Injury to, or loss of, guests' property. See note, 99 Am. St. Rep. 578, 590.

33 Cal. 620–631, BELL v. ELLIS.

Mere Fact That Purchaser is Insolvent and does not reveal the fact when sale is made on credit does not render it void.

Approved in Slayden-Kirksey Woolen Mills v. Weber, 46 Tex. Civ. 438, 102 S. W. 474, following rule.

Fraud in Obtaining Credit. See note, 14 L. R. A. 265.

Solvency of Trader Does not Depend upon simple question whether his assets at alleged date will or will not satisfy all demands against him, due and to become due.

Approved in Brenton v. Peck, 39 Tex. Civ. 228, 87 S. W. 901, mere refusal of corporation to pay debts not ground for appointing receiver.

Goodwill of Trade is Probability That Business will continue in future as in past.

Approved in Millspaugh Laundry v. First Nat. Bank, 120 Iowa, 5, 94 N. W. 263, approving definition of goodwill.

33 Cal. 641–649, HARPER v. LAMPING.

Judgment Winding Up Partnership may Make division of property in kind if fair to all parties as sale and division of proceeds.

Approved in Ruggles v. Buckley, 158 Fed. 957, 86 C. C. A. 154, holding division of stock held in partnership properly made in specie on winding up partnership.

While Cross-examination cannot Go Outside Subject Matter of direct examination, it may be allowed very free range within it.

Approved in Taggart v. Bosch (Cal.), 48 Pac. 1094, following rule.

33 Cal. 650–658, WENDT v. ROSS.

Objection for Misjoinder of Parties plaintiff is waived where not taken by answer.

Reaffirmed in Russ v. Tuttle, 158 Cal. 231, 110 Pac. 814.

Creditor cannot Change Application of payment without consent of debtor.

Reaffirmed in Harrison v. Woodward, 11 Cal. App. 21, 103 Pac. 936.

Application of Payments. See note, 96 Am. St. Rep. 52, 75.

33 Cal. 658–668, ABILA v. BURNETT.

Executor is Entitled to Costs of Litigation on will contest.

Approved in Estate of Chittenden, 1 Cof. Prob. 2, allowing executor counsel fees for probate of will.

Counsel Fees cannot be Allowed successful litigant in contest over probate of will.

Approved in Bowman v. Bowman, 27 Nev. 419, 76 Pac. 636, following rule.

Authority of One of Several Executors or administrators. See notes, 127 Am. St. Rep. 383; 5 Cof. Prob. 379.

Specific, Demonstrative and General Bequests. See note, 140 Am. St. Rep. 611.

Liability of Coexecutor for Default of one permitted to manage estate. See note, 11 L. R. A. (n. s.) 299.

33 Cal. 668–676, BERNAL v. GLEIM.

Color of Title is That Which Law will consider prima facie good title, but which does not in fact amount to title.

Approved in United States v. Cameron, 3 Ariz. 107, 21 Pac. 179, holding claim and color of title must be based on paper title.

Sheriff's Deed Executed Before Expiration of redemption time is void and possession thereunder is without color of title.

Distinguished in Packard v. Johnson (Cal.), 4 Pac. 635, holding decree adjudging party's grantor had some estate in land in controversy shows color of title.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1215.

33 Cal. 678–686, PECK v. STRAUSS.

Irregularity in Mode of Service of Summons is merely ground for motion to set aside summons.

Approved in Sodini v. Sodini, 94 Minn. 303, 110 Am. St. Rep. 371, 102 N. W. 862, upholding, on collateral attack, default judgment, when return showed name of defendant in summons was not true name but an alias.

33 Cal. 690–694, KILLEY v. WILSON.

Possession With Claim of Title is Notice to purchaser to put him on inquiry as to possessor's rights.

Distinguished in Womble v. Wilbur, 3 Cal. App. 542, 86 Pac. 919, holding bona fide purchaser from grantee in possession under escrow arrangement for delivery of deed to grantee or assigns is not chargeable with notice of prior unrecorded agreement of grantee to pay interest.

Surrender and Destruction of Deed does not revest title in grantor.

Approved in Miser Gold Mining etc. Co. v. Moody, 37 Colo. 316, 86 Pac. 337, holding where deed to corporation was returned to grantors for correction, he held such deed in trust for grantee.

Effect of Destruction or Cancellation, or redelivery to grantor for that purpose, **of delivered but unrecorded deed.** See note, 18 L. R. A. (n. s.) 1170.

Effect of Possession of real property as notice. See notes, 104 Am. St. Rep. 335; 13 L. R. A. (n. s.) 81.

Effect of Legal Remedy upon Equitable Jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 56.

33 Cal. 694–697, CAREY v. PHILADELPHIA ETC. PETROLEUM CO.

In Action Against Private Corporation on contract made by person in its behalf, purporting to act as its agent, parol is admissible to show person was authorized to act as its agent.

Approved in Judell v. Goldfield Realty Co., 32 Nev. 359, 108 Pac. 458, where corporation which took over business of another held out secretary as authorized to make settlements with creditors of latter and corporation accepted benefits of contracts so made, third persons could enforce note made by secretary in name of corporation in payment of claim.

Private Corporations have Same Powers as natural persons with regard to appointment of agents and making contracts, unless limited by charter.

Approved in Colpe v. Jubilee Min. Co., 2 Cal. App. 397, 84 Pac. 325, holding appointment of superintendent of mine ratified by silence of directors who had full knowledge of his acting as such.

Account Stated Alters Nature of Original Indebtedness, and constitutes new promise of undertaking.

Approved in Naylor v. Lewiston etc. Ry. Co., 14 Idaho, 804, 96 Pac. 578, action may be maintained on account stated without proving original items.

An Action on an Account Stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties.

Distinguished in Kearney v. Bell, 160 Cal. 670, 117 Pac. 928, in action on account stated, defendant may, under proper pleading, show assent thereto was procured by fraud.

33 Cal. 698–703, HOOD v. HAMILTON.

What is Community Property. See note, 126 Am. St. Rep. 118.

Real Property Granted by Government to citizen as separate or community property. See note, 96 Am. St. Rep. 916.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 34 CALIFORNIA.

34 Cal. 11–14, FRISBIE v. FOGARTY.

Writ of Assistance will Issue in Foreclosure against all defendants served and included in decree.

Approved in Fox v. Stubenrauch, 2 Cal. App. 93, 83 Pac. 84, holding writ of assistance will issue against any defendant named in judgment; dissenting opinion in Anderson v. Thompson, 3 Ariz. 69, 20 Pac. 805, majority holding writ of assistance lies in favor of purchaser at foreclosure sale to remove claimants under homestead law when they had disclaimed all right and had been dismissed from suit.

34 Cal. 18–25, FRIEDLANDER v. LOUCKS.

Jurisdictional Facts in Insolvency Proceedings are petition setting forth state of facts to bring case within statute and publication of notice to creditors.

Approved in Newlove v. Mercantile Trust Co., 156 Cal. 665, 105 Pac. 975, holding failure to include in inventory certain real property of insolvent did not affect jurisdiction of court when questioned on collateral attack.

34 Cal. 25–28, OLIPHANT v. WHITNEY.

Where Demurrer is Filed Party cannot be in Default until it is disposed of.

Approved in Smith v. Clyne, 16 Idaho, 468, 101 Pac. 819, following rule; Dible v. Hanson, 17 N. D. 23, 114 N. W. 372, holding void default judgment entered by clerk without order.

34 Cal. 28–36, SOLOMON v. REESE.

Ad Damnum Clause is Test of Jurisdiction of appellate court.

Approved in Rubio Canyon etc. Assn. v. Everett, 154 Cal. 31, 96 Pac. 812, holding appellate court has jurisdiction of appeal from judgment for title to pipe-line and damages for injury thereto of one hundred dollars, although plaintiff had parted with his interest in the pipe-line before appeal.

34 Cal. 39–48, NUDD v. THOMPSON.

Admission in One of Several Answers is not available in proof of issues raised by others.

Reaffirmed in The Snipsic Co. v. Smith, 7 Cal. App. 151, 93 Pac. 1035.

If Answer Contains Denial of Material Facts alleged, plaintiff is not entitled to judgment on pleadings even though entire cause of action is confessed in special defense.

Approved in Thomas v. Ray, 48 Colo. 427, 110 Pac. 79, following rule; Casci v. Ozalli, 158 Cal. 283, 110 Pac. 933, applying rule in quiet suit in which allegations of ownership and possession were specifically denied in answer.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 198, 204.

Miscellaneous.—Cited in Wendling etc. Co. v. Glenwood etc. Co., 153 Cal. 416, 95 Pac. 1031, to point that in action for conversion of personal property evidence of fraud is admissible without allegation thereof in complaint.

34 Cal. 48–60, 91 Am. Dec. 672, MAYNARD v. FIREMAN'S FUND INS. CO.

Directors of Corporation are Deemed to be mind and soul of corporate entity, and motives of directors when material to fact in issue are to be imputed to corporation.

Approved in Lowe v. Yolo County etc. Water Co., 157 Cal. 511, 512, 108 Pac. 300, 301, holding declarations of president and general manager of corporation admissible as showing intent and motive of corporation in illegally refusing to furnish water.

Liability for Inducing Breach of contract. See note, 21 L. R. A. 235.

Liability of Principal for unauthorized acts of agent. See note, 88 Am. St. Rep. 794.

Corporate Liability for Libel and Slander. See note, 115 Am. St. Rep. 722.

Whether Article Susceptible of Libelous Meaning is rendered nonlibelous by fact that it would not be understood in libelous sense by plaintiff's acquaintances. See note, 18 L. R. A. (n. s.) 622.

34 Cal. 63–76, 91 Am. Dec. 681, RICHARDSON v. KIER.

Owner of Ditch is Liable for Injuries due to his negligent use of ditch.

Approved in Bacon v. Kearney Vineyard Syndicate, 1 Cal. App. 176, 82 Pac. 85, following rule.

Use of Natural Stream to Convey appropriated water. See note, 51 L. R. A. 931.

34 Cal. 79–81, PARROTT v. DEN.

Judgment by Default will not be Opened unless it appears prima facie that judgment as it stands is unjust.

Approved in California Casket Co. v. McGinn, 10 Cal. App. 9, 100 Pac. 1079, holding erroneous order setting aside default judgment; Donlan v. Thompson Falls etc. Min. Co., 42 Mont. 267, 112 Pac. 448, defendant not entitled to have default set aside when affidavit failed to show valid defense on merits; Pearce v. Butte Elec. Ry. Co., 40

Mont. 324, 106 Pac. 564, refusing to open default when answer tendered is mere denial.

34 Cal. 81–90, DAVIS v. MITCHELL.

Maker of Note cannot Defend on Note against purchaser at execution sale from payee that it was given as part of transaction in fraud of payee's creditors.

Approved in Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486, holding right of action could not arise against partner in fraud.

Liability of Promissory Note to attachment or execution. See note, 14 L. R. A. (n. s.) 1235.

34 Cal. 90–92, BARSTOW v. NEWMAN.

Party may be in Possession of Land without personal residence thereon.

Approved in Moore v. Moore (Cal.), 34 Pac. 91, following rule; Johnston v. Abuquerque, 12 N. M. 28, 72 Pac. 11, holding inclosure of land followed by neglect to maintain fences did not show such possession as to entitle claimant to benefit of statute of limitations.

Errors of Law Relied on in Motion for new trial must be particularly specified in the statement.

Reaffirmed in Chase v. Alaska F. & L. Co., 2 Alaska, 84.

34 Cal. 92–100, LANGENOUR v. FRENCH.

Statutes Should be so Construed as to give some effect, if possible, to every part.

Approved in Edwards v. Sweigert, 15 Cal. App. 507, 115 Pac. 258, following rule; Primm v. Superior Court, 3 Cal. App. 212, 84 Pac. 788, holding sections 553 and 946, Code of Civil Procedure, allow attachment to continue in force pending plaintiff's appeal from judgment in favor of defendant.

34 Cal. 100–109, KING v. DAVIS.

Where Sufficiency of Pleading to Raise particular issue is not objected to, and evidence is introduced and such issue found upon, question of sufficiency of pleading cannot be raised on appeal.

Approved in Gervaise v. Brookins, 156 Cal. 112, 103 Pac. 333, holding that finding of fact is sufficient showing that that issue was raised.

34 Cal. 109–122, 91 Am. Dec. 685, NEVADA WATER CO. v. POWELL.

Change of Use or Channel of water appropriated. See note, 30 L. R. A. 387.

34 Cal. 125–136, GAY v. MOSS.

Findings of Fact Unsupported by Evidence cannot be questioned on appeal when no motion was made for new trial and findings were not excepted to in court below.

Approved in dissenting opinion in Kerns v. Dean (Cal.), 6 Pac. 706, majority granting new trial on ground that facts were not properly found, although appellant did not move for new trial.

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 745, 751, 771.

34 Cal. 145–149, MOORE v. WADDLE.

In Declaring on a Specialty, consideration need not be alleged.

Approved in Alaska Salmon Co. v. Standard Box Co., 158 Cal. 576, 112 Pac. 458, averment in complaint in action for damages for failure to deliver goods contracted for, that plaintiff had always been ready and willing to receive goods and to pay for them as per contract, is sufficient allegation of consideration in absence of demurrer.

34 Cal. 153–164, GAY v. WINTER.

Special Damages must be Pleaded.

Approved in Razzo v. Varni (Cal.), 21 Pac. 763, following rule.

In Action for Wrongful Death, where there is no proof of conduct of deceased, jury may infer ordinary care and diligence on his part.

Approved in Ames v. Waterloo & Cedar Falls R. T. Co., 120 Iowa, 658, 95 N. W. 166, following rule; Pittsburgh, Cincinnati etc. Ry. Co. v. Parish, 28 Ind. App. 200, 91 Am. St. Rep. 120, 62 N. E. 518, holding slight positive testimony supported conclusion that person killed did not contribute to result.

Distinguished in Wright v. Boston & Maine R. R. Co., 74 N. H. 133, 124 Am. St. Rep. 949, 65 Atl. 690, 8 L. R. A. (n. s.) 832, where one killed at crossing was active in bringing about dangerous situation, absence of evidence of what he did at time could not be supplied by conjecture that he on instinct exercised due care; Shumms v. Rutland, 81 Vt. 202, 69 Atl. 950, 19 L. R. A. (n. s.) 973, holding there was no presumption that deaf person killed at crossing exercised due care.

Presumption of Exercise of Care. See notes, 116 Am. St. Rep. 113, 114; 16 L. R. A. 267; 4 L. R. A. (n. s.) 344.

Sham Pleadings. See note, 113 Am. St. Rep. 643.

34 Cal. 165–167, ALLEN v. MARSHALL.

Statute of Limitations is Stopped by Filing Complaint and amendment relates back to date of filing.

Approved in Link v. Jarvis (Cal.), 33 Pac. 207, following rule.

Relation of New Pleadings to statutes of limitations. See note, 3 L. R. A. (n. s.) 269.

34 Cal. 167–175, HALLOCK v. JAUDIN.

Failure to Plead to Complaint Stating cause of action admits it to be true.

Approved in Randall v. Sanders, 71 Ark. 610, 77 S. W. 56, upholding judgment on default.

Judgment by Default is Final Judgment and there is no distinction between such and judgment after trial as to right of appeal.

Approved in Oregon R. & Nav. Co. v. McCormick, 46 Wash. 49, 89 Pac. 187, holding owner could appeal from default judgment fixing compensation for land taken by eminent domain for error in summoning jury to fix compensation.

Denied in Luce v. Chin Wa, 5 Haw. 630, holding no appeal lies from judgment by default.

Revenue Stamp Forms No Part of promissory note.

Approved in Beer v. State, 42 Tex. Cr. 505, 96 Am. St. Rep. 610, 60 S. W. 963, following rule.

Effect of Omission to Stamp an Instrument or to cancel stamps. See notes, 84 Am. St. Rep. 192; 48 L. R. A. 308, 309, 317, 319.

Miscellaneous.—Cited in Santa Rosa Bank v. Paxton, 149 Cal. 198, 86 Pac. 194, to point that written instrument upon which cause of action is founded may be pleaded by setting forth substance and effect, or copying in complaint, or by attaching copy to complaint with reference thereto.

34 Cal. 176–178, PEOPLE v. HOY YEN.

When Evidence has been Improperly Admitted on criminal trial and is struck out by court and jury instructed to disregard it, the error is cured.

Reaffirmed in People v. Herges, 14 Cal. App. 275, 111 Pac. 624.

Admissibility of Evidence Obtained by Aid of involuntary or inadmissible confession. See note, 53 L. R. A. 403, 408.

34 Cal. 181–182, PEOPLE v. HAWKINS.

Receiving Stolen Goods is a Different Offense from being accessory after fact.

Approved in Ex parte Goldman (Cal.), 88 Pac. 821, holding indictment charging accused with concealing commission of felony does not charge him with being accessory after fact.

34 Cal. 189–190, PEOPLE v. AH KIM.

Where Defendant was Indicted Under False Name and tried under true name, verdict by jury under false name is not open to doubt as to party intended.

Approved in Spofford v. Rhode Island Suburban R. Co., 29 R. I. 36, 69 Atl. 3, upholding verdict when rendered by mistake in name of company first sued, when another company had been joined as defendant and had admitted acts charged as negligence, and trial was in fact as to its negligence.

34 Cal. 191–211, PEOPLE v. CRONIN.

Indictment is Sufficient if It Alleges All Acts or facts which have been used by legislature in defining particular offense charged.

Approved in State v. Sly, 11 Idaho, 112, 113, 115, 80 Pac. 1126, 1127, holding indictment for murder sufficiently alleged death.

Charge as to Credibility of Defendant's Testimony in criminal trial considered and held correct.

Approved in People v. Crowl (Cal.), 34 Pac. 861, approving charge; People v. Ryan, 152 Cal. 368, 92 Pac. 855, approving charge as to weight to be given to defendant's testimony in his own behalf; People v. Hill, 1 Cal. App. 418, 82 Pac. 400, holding correct charge given as to weight of defendant's evidence; Robertson v. Territory of Arizona, 188 Fed. 787, upholding instruction in murder case in which accused testified that if his statements were convincing, jury could receive and act upon them, and if not they could reject them; State v. Bartlett, 50 Or. 443, 444, 126 Am. St. Rep. 751, 93 Pac. 244, disapproving charge as to credibility of defendant's testimony in criminal trial as seeming to leave implication it was incumbent on jury to consider defendant's testimony false.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 809, 818.

Criticised in People v. Maughs, 149 Cal. 262, 86 Pac. 191, holding erroneous instruction that where defendant offers himself as witness, it is proper, in determining his credibility, to consider consequences, inducements, and temptations which would ordinarily influence person in his situation.

Circumstantial Evidence is Sufficient for conviction if it is such as to satisfy jury of defendant's guilt beyond all reasonable probabilities.

Approved in People v. Daniels (Cal.), 34 Pac. 234, following rule; People v. Taggart, 1 Cal. App. 424, 82 Pac. 396, holding correct, instruction given as to circumstantial evidence in language used in leading case; People v. Dole (Cal.), 51 Pac. 946, holding correct charge that where evidence is largely direct and positive and circumstantial evidence is not inconsistent therewith, jury must convict.

Circumstantial Evidence. See note, 97 Am. St. Rep. 776, 800, 801.

34 Cal. 211–218, PEOPLE v. NICHOL.

Where Killing is Intentional, Deliberate, and premeditated, it is murder in first degree.

Approved in People v. Ye Foo, 4 Cal. App. 739, 89 Pac. 453, following rule; Eytinge v. Territory, 12 Ariz. 141, 100 Pac. 446, holding murder by poison to be in first degree; Rhea v. State, 63 Neb. 480, 88 N. W. 795, holding homicide committed during robbery to be murder in first degree.

Declaration of Degree of Murder in indictment is mere surplusage.

Reaffirmed in State v. Noah, 20 N. D. 292, 124 N. W. 1126.

Where Defendant was Charged With Murder in second degree, refusal of instruction that he could not be found guilty in first degree is not prejudicial error when jury returned verdict in second degree.

Approved in Loudenback v. Territory, 19 Okl. 201, 91 Pac. 1031, where defendant was on trial for higher degree of crime and court correctly instructed jury as to lower degree, and jury returned verdict in lower degree, defendant cannot complain.

There Need be No Appreciable Time Between Intent to kill and act to constitute murder in first degree.

Reaffirmed in State v. Prolow, 98 Minn. 453, 108 N. W. 875.

When Jury Could Find Defendant Guilty of Murder in first or second degree, failure to designate degree renders verdict uncertain.

Distinguished in State v. McDonald, 16 S. D. 83, 91 N. W. 448, holding verdict of guilty as charged sufficiently indicated degree where it could be gathered from information.

Instruction as to Killing in Self-defense considered and approved.

Approved in Wilson v. Territory, 7 Ariz. 51, 60 Pac. 698, approving same instruction.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 465.

34 Cal. 218–224, PEOPLE v. AH HOW.

Power of Court to Dissolve Trust. See note, 18 L. R. A. 777.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 833.

34 Cal. 231–235, 91 Am. Dec. 692, LEVARONI v. MILLER.

Pollution of Stream by Mining. See note, 24 L. R. A. 64.

34 Cal. 235–242, McKINNEY v. TUTTLE.

Mutual Mistake of Defendants in Regard to retention of counsel is ground for setting aside default.

Approved in Barto v. Sioux City Electric Co., 119 Iowa, 185, 93 N. W. 270, following rule; Farmers' Exchange Bk v. Trester, 145 Iowa, 670, 124 N. W. 795, holding mistake between attorney and counsel as to looking up evidence ground for setting aside default.

34 Cal. 242–245, PEOPLE v. STIEKMAN.

Chicken-house is "House" Within Meaning of statute defining burglary.

Approved in Gunter v. State, 79 Ark. 434, 116 Am. St. Rep. 85, 96 S. W. 182, following rule.

34 Cal. 246–248, HIMMELMAN v. OLIVER.

Board of Supervisors of San Francisco may Readvertise for bids when contractor has failed to perform work, without repeating steps necessary to obtain jurisdiction.

Approved in Lexington v. Commercial Bank, 130 Mo. App. 694, 108 S. W. 1096, on failure of lowest bidder to enter into contract for street work council may readvertise for bids.

Implied Right to Interest on Taxes or assessments. See note, 6 L. R. A. (n. s.) 695.

34 Cal. 254–258, CURREY v. ALLEN.

Where Land is Purchased in Name of One Person and consideration paid by another, a trust results in favor of one paying the consideration.

Approved in Zenda Mining & Milling Co. v. Tiffin, 11 Cal. App. 65, 104 Pac. 12, following rule; Mallagh v. Mallagh (Cal.), 16 Pac. 537, following rule and holding that consideration need not be money.

34 Cal. 258–265, GLEASON v. WHITE.

Claim of Surviving Partner in Partnership Matters cannot be presented to administrator of estate of deceased partner until affairs of partnership are wound up.

Approved in McKay v. Joy (Cal.), 9 Pac. 942, holding surviving partner cannot bring suit against administrator of deceased partner's estate without first presenting account to administrator; Foss v. Dawes, 72 Neb. 609, 101 N. W. 238, contribution for payment of partnership debts cannot be enforced until there is final settlement of partnership affairs.

Contingency of Claim as Affecting Limitation of time for presentation. See note, 58 L. R. A. 89.

34 Cal. 265–269, WHEELOCK v. WARSCHAUER.

Acquisition of Adverse Title as Defense to unlawful detainer. See note, 120 Am. St. Rep. 58.

Effect of Judgment in Ejectment against tenant upon landlord not a party, or vice versa. See notes, 112 Am. St. Rep. 28; 26 L. R. A. (n. s.) 507.

34 Cal. 270–273, HESS v. WINDER.

When Title to Mining Claim is in Litigation, injunction may be granted to preserve property pending litigation.

Reaffirmed in Safford v. Flemming, 13 Idaho, 275, 89 Pac. 828.

Injunction Lies to Preserve Mining Claim when title is in litigation.

Approved in Bullard v. Kempff, 119 Cal. 13, 50 Pac. 781, holding preliminary injunction against removal of bulkhead on boundary of lots should be allowed to stand during trial of action to enjoin removal.

34 Cal. 273–277, WEBSTER v. BYRNES.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 60.

34 Cal. 281–284, HASKELL v. BARTLETT.

Implied Right to Interest on Taxes or assessments. See note, 6 L. R. A. (n. s.) 695.

34 Cal. 284–292, SHARP v. CONTRA COSTA CO.

County cannot be Sued by Creditors, since it is a part of state government.

Approved in People v. San Joaquin Valley Agricultural Assn., 161 Cal. 806, 91 Pac. 744, holding property of district agricultural association organized under act of April 15, 1880, cannot be taken upon execution by its creditors.

34 Cal. 293–301, JOHNSON v. LAMPING.

Garnishment of Unliquidated Claims. See note, 59 L. R. A. 357, 361.

34 Cal. 302–307, 91 Am. Dec. 695, BRUSIE v. GRIFFITH.

Team of Teamster is not Exempt from Execution when not used as principal mode of making living.

Approved in Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 751, 108 Pac. 718, holding judgment debtor could not claim exemption from execution both as teamster and farmer; Howell v. Boyd, 2 Cal. App. 490, 84 Pac. 317, holding exemption cannot be claimed as farmer after retirement from actual pursuit of that occupation.

As to Who are Laborers, Employees, or Servants within statutes giving them preferences. See note, 18 L. R. A. 309.

34 Cal. 307–309, PEOPLE v. STACEY.

Organization of Grand Jury. See note, 27 L. R. A. 777.

34 Cal. 309–310, PEOPLE v. FERGUSON.

Bill of Exceptions must be Settled and signed by judge.

Approved in Chandler v. State, 3 Okl. Cr. 257, 105 Pac. 376, and Bradford v. State, 3 Okl. Cr. 373, 106 Pac. 538, both following rule; People v. Schultz, 14 Cal. App. 108, 111 Pac. 272, refusing to consider record on appeal as not being properly authenticated.

34 Cal. 321–329, JOLLEY v. FOLTZ.

Jurisdiction of Justice's Court must be affirmatively shown by one relying upon its judgment.

Approved in Ferguson v. Basin Consolidated Mines, 152 Cal. 715, 93 Pac. 869, holding affirmative showing must be made that proper certificate was attached to justice's court summons served outside county to sustain claim based on default judgment; Harlan v. Glad-

ding, McBean & Co., 7 Cal. App. 53, 93 Pac. 401, holding void attachment issued by justice acting for another upon oral request.

34 Cal. 329–334, NORWOOD v. KENFIELD.

Judgment, to be Valid, must be Rendered by court of competent jurisdiction at time and place and in form prescribed by law.

Approved in Hanley v. City of Medford, 56 Or. 176, 183, 108 Pac. 190, 193, judge of one circuit court cannot call special term in another district.

Power of Officials to Act, as Determined by place of performance. See note, 33 L. R. A. 88.

View by Jury. See note, 42 L. R. A. 386.

34 Cal. 334–345, PIERCY v. CRANDALL.

Location of Boundaries. See note, 129 Am. St. Rep. 996.

34 Cal. 365–390, 94 Am. Dec. 722, ARRINGTON v. LISCOM.

Record Title is Cloud on Title acquired subsequently by limitations.

Reaffirmed in Drinkwater v. Hollar, 6 Cal. App. 122, 91 Pac. 666.

Adverse Possession for Period of Limitations gives perfect title to adverse holder.

Approved in Wutchumna Water Co. v. Ragle, 148 Cal. 764, 84 Pac. 164, holding prescriptive right in use of water acquired by adverse holding; Allen v. Allen (Cal.), 27 Pac. 32, and Green v. Thornton, 9 Cal. App. 165, 96 Pac. 385, both to point that right to redeem on mortgage given for debt is barred when debt is barred; Boe v. Arnold, 54 Or. 66, 102 Pac. 294, one claiming title by adverse possession, but recognizing superior title of government, and seeking to acquire it, may assert such title against one claiming under prior grant.

Distinguished in Goldman v. Sotelo, 8 Ariz. 91, 68 Pac. 560, holding under Arizona statutes possession under limitations must have color of title or be founded on deed to give perfect title.

Effect of Bar of Statute of limitations. See note, 95 Am. St. Rep. 672, 676.

34 Cal. 391–432, 94 Am. Dec. 742, HAHN v. KELLY.

Judgment is Void if Record Discloses lack of jurisdiction of court.

Approved in Johnston v. Southern Pacific Co., 150 Cal. 537, 89 Pac. 349, holding that when record does not show that minor over fourteen, for whom personal injury suit is brought by guardian ad litem, gave consent to appointment of such guardian, judgment in suit is void.

Affidavit and Order of Publication do not form part of judgment-roll and cannot be examined to determine validity of judgment by default.

Approved in Estate of McNeil, 155 Cal. 342, 100 Pac. 1090, following rule; Emery v. Kipp, 154 Cal. 85, 129 Am. St. Rep. 141, 97 Pac. 19, 19 L. R. A. (n. s.) 983, holding judgment quieting title against married woman under maiden name not void on face of record; Estate of Hancock, 156 Cal. 811, 134 Am. St. Rep. 177, 106 Pac. 61, holding record showing insufficient affidavit of publication in divorce renders judgment void.

Service of Process Sufficient to Constitute due process of law. See note, 50 L. R. A. 583.

Recitals in Judgment of Court of General jurisdiction are presumptive evidence of their truth.

Approved in Page v. Smith, 5 Cal. App. 385, 90 Pac. 482, applying rule, where judgment by superior court was collaterally attacked on ground of jurisdiction; Aldrich v. Barton, 153 Cal. 494, 95 Pac. 903, holding certificate of discharge from state insane hospital under section 2189, Political Code, open to collateral attack on question of jurisdiction; Livermore v. Ratti, 150 Cal. 461, 89 Pac. 330, holding recital in record settling account of guardian that notice was given by posting, it will not be presumed that jurisdiction was acquired by appearance; Seaboard National Bank v. Ackerman, 16 Cal. App. 59, 116 Pac. 93, fact that evidence, in action on burned judgment, does not show upon whom or how service of summons in original action was made, is immaterial; Guardianship of Treadwell, 3 Cof. Prob. 316, where letters of guardianship are granted by superior court of one county, order refusing to vacate same on ground that minors are nonresidents bars application for letters in another county; McKenna v. Cosgrove, 41 Wash. 337, 83 Pac. 242, holding mortgage by executrix presumed to be regularly executed under order of court; Taylor v. Huntington, 34 Wash. 460, 75 Pac. 1106, holding judgment equally entitled to credit whether jurisdiction was general or specially conferred by statute.

Legal Presumptions. See note, 106 Am. St. Rep. 687.

Judgment-roll, in Case of Default Judgment in quiet title suit, consists of summons, affidavit or proof of service, complaint with default indorsed thereon, and copy of judgment.

Approved in O'Neill v. Potvin, 13 Idaho, 725, 93 Pac. 21, following rule; Harpold v. Doyle, 16 Idaho, 686, 102 Pac. 162, holding order and affidavit for publication of summons not part of judgment-roll.

Jurisdiction of Superior Court Need not Affirmatively Appear in judgment-roll; if it does not, and contrary does not affirmatively appear, jurisdiction will be conclusively presumed.

Approved in Rice v. Bamberg, 59 S. C. 505, 38 S. E. 211, holding it error to submit to jury question of loss of proof of service of summons from record where there was no evidence of such loss, and record shows acceptance of service; Providence County Savings Bk. v. Hughes, 26 R. I. 78, 106 Am. St. Rep. 682, 58 Atl. 256, order appointing guardian on petition, which did not recite statutory ground, is subject to collateral attack, lack of jurisdiction appearing affirmatively on record; O'Neill v. Potvin, 13 Idaho, 726, 727, 728, 729, 93 Pac. 22, 23, upholding judgment on collateral attack.

Minutes of Court cannot be Used to contradict record.

Approved in Harwood v. Wentworth, 4 Ariz. 401, 42 Pac. 1030, journals of houses of legislature inadmissible to show parts of bill as passed by houses were omitted from enrolled bill signed by governor.

Miscellaneous.—Cited in Gambert v. Hart, 44 Cal. 551, referring historically to principal case.

34 Cal. 432–463, PEOPLE v. McCREERY.

Constitutional Provisions Against Double Taxation do not apply to license taxes.

Approved in Los Angeles v. Los Angeles etc. Co., 152 Cal. 767, 93 Pac. 1007, holding license not tax on property within meaning of article XIII, section 1, Constitution.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 366.

In Suit to Collect Tax on Mortgages from mortgagee defendant cannot plead that mortgagor is also taxed on the mortgaged property.

Approved in Hackfeld v. Luce, 4 Haw. 185, holding mortgages may be taxed although mortgaged property is also taxed for full value; Brooks v. Town of West Springfield, 193 Mass. 195, 79 N. E. 339, holding taxable corporation bond secured by mortgage on property already taxed.

Taxation of Mortgage and Real Estate at full value as double taxation. See note, 23 L. R. A. (n. s.) 154.

Omission of Assessor Through Mistake in fact or misapprehension of law to assess certain parcels of property does not invalidate whole assessment-roll.

Approved in Chicago & N. W. R. Co. v. State, 127 Wis. 627, 108 N. W. 576, following rule; Doty Lumber & Shingle Co. v. Lewis County, 60 Wash. 433, 111 Pac. 564, failure of assessor to assess money, on erroneous advice of attorney general, does not invalidate tax on other property.

A Tax is a Charge Levied by Sovereign Power upon property of its subject.

Approved in State v. Western & Atlantic R. R. Co., 136 Ga. 625, 71 S. E. 1058, income tax referred to in section 11 of act of 1889, to lease Western and Atlantic Railroad, is tax levied in exercise of sovereignty.

Invalidity of Exemption Clause in revenue act does not make residue of act which is complete in itself void.

Approved in Robinson v. Amita County, 2 Miss. Dec. 81, invalidity of exemption clause in tax law does not make law imposing tax void.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 309.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

34 Cal. 464–469, ESTATE OF HAMILTON.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 547.

34 Cal. 476–483, SPANAGEL v. DELLINGER.

Motion for New Trial may be Made before or after entry of judgment or making up of judgment-roll.

Reaffirmed in Hamilton v. Murray, 29 Mont. 87, 74 Pac. 77.

34 Cal. 492–503, PEOPLE v. RAYMOND.

Corporate Taxation and the Commerce Clause. See note, 60 L. R. A. 644.

34 Cal. 503–506, DAVIDSON v. RANKIN.

Right of Action Against Stockholders on individual liability accrues at same time as right against corporation.

Approved in Miller v. Lane, 160 Cal. 93, 116 Pac. 60, applying rule in action to enforce liability of stockholders under Colorado statute; Boyd v. Mutual Fire Assn., 116 Wis. 169, 96 Am. St. Rep. 948, 90 N. W. 1091, 61 L. R. A. 918, right of action against stockholder of corporation accrued on its being declared insolvent.

Statute of Limitations in Actions against corporate officers and stockholders. See note, 96 Am. St. Rep. 974.

Time of Accrual of Right of Action as to stockholder's liability. See note, 10 L. R. A. (n. s.) 903.

Contingency of Claim as Affecting Limitation of time for presentation. See note, 58 L. R. A. 85.

34 Cal. 518–519, **LYNCH v. DUNN.**

Filing of Notice of Appeal must precede or be contemporaneous with service thereof.

Approved in State v. District Court, 34 Mont. 115, 115 Am. St. Rep. 522, 85 Pac. 872, following rule; State v. District Court, 32 Utah, 422, 91 Pac. 135, notice of intention to file undertaking does not support appeal from justice court, but notice of actual filing must be given.

34 Cal. 520–548, **PEOPLE v. PROVINES.**

Police Court of San Francisco is municipal court within meaning of constitution.

Approved in In re Baxter, 3 Cal. App. 722, 86 Pac. 1000, holding "recorder" and "police judge" synonymous as used in San Bernardino charter.

Board of Supervisors is not an Inferior Court.

Approved in Chinn v. Superior Court, 156 Cal. 481, 105 Pac. 581, holding no appeal lies to superior court from order of supervisors establishing irrigation district.

Article III of Constitution Refers to Respective Departments of state government and not to local, county and municipal governments.

Approved in Nicholl v. Koster, 157 Cal. 423, 424, 108 Pac. 305, 306, holding constitutional act providing for appointment of probation officer by superior court; State v. Townsend, 72 Ark. 184, 79 S. W. 783, office of town recorder not incompatible with holding office of county and probate judge at same time; Baltimore etc. R. R. Co. v. Town of Whiting, 161 Ind. 234, 68 N. E. 268, upholding statute conferring powers of justice of peace on town clerk; State v. Brill, 100 Minn. 518, 111 N. W. 647, holding void act requiring judges of district court to appoint county board of control.

As to Whether Judges of Municipal or Police Courts may be vested or burdened with powers or duties of nonjudicial character. See note, 19 L. R. A. (n. s.) 615.

Legislature may Create Offices and Confer Powers to appoint incumbents upon person named having no official relation to any department of government.

Approved in Richardson v. Young, 122 Tenn. 519, 125 S. W. 675, upholding act conferring upon board of elections, to be appointed by governor, power to appoint election commissioners.

34 Cal. 548–554, **CHRISTY v. DANA; S. C., 42 Cal. 174.**

Mortgage Given by Pre-emptor Prior to entry on land is valid.

Distinguished in Hafemann v. Gross, 199 U. S. 346, 26 Sup. Ct. 80, 50 L. Ed. 220, holding agreement with party advancing money to pay expenses of final proof on public lands did not amount to mortgage of land.

Conveyance Recorded Before Grantor obtained title, as notice. See note, 23 L. R. A. 563.

34 Cal. 558–563, PRALUS v. JEFFERSON ETC. MINING CO.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 772.

Effect of Legal Remedy upon Equitable Jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 71.

34 Cal. 563–567, BROOKS v. CALDERWOOD.

In Action to Determine Adverse Claim, judgment that defendant has no just claim of title will not be reversed because it contains clause restraining defendants forever from setting up such claim.

Approved in Dorris v. McManus, 3 Cal. App. 582, 86 Pac. 912, following rule; Cottonwood Ditch Co. v. Thom, 39 Mont. 119, 101 Pac. 826, holding court could enjoin future assertion of adverse claim adjudged void in quiet title suit.

Miscellaneous.—Cited in Lorenz v. Jacobs (Cal.), 3 Pac. 656, to point that answering averments in complaint in partition is not disclaimer, although such defendant is adjudged to have no interest in the realty.

34 Cal. 567–571, HEALY v. BUCHANAN.

Period Within Which Letters of Administration on estates of deceased persons may be granted is not limited by law.

Denied in Gwinn v. Melvin, 9 Idaho, 211, 108 Am. St. Rep. 119, 72 Pac. 963, holding right of applicant to letters of administration barred in four years from accrual of his right.

34 Cal. 571–577, PEOPLE v. HASTINGS.

Absence of Dollar-marks from Head of Column and before figures on assessment-roll render assessment invalid.

Reaffirmed in Fox v. Townsend, 152 Cal. 53, 91 Pac. 1007.

Distinguished in Fox v. Wright, 152 Cal. 60, 91 Pac. 1005, holding omission of dollar-marks in list of delinquent taxes immaterial where figures were explained in publication; Carter v. Osborn, 150 Cal. 622, 89 Pac. 609, holding omission of dollar-mark on delinquent tax list immaterial.

34 Cal. 580–586, KEERAN v. GRIFFITH.

Exception to Rulings of Court must be taken when made to be effectual on appeal.

Approved in People v. Emmons, 7 Cal. App. 688, 95 Pac, 1034, and Randall v. Freed, 154 Cal. 301, 97 Pac. 670, both following rule.

34 Cal. 591–594, PEOPLE v. ROBLES.

Possession by Defendant of Stolen Property other than that described in indictment may be shown on trial for larceny.

Reaffirmed in Territory v. Livingston, 13 N. M., 324, 84 Pac. 1022.

Evidence of Other Crimes in criminal cases. See note, 62 L. R. A. 322.

34 Cal. 594–600, TURNER v. NORTH BEACH ETC. R. R. CO.

Principle is Liable for All Actual Damage resulting from malfeasance, negligence or tort of his agent in course of his employment, but not for unauthorized or malicious act of his agent.

Cited in Davis v. Hearst, 160 Cal. 165, 116 Pac. 540, discussing liability of newspaper owner for punitive damages for libel where manager had carte blanche in running paper.

Liability of Principal for unauthorized acts of agent. See note, 88 Am. St. Rep. 791.

Exemplary Damages for Act of employee. See note, 101 Am. St. Rep. 762.

Liability for Malicious Act of Servant when master owes special duty to party injured. See note, 4 L. R. A. (n. s.) 493.

34 Cal. 601–608, 94 Am. Dec. 770, TREADWELL v. DAVIS.

Where Contract is Severable, Valid Part will stand and void part fall.

Approved in Porter v. Fisher (Cal.), 34 Pac. 701, holding broker entitled to commission, on sale of realty with personalty thereon, on the personalty only, when his authority was by parol.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 498.

Preference by Mortgage or Sale as assignment for creditors. See note, 37 L. R. A. 340.

34 Cal. 611–616, SHARP v. LUMLEY.

Execution may Lawfully Issue After Entry of judgment before making up judgment-roll.

Reaffirmed in Burton v. Kipp, 30 Mont. 285, 76 Pac. 565.

Entry or Record Necessary to Complete Judgment or order. See note, 28 L. R. A. 634.

Actual Notice of Action Pending has same effect as filing of lis pendens.

Approved in Martin v. Abbott, 72 Neb. 91, 100 N. W. 142, purchaser of land with notice of claim of dower, asserted in action therefor, takes subject to claims.

Miscellaneous.—Cited in McEnerney v. United States, 143 Fla. 735, 74 C. C. A. 655, to point that papers filed in naturalization proceeding, with affidavits, certificates and record of proceedings, constitute record of court within meaning of statute making stealing court records a criminal offense.

34 Cal. 616–623, TARBELL v. CENTRAL PACIFIC R. R. CO.

What is a Reasonable Sum Which may be Tendered in payment of fare. See note, 35 L. R. A. 490.

34 Cal. 624–629, REAMER v. NESMITH.

Parol Evidence is Admissible to Explain meaning of particular indefinite expressions in deeds.

Approved in Hill v. McCoy, 1 Cal. App. 162, 81 Pac. 1016, holding parol evidence admissible to identify land referred to by name in contract.

34 Cal. 629–635, LEWIS v. JOHNS.

In Action by Parties Whose Property has Been Wrongfully Taken under legal process, all who participate in the trespass are jointly liable.

Distinguished in Northam v. Casualty Co., 177 Fed. 983, holding employer's liability indemnitor could not be sued in original suit for damages for wrongful death brought by representatives of deceased.

34 Cal. 635–641, KELLER v. CHAPMAN.

Contestant in Election Contests cannot take judgment by default.

Distinguished in O'Dowd v. Superior Court, 158 Cal. 540, 111 Pac. 752, personal appearance of respondent in court for purpose of ques-

tioning jurisdiction is insufficient to confer jurisdiction over him in election contest.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 50.

34 Cal. 641–646, HISLER v. CARR.

Attachment is Void When Insufficient by proper undertaking.

Approved in Kern Valley Bank v. Koehn, 157 Cal. 240, 107 Pac. 112, holding void attachment on undertaking not in terms of statute.

34 Cal. 647–648, PEOPLE ex rel. QUINN v. STATE BOUNTY BOARD OF EXAMINERS.

Sufficiency of Constructive Delivery to sustain gift causa mortis. See note, 18 L. R. A. 202.

34 Cal. 648–655, COWING v. ROGERS.

Full Performance of Condition of Contract is prerequisite to seeking aid of equity to enforce same.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, refusing to enforce trust when complaint did not allege that conditions for enforcement had been fulfilled.

In Action to Redeem from Mortgage, decree of foreclosure and sale is not proper, but decree may properly prescribe terms of redemption.

Approved in Sloan v. Lucas, 37 Wash. 354, 79 Pac. 951, upholding decree in redemption suit prescribing terms of payment.

When Decree in Action to Determine Right to redeem from mortgage remains unfulfilled by party in whose favor it was made, upon his default judgment may be rendered dismissing complaint.

Approved in Hanley v. Mason, 42 Ind. App. 323, 85 N. E. 384, holding foreclosure became final when parties who were adjudged entitled to redeem defaulted under terms of decree.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769.

34 Cal. 658–660, ECKSTEIN v. CALDERWOOD.

Whether, When, and How Purchaser at judicial sale may object to title. See note, 135 Am. St. Rep. 925.

34 Cal. 663–666, PEOPLE v. DICK.

Correction of Verdict in Criminal Cases. See note, 23 L. R. A. 727.

34 Cal. 671–672, PEOPLE v. THOMPSON.

Juror to be Competent must be Assessed on last assessment-roll of his township or county on property belonging to him, if resident at time of assessment.

Approved in Houghton v. Market St. Ry. Co., 1 Cal. App. 582, 82 Pac. 974, following rule.

Larceny of One's Own Property. See note, 88 Am. St. Rep. 596.

Miscellaneous.—Cited in Wetherbee v. Dunn, 36 Cal. 150, 95 Am. Dec. 166, as to proof necessary to show prima facie possession.

34 Cal. 676–682, PEOPLE ex rel. HARBOR COMMISSIONERS v. STEAMER AMERICA.

Admiralty Jurisdiction of Contracts. See note, 66 L. R. A. 212.

34 Cal. 682–690, MATTER OF WILL OF BOWEN.

District Courts have No Jurisdiction to try issues framed in probate courts under constitutional amendments of 1862.

Approved in McDaniel v. Pattison (Cal.), 27 Pac. 654, holding chancery court has no jurisdiction to probate will.

NOTES

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35 Cal. 25-29, STRINGER v. DAVIS.

Mortgagees' Right of Action Against Third Persons for invasion of their rights. See note, 109 Am. St. Rep. 449.

35 Cal. 30-37, PRALUS v. PACIFIC GOLD AND SILVER MIN. CO.

General Finding That All Allegations of complaint are true and all in answer are untrue is sufficient.

Approved in Healey v. Norton (Cal.), 41 Pac. 1081, following rule.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 867, 880.

Relocation of Mining Claim as abandoned or forfeited. See note, 68 L. R. A. 848.

35 Cal. 37-41, PEOPLE v. CARRILLO.

Entry of Default is Ministerial Act to be performed by clerk and disqualification of judge to try case does not disqualify clerk from making entry.

Approved in Dudley v. White, 44 Fla. 269, 31 So. 831, applying rule where judge was plaintiff.

Assessment of Tax on Property of decedent's estate. See note, 56 L. R. A. 637.

35 Cal. 49-52, 95 Am. Dec. 49, PEOPLE v. VERNON.

Voluntary and Spontaneous Declarations tending to explain transaction and made at so near time to it as to preclude idea of deliberate design, are part of res gestae.

Approved in Price v. State, 1 Okl. Cr. 366, 98 Pac. 451, following rule; Durkee v. Central Pac. R. Co. (Cal.), 9 Pac. 101, admitting declarations of engineer made three or five minutes after accident; Murray v. Boston & Maine R. R. Co., 72 N. H. 37, 101 Am. St. Rep. 660, 54 Atl. 292, 61 L. R. A. 495, discussing law of res gestae; Stevens v. Friedman, 58 W. Va. 84, 51 S. E. 135, in civil action for assault and battery, evidence of arrest of defendant for assault and battery and his acquittal is not part of res gestae.

Declarations as Part of Res Gestae. See note, 19 L. R. A. 737, 739.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 642; 56 L. R. A. 384, 414, 426.

Miscellaneous.—Cited in Kidder v. Bacon, 74 Vt. 275, 52 Atl. 325, in slander, testimony of others who observed symptoms of plaintiff's mental condition is admissible to show mental pain and anguish.

35 Cal. 52–84, 95 Am. Dec. 76, FALKINBURG v. LUEY.

Plaintiff is Entitled to Injunction at Time of issuing summons on verified complaint alone if it makes proper case.

Approved in Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 762, 115 Pac. 955, no objection to injunction in action to restrain diversion of water that complaint alleged complainant was entitled to unobstructed flow of stream as riparian owner and also as an appropriator.

Words Expressive of Kind or Quality cannot be exclusively appropriated as trademark.

Approved in Italian-Swiss Colony v. Italian Vineyard Co., 158 Cal. 257, 110 Pac. 915, Italian word "Tipo," used to express "type" of wine, cannot be appropriated.

What Words or Phrases may constitute a valid trademark. See note, 85 Am. St. Rep. 86, 98.

Competition in Business, use of trademark. See note, 17 L. R. A. 130.

If Defendant Uses Verified Answer on moving to dissolve injunction, plaintiff is entitled to reply by way of affidavits.

Reaffirmed in Thayer v. Bellamy, 9 Idaho, 4, 71 Pac. 545.

35 Cal. 89–97, CLARK v. REESE.

Privilege of not Answering on Ground that answer would degrade is personal to witness.

Approved in dissenting opinion in State v. Shockley, 29 Utah, 78, 80 Pac. 883, majority holding witness who is also defendant may claim immunity through counsel.

35 Cal. 97–102, EX PARTE McCULLOUGH.

Function of Habeas Corpus Does not Extend beyond inquiry into jurisdiction of court issuing it and validity of process upon face on which prisoner is held.

Approved in In re Myrtle, 2 Cal. App. 386, 84 Pac. 337, refusing to discharge on habeas corpus one pleading guilty to robbery under information failing to specifically allege ownership of stolen property in person robbed.

Where in Supplementary Proceedings Court ordered defendant to deliver up property in satisfaction of execution and committed him for contempt for refusing, habeas corpus does not lie to review validity of order.

Approved in In re Downey, 31 Mont. 447, 78 Pac. 774, denying habeas corpus to release defendant who, in supplementary proceedings, was ordered to pay judgment out of proceeds of order on certain society, and committed for contempt for his refusal to obey.

35 Cal. 102–107, SEALE v. SOTO.

Liability of Cotenants for Improvements and repairs. See note, 29 L. R. A. 452, 453.

35 Cal. 110–114, PEOPLE v. POTTER.

Courts Take Judicial Notice of acts incorporating city.

Approved in Stoner v. Los Angeles, 8 Cal. App. 610, 97 Pac. 694, applying rule to charter; Bode v. State, 80 Neb. 75, 113 N. W. 997.

information for embezzlement under Criminal Code, section 124, need not allege that city whose funds are taken is organized city.

Indictment for Embezzlement of Moneys of city, whose government was vested in mayor, council, marshal, clerk and treasurer, charging defendant was "city marshal" shows he was officer of city.

Approved in Showers v. Caddo County, 14 Okl. 159, 77 Pac. 189, applying principle to complaint against school district officers for malfeasance.

35 Cal. 115–118, PEOPLE v. BURGESS.

Failure to Demur to Indictment for duplicity is waiver of such defect.

Approved in Irvin v. State, 52 Fla. 56, 41 So. 786, following rule; Shivers v. Territory, 13 Okl. 475, 74 Pac. 902, objection that indictment not indorsed "a true bill" and not signed by foreman is waived by motion.

35 Cal. 118–121, 95 Am. Dec. 90, POORMAN v. MILLS & CO.

Averment in Complaint That Plaintiff is owner and holder of note and entitled to receive money due thereon is surplusage.

Approved in Kirk v. Roberts (Cal.), 31 Pac. 622, in action by assignee of notes against assignee in insolvency, owner, who had transferred notes but held possession to collect same as agent, for moneys collected, averment of nonpayment is unnecessary; Berry v. Barton, 12 Okl. 244, 71 Pac. 1081, 66 L. R. A. 513, where complaint alleges execution of note by maker to plaintiff for valuable consideration and defendants' default in payment, answer denying plaintiff is owner and holder states no defense.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 533.

35 Cal. 122–126, ADAMS v. PATTERSON.

Allegation in Answer That No Action has accrued to plaintiff by reason of matter alleged in complaint at any time within two years next preceding commencement of action is good plea of statute of limitations.

Approved in Osborn v. Hopkins, 160 Cal. 504, 117 Pac. 521, allegation that "plaintiff's cause of action for compensation for said services did not accrue within two years next before commencement" of action sufficiently pleads limitations.

35 Cal. 127–129, ROGERS v. PARISH.

One not in Possession Under Either of Parties to action for possession of land cannot be dispossessed under writ of restitution issued on judgment rendered for plaintiff therein.

Cited in King v. Davis, 137 Fed. 220, arguendo.

35 Cal. 129–133, TREAT v. REILLY.

Refusal to Strike Out Inadmissible Evidence is not prejudicial error where party objecting afterward introduces same testimony.

Approved in Short v. Frink, 151 Cal. 87, 90 Pac. 202, error in refusing to strike out incompetent testimony not cured by subsequent testimony of defendant as to same conversation which materially contradicted testimony of witness.

One Tenant in Common Alone may recover possession of entire premises as against trespasser.

Approved in Griswold v. Minneapolis etc. R. R. Co., 12 N. D. 439, 102 Am. St. Rep. 572, 97 N. W. 539, and Godfrey v. Rowland, 17 Haw. 587, 7 Ann. Cas. 993, both following rule.

Extent of Recovery in Ejectment by Tenants in common against stranger. See note, 6 L. R. A. (n. s.) 713.

35 Cal. 155–182, LARRABEE v. BALDWIN.

Any One Creditor Whose Debt is Sufficient may collect of any stockholder entire amount of his liability on all corporate debts.

Distinguished in Gardiner v. Bank of Napa, 160 Cal. 581, 585, 586, 587, 588, 117 Pac. 668, 670, 671, single creditor cannot collect upon his individual claim a sum equal, if necessary to satisfaction of his claim, to stockholder's entire liability upon debts of corporation.

Effect as Against Stockholders of judgment against corporation. See note, 97 Am. St. Rep. 470.

Effect of Judge Communicating With Jury, not in open court. See note, 17 L. R. A. (n. s.) 612.

35 Cal. 187–195, HATHAWAY v. RYAN.

On Trial to Court Trial Judge may sign and file findings without notice to attorneys.

Approved in County of San Luis Obispo v. Simas, 1 Cal. App. 183, 81 Pac. 976, after submission and verdict of jury, offer to prove that absent owner was insane is no objection to signing and filing of findings and judgment.

35 Cal. 195–199, 95 Am. Dec. 93, CORWIN v. WARD.

Act of 1866, Authorizing Five Per Cent Damages as costs in litigated cases in San Francisco, is valid.

Approved in Doyle v. Eschen, 5 Cal. App. 63, 89 Pac. 840, fee bill of 1895, does not repeal San Francisco fee act of 1866.

Constitutionality of Statutes allowing attorneys' fees. See note, 79 Am. St. Rep. 179.

Setting Off One Judgment against another. See note, 109 Am. St. Rep. 145.

35 Cal. 199–212, PORTER v. BROOKS.

In Order to Bar Attachment, Lien or Pledge of creditor must be of fixed determinate character, unconditional, and capable of being enforced with certainty.

Approved in Bowman v. Wade, 54 Or. 358, 103 Pac. 76, one whose debt is secured by mortgage of person non compos mentis has not a "secured claim" within attachment law.

Vendor's Lien for Unpaid Price of Land conveyed to third party before suit to enforce lien is not of such fixed determinate character as to bar attachment.

Approved in Hodgson v. Smith Bros., 136 Iowa, 518, 114 N. W. 40, one conveying land in exchange for goods and through mistake receiving less goods is entitled to lien on land for amount of difference in value as against assignee for benefit of creditors of vendee.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 188.

35 Cal. 213–214, LEWIS v. BARCLAY.

Mandamus cannot Prescribe What Decision of inferior tribunal shall be if duty is judicial.

Overruled in Matter of Ford, 160 Cal. 345, 346, 116 Pac. 761, granting mandamus to compel dismissal of prosecution where court has, without cause, arbitrarily postponed trial beyond statutory time.

Mandamus Does not Lie to Reinstate Case when appeal has been dismissed, though dismissal was erroneous.

Distinguished in Armantage v. Superior Court, 1 Cal. App. 136, 81 Pac. 1035, denying certiorari to review decision of superior court on appeal from justice's court taken on questions of law and fact.

35 Cal. 214–215, VLAUTIN v. BUMPUS.

Liability of Community Property for Debts. See note, 19 L. R. A. 235.

35 Cal. 216–218, WAGGENHEIM v. HOOK.

Appeal from Judgment must be Taken within one year from time same was rendered.

Approved in People v. Schmitz, 7 Cal. App. 345, 94 Pac. 410, criminal appeal is not premature because taken after rendition of judgment and before its entry.

35 Cal. 229–247, HALE v. TROUT.

Where Under Contract to Manufacture given quantity of lumber within certain time for which defendant is to fix price per thousand payable monthly and refuses to accept or pay for any more lumber, plaintiff may sue for entire damages without waiting for lapse of entire time.

Approved in Alderson v. Houston, 154 Cal. 10, 96 Pac. 887, applying rule where owner breached contract with real estate brokers to sell city lots.

Countermand of Executory Contract of Sale. See note, 94 Am. St. Rep. 122.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 70.

Where Party, Who Contracts With Another to make lumber and to pay fixed sum monthly as lumber is made, breaks contract, meausre of damages is difference between cost of manufacture and contract price.

Approved in Gardner v. Deeds, 116 Tenn. 138, 92 S. W. 520, 4 L. R. A. (n. s.) 740, applying rule to breach of contract for sale of buggies to be ordered as needed; Duke v. Norfolk etc. Ry. Co., 106 Va. 158, 55 S. E. 550, applying rule to breach of contract for sale of railroad ties.

Loss of Profits as Element of Damages for breach of contract. See notes, 52 L. R. A. 255; 53 L. R. A. 36.

Distinguished in Holliday v. Highland Iron etc. Co., 43 Ind. App. 353, 87 N. E. 252, where defendant agreed to purchase certain quantity of iron of rolling-mill according to defendant's specifications, measure of damages for defendant's failure to furnish specifications and receive iron was difference between cost of making iron and contract price.

35 Cal. 247–263, CENTRAL PACIFIC R. R. CO. v. PEARSON.

In Condemnation Proceedings Witness cannot, in Giving Opinion as to value of land, testify as to particular transactions.

Approved in Oregon R. & N. Co. v. Eastlack, 54 Or. 202, 102 Pac. 1013, and Watkins v. Wabash Ry. Co., 137 Iowa, 443, 113 N. W. 925, both following rule; Sacramento etc. R. R. Co. v. Heilbron, 156 Cal.

410, 104 Pac. 980, in condemnation proceedings value of land in terms of money which witness might think it worth for any particular purpose is inadmissible.

Commissioners in Condemnation Proceedings must hear evidence offered and are governed by rules of evidence in other cases.

Cited in City of Shreveport v. Youree, 114 La. 186, 38 So. 137, arguendo.

In Condemnation Proceedings Land Owner is not allowed compensation for removing personal property from premises.

Disapproved in Blincoe v. Choctaw etc. R. R. Co., 16 Okl. 291, 83 Pac. 905, 4 L. R. A. (n. s.) 890, damages in condemnation are such as owner actually sustains to either his realty or personalty by appropriation.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 299.

Power to Set Aside Award in Condemnation Proceedings for misconduct of commissioners or jurors. See note, 27 L. R. A. (n. s.) 567.

35 Cal. 264–268, 95 Am. Dec. 95, MARSHALL v. BUCHANAN.

Action Lies for False and Fraudulent Representations whereby another has suffered damage.

Approved in Bank of Havelock v. Western Union Tel. Co., 141 Fed. 526, 72 C. C. A. 580, 4 L. R. A. (n. s.) 181, upholding award of damages against telegraph company for loss of lien on cattle caused by transmission of unauthorized telegram.

35 Cal. 274–282, 95 Am. Dec. 98, MACDOUGALL v. MAGUIRE.

In Action for Damages for Assault and Battery, language used by defendant while committing assault is part of res gestae.

Approved in Durkee v. Central Pac. R. Co. (Cal.), 9 Pac. 101, admitting declaration of engineer made three or five minutes after accident.

When Libel is Set Up as Counterclaim in action for assault, objection to such counterclaim is not waived by failure to demur.

Denied in Ennor v. Raine, 27 Nev. 214, 74 Pac. 2, where in action for injury to water rights court had jurisdiction of counterclaim, failure to object in trial court that matter not proper counterclaim is waiver of objection.

In Civil Action for Assault and Battery libel published by plaintiff does not constitute counterclaim.

Approved in Wrege v. Jones, 13 N. D. 271, 112 Am. St. Rep. 379, 100 N. W. 706, one slander cannot be set up as counterclaim against another.

Damages for Assault and Battery. See note, 112 Am. St. Rep. 687.

35 Cal. 282–288, PEOPLE v. NILES.

To Authorize Taxation of Personalty in county other than of owner's residence, such property must be kept or maintained there permanently.

Approved in Flowerree Cattle etc. Co. v. Lewis & Clarke Co., 33 Mont. 37, 81 Pac. 399, 8 Ann. Cas. 674, cattle temporarily taken into another county to be winter fed and to be returned in spring are not taxable in such county.

Distinguished in Griggsby Construction Co. v. Freeman, 108 La. 441, 32 So. 401, 58 L. R. A. 349, contractor's outfit brought here from

another state for use in railroad work for several months is taxable here.

Where Ships are Taxable. See note, 37 L. R. A. 518.

35 Cal. 291-296, DOE v. CULVERWELL.

Contract is not Valid unless it is mutual and reciprocal.

Limited in Harper v. Goldschmidt, 156 Cal. 248, 134 Am. St. Rep. 124, 104 Pac. 452, vendee who has not signed an executory contract for sale of land and who has done no more than pay part of price, taking receipt therefor cannot be compelled specifically to perform.

35 Cal. 302-310, 95 Am. Dec. 102, TULLY v. HARLOE.

A Mortgage Given in Good Faith to Secure Future Advances is valid; it need not express its object upon its face.

Approved in Hester v. Gairdner, 128 Ga. 536, 58 S. E. 168, admitting parol to show deed was given to secure antecedent debt and future advances.

Mortgages to Secure Future Advances. See note, 116 Am. St. Rep. 695.

35 Cal. 310-316, ESTATE OF BUSSE.

Widow may Have a Homestead Set Apart to her though such homestead had not been occupied by nor selected and recorded by deceased as homestead during his lifetime.

Approved in Estate of Green, 1 Cof. Prob. 453, following rule.

35 Cal. 316-320, MANN v. ROGERS.

Homestead Right in Lands cannot be Acquired by one who, at time of declaring same, is not of possession and has never since been in possession.

Cited in Hanley v. Hanley, 4 Cof. Prob. 475, arguendo.

Remedies of Plaintiff Dispossessed after being put in possession under judgment in ejectment. See note, 135 Am. St. Rep. 650.

Conclusiveness of Judgment in Actions of nature of ejectment, as to claim of title, previously acquired, not in issue. See note, 4 L. R. A. (n. s.) 297.

35 Cal. 320-325, ESTATE OF WIXON.

Where Two Laws on Same Subject, passed at different times, are inconsistent, latter prevails.

Approved in County of Trinity v. County of Mendocino, 151 Cal. 284, 90 Pac. 687, act of 1872 relating to county boundaries, prevails over Political Code, section 3969.

35 Cal. 325-335, CARSON v. CENTRAL R. R. CO.

Injury to Abutting Owner by Street Railway near side of street. See note, 43 L. R. A. 558.

35 Cal. 336-343, IN RE GARRAUD.

Parol Evidence is Inadmissible to show testator intentionally omitted to provide for children.

Denied in Brown v. Brown, 71 Neb. 205, 115 Am. St. Rep. 568, 98 N. W. 720, parol evidence is admissible to show whether omission of child from will was intentional.

Adopted and Illegitimate Children as Heirs. See note, 115 Am. St. Rep. 589.

35 Cal. 346–364, CARPENTIER v. SMALL.

If Evidence Offered in Support of New Matter in answer is admitted over objection but after trial court disregards evidence because defense not properly pleaded, defendant is entitled to new trial.

Approved in Smith v. Sinbad Development Co., 11 Cal. App. 257, 104 Pac. 708, in absence of specification in motion for new trial, connected with change in ruling of court to defendant's surprise, or as constituting irregularity, these matters cannot be considered on appeal.

Finding, in Ejectment, That Defendant had No Title and that he is cotenant with estate of deceased cotenant, where parties had stipulated that defendant had entered under deed from deceased cotenant's administrator, is contrary to evidence.

Approved in Goodwin v. Kraft, 23 Okl. 336, 101 Pac. 859, in case tried in supreme court on review on agreed statement of facts, court will apply law to facts as court of first instance.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 176, 177.

35 Cal. 365–372, 95 Am. Dec. 107, McCONNELL v. DENVER.

Unincorporated Ditch Company for Sale of Water having stock which is sold at will of owners is not commercial partnership.

Approved in dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, majority holding majority owners of community ditch cannot, at will, change ancient course of ditch to damage of one owner.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 407.

Member of Unincorporated Ditch has No Authority to bind company by his contracts.

Approved in Spotswood v. Morris, 12 Idaho, 384, 85 Pac. 1102, 6 L. R. A. (n. s.) 665, discussing nature of unincorporated associations.

35 Cal. 372–378, LYON v. HANCOCK.

One Who Arrests Another for Crime under belief that such person has committed crime does not act maliciously, though he may act unlawfully.

Cited in State v. Peace, 121 La. 1081, 47 So. 31, arguendo.

35 Cal. 378–388, HASSIE v. G. I. W. U. CONGREGATION.

Proceeding Supplementary to Execution is entirely statutory.

Approved in Bryant v. Bank of California (Cal.), 7 Pac. 130, reaffirming rule.

Garnishment of Unliquidated Claims. See note, 59 L. R. A. 354, 384.

Mortgage or Assignment of Future Accounts or earnings. See note, 14 L. R. A. 126.

35 Cal. 389–392, PEOPLE v. APGAR.

Conviction of Lesser Grade of Offense is bar to conviction for greater where new trial granted.

Approved in Huntington v. Superior Court, 5 Cal. App. 291, 292, 90 Pac. 143, where one charged with murder was tried for death caused by abortion and convicted of manslaughter and conviction reversed for improper instruction thereon, new trial must be limited to manslaughter; dissenting opinion in People v. Bennett (Cal.), 50 Pac.

705, majority holding where on charge of assault to murder defendant convicted of lesser offense, and new trial granted and thereafter convicted of higher offense, and grant of new trial reversed for failure to plead jeopardy, supreme court could not on appeal from judgment on verdict review former decision; dissenting opinion in Trono v. United States, 199 U. S. 540, 26 Sup. Ct. 121, 50 L. Ed. 300, 4 Ann. Cas. 773, majority holding one not placed in jeopardy by conviction of homicide in Philippine supreme court, on appeal taken by accused, where he was convicted of assault by trial court; dissenting opinion in Cornelius v. State, 54 Tex. Cr. 201, 112 S. W. 1064, majority holding where one convicted of manslaughter on indictment for murder, evidence of murder is admissible on new trial.

Limited in People v. Ham Tong, 155 Cal. 584, 132 Am. St. Rep. 110, 102 Pac. 265, 24 L. R. A. (n. s.) 481, conviction of robbery under indictment not averring money taken from possession of person robbed, which conviction is reversed, is no bar to prosecution for grand larceny.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 78.

Former Jeopardy in Retrial on Higher after setting aside verdict for lower charge. See note, 5 L. R. A. (n. s.) 571.

35 Cal. 392–398, 95 Am. Dec. 111, ESTATE OF NERAC.

Where One is Sent to Penitentiary for Term less than life, rights of his creditors are not suspended.

Approved in Brown v. Mann (Cal.), 9 Pac. 545, fact that defendant sued as administrator and recovering judgment was convicted of embezzlement is no ground for dismissing appeal.

As to When Suspension of Civil or Political Rights of convict commences. See note, 17 L. R. A. (n. s.) 502.

Probate Court has No Power to Appropriate Share of heir or devisee to payment of his debts.

Approved in Ward v. Du Pree, 16 S. D. 507, 94 N. W. 399, action by legatee to set aside release of share of estate to defendants, who were also legatees, on ground of fraud and to restrain further administration proceedings pendente lite, is not within exclusive jurisdiction of county court.

Money in Hands of Administrator after decree of distribution may be garnisheed for distributee's debt.

Distinguished in In re Argonaut Shoe Co., 187 Fed. 786, dividends declared by bankrupt's trustee while unpaid to claimants are not garnishable.

Garnishment of Executor or Administrator. See note, 47 L. R. A. 348.

Right to Attach or Garnish Fund in hands of officer of court after order to pay same to party. See note, 13 L. R. A. (n. s.) 759.

Garnishment of Unliquidated Claims. See note, 59 L. R. A. 387.

35 Cal. 404–416, HEYLAND v. BADGER.

Chattel Mortgage Vests Title in Mortgagee.

Denied in Demers v. Graham, 36 Mont. 406, 122 Am. St. Rep. 384, 93 Pac. 269, 14 L. R. A. (n. s.) 431, chattel mortgage on cattle does not cover calves in gestation when mortgage executed.

35 Cal. 416–424, 95 Am. Dec. 115, POLACK v. PIOCHE.

"Act of God" must be an Act Independent of any human agency, however remote.

Approved in The Salton Sea Cases (California Development Co. v. New Liverpool Salt Co.), 172 Fed. 819, 97 C. C. A. 214, holding irrigation company negligently constructing intakes from river into its canal without gates, by reason of which, in flood, water washed away river bank and flooded lands, is liable, though flood was extraordinary.

Acts of God. See notes, 80 Am. St. Rep. 89; 129 Am. St. Rep. 458.

What Constitutes Damages "by the Elements" within meaning of contract stipulations. See note, 53 L. R. A. 673.

General Covenant to Repair Demised Premises is binding under all circumstances.

Approved in Mitchell v. Hancock Co., 91 Miss. 419, 124 Am. St. Rep. 706, 45 So. 572, 15 L. R. A. (n. s.) 833, statutory bond given by bridge contractor to county stipulating for rebuilding bridge if it shall be removed from any cause within certain time binds him to rebuild when it is destroyed by flood.

Meaning of the Word "Repair." See note, 124 Am. St. Rep. 707.

Duty of Warehousemen in care of property. See note, 136 Am. St Rep. 230.

35 Cal. 441–452, HIMMELMAN v. DANOS.

A General Allegation of Conditions prescribed by statute is insufficient.

Approved in Estate of Renton, 3 Cof. Prob. 531, written opposition to probate of will by adopted children must show statute as to adoption has been complied with.

Complaint to Recover Street Assessment must show compliance by supervisors of all steps prescribed by law to confer jurisdiction on board.

Approved in Kinley v. Thelen, 158 Cal. 184, 110 Pac. 517, complaint seeking to hold trustee for negligent loss of land purchased from state by his failure to make purchase payments and failure to pay taxes on the lands must aver facts showing divestiture of title.

Distinguished in Paden v. Goldbaum (Cal.), 37 Pac. 761, proof of service on sheriff of third party claim is admissible against sheriff in action by claimant for wrongful seizure, though it is not pleaded.

Statute Prescribing That Assessment, warrant and diagram, with affidavit of demand and nonpayment, shall be prima facie evidence of defendant's indebtedness, establishes rule of evidence only.

Approved in Metteer v. Smith, 156 Cal. 575, 105 Pac. 736, defendant in suit to quiet title relying on tax title must allege in answer matters essential to validity of tax deed in order to admit deed in evidence.

Distinguished in Farnsworth v. Sutro, 136 Cal. 243, 68 Pac. 706, in action by assignee of insolvent, averments of complaint showing adjudication in insolvency and that plaintiff was elected assignee and that property was assigned to him by clerk, raise presumption that assignee had qualified.

35 Cal. 452–460, LIGHTNER v. MENZEL.

Absence of Witness is No Ground for Continuance where applicant has taken no steps to procure deposition merely because several weeks prior to trial witness promised to attend.

Reaffirmed in Rankin v. Caldwell, 15 Idaho, 632, 99 Pac. 110.

Where Complaint Alleges Sale and Delivery of goods and their value, answer denying debt but not facts only denies legal conclusion.

Approved in Wolf Co. v. Northwestern Dairy Co., 55 Wash. 670, 104 Pac. 1125, where complaint for balance due under contract for sale of ice plant alleged seller's compliance with contract and buyer's acceptance of plant, latter admitting acceptance could not raise issue of nonperformance without pleading facts avoiding effect of acceptance.

Validity of Contract Giving Exclusive Local Right to handle goods. See note, 9 L. R. A. (n. s.) 502.

35 Cal. 463–470, JUDSON v. LOVE.

Where Party to Action Dies After Decision or verdict, judgment cannot be entered without proper substitution.

Approved in Moehlenpah v. Mayhew, 138 Wis. 566, 119 N. W. 828, following rule; Crossman v. Vivienda Water Co., 150 Cal. 581, 89 Pac. 337, judgment against dissolved corporation is void.

Effect on Contract of Death of Party. See note, 23 L. R. A. 711.

Where, After Verdict, Party Dies, his attorney can neither give nor receive notice of motion for new trial or of appeal.

Approved in Deiter v. Kiser, 158 Cal. 262, 110 Pac. 922, Bill v. San Francisco Savings Union, 153 Cal. 69, 70, 94 Pac. 227, McCornick v. Shaughnessy, 19 Idaho, 468, 114 Pac. 22, and Kilgore v. Yarnell, 24 Okl. 532, 103 Pac. 701 all following rule.

Executor is not a Party to a Suit until he is made so in due form.

Approved in First National Bank v. Hotchkiss, 49 Colo. 598, 114 Pac. 312, administrator is not required to take notice of action pending against his decedent until made a party thereto.

35 Cal. 481–489, SANDFOSS v. JONES.

Fraud in Entering into Parol Agreement takes it out of operation of statute of frauds.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, applying principle in suit to declare resulting trust arising out of fraud in procuring conveyance of land.

Where Party Orally Agrees to Purchase Property at execution sale and convey it to debtor on his repayment of price and interest, purchaser is trustee for debtor.

Approved in Levy v. Ryland, 32 Nev. 466, 109 Pac. 907, where entire amount necessary to purchase land is advanced at time of purchase by one taking title, with prior understanding with another that purchase shall be for joint benefit, part advanced is loan; Avery v. Stewart, 136 N. C. 437, 48 S. E. 779, 68 L. R. A. 776, where defendant agreed to purchase land under plaintiff's option and convey it to plaintiff on payment of price and interest and one hundred dollars, defendant held as trustee; Chadwick v. Arnold, 34 Utah, 58, 95 Pac. 531, applying rule where party agreed to purchase at foreclosure sale and reconvey to owner for specified sum; Liskey v. Sny-

der, 56 W. Va. 637, 49 S. E. 526, purchase of realty at judicial sale by stranger, and contemporaneous resale to debtor by executory contract whereby he is charged with additional sum pursuant to prior verbal agreement, is loan of money with land as security.

35 Cal. 489–502, STONE v. BROOKS.

A Mere Cul-de-sac may be Dedicated to public use in like manner as a thoroughfare.

Reaffirmed in Petitpierre v. Maguire, 155 Cal. 249, 100 Pac. 693.

Where One Sells Lots as Bounded by Streets laid out through same, right of way over such streets vests in grantee in common with public.

Approved in The McCarthy Company v. Moir, 12 Cal. App. 444, 107 Pac. 629, following rule.

35 Cal. 503–509, PEOPLE v. TOMLINSON.

Indictment for Forgery must Show either from description of instrument forged or from averment of matter aliunde that it is of character that, if genuine, it would injure someone.

Approved in People v. Johnson, 7 Cal. App. 129, 93 Pac. 1043, upholding sufficiency of information for forgery of receipt; People v. Munroe (Cal.), 33 Pac. 777, upholding indictment for forgery of assignment of school warrant for unearned salary, where assignment contained guaranty of payment of sum assigned; State v. Floyd, 169 Ind. 139, 81 N. E. 1154, indictment on forged receipt for expenditure of tuition funds, signed in name of one as teacher, must allege that person of name signed was under contract to teach before commission of forgery; Wilson v. State, 85 Miss. 690, 38 So. 47, it is not forgery to alter figures "2.50" written in corner of draft so as to read "$12.50," where words "two and 50/100 dollars" are written in body and words "Ten Dollars or Less" are stamped across face; State v. Jackson, 221 Mo. 502, 133 Am. St. Rep. 477, 120 S. W. 72, one receiving deposit slip on making deposit without having deposit-book with him and who increases figures on slip is guilty of forgery; State v. Sharpless, 212 Mo. 195, 111 S. W. 74, holding deed of release subject of forgery; State v. Cordray, 200 Mo. 31, 98 S. W. 2, holding instrument alleged to have been a lease was void on face and not subject of forgery.

Forgery of Worthless Instruments. See note, 24 L. R. A. 33, 43.

In Law of Forgery Words "Letter" and "Publish" are synonymous.

Approved in People v. Russell, 156 Cal. 455, 105 Pac. 418, upholding sufficiency of information for uttering check with intent to defraud named party which was corporation.

Revenue Stamp is No Part of Instrument, and want of it does not render instrument void.

Approved in Beer v. State, 42 Tex. Cr. 505, 96 Am. St. Rep. 610, 60 S. W. 963, where alleged forged check had lithographed on it a revenue stamp, but indictment describing check omitted stamp, there was no variance.

Want of Internal Revenue Stamp on instrument as affecting criminal prosecution. See note, 46 L. R. A. 455.

Miscellaneous.—Cited in McCoy v. Briant, 59 Cal. 250, to point that when mode in which power of municipalities may be exercised is prescribed by charter, mode constitutes measure of power.

35 Cal. 512–527, DOUGHERTY v. HITCHCOCK.

Street Assessment must be Attested by signature of street superintendent.

Approved in Ede v. Cuneo (Cal.), 55 Pac. 389, second assessment is not authorized where foreclosure of street lien is defeated for want of engineer's certificate.

35 Cal. 528–534, SHARP v. BRUNNINGS.

Recital of Service in Judgment is conclusive in favor of jurisdiction.

Approved in Russell v. Houston, 115 Tenn. 541, 91 S. W. 194, where papers in case have disappeared from clerk's office, final decree and entries in rule docket are admissible to show former adjudication in subsequent action involving same issues.

35 Cal. 534–549, CLARK v. WILLETT.

Where Attorney is not Authorized to Bring Suit, court may order it dismissed on defendant's motion.

Approved in Magnolia etc. Fruit Cannery v. Guerne (Cal.), 31 Pac. 363, following rule.

Effect of Judgment Obtained upon Unauthorized Appearance by attorney. See note, 21 L. R. A. 851.

In Matters of Opinion Proper Mode of proof is to take testimony of persons who have examined premises.

Approved in Lloyd Chemical Co. v. Mathes & Sons Rag Co., 145 Mo. App. 691, 123 S. W. 533, discussing admissibility of evidence of fires other than one in question in action for loss by fire communicated from defendant's fire.

35 Cal. 553–556, PEOPLE v. TYLER.

Impeaching Witness Need not Testify that from general reputation of impeached witness he would not believe him under oath.

Limited in People v. Corey, 8 Cal. App. 726, 97 Pac. 911, where witness is called to impeach another by showing knowledge of bad reputation of witness for truth, it is reversible error to reject opinion evidence of such witness that he would not believe impeached witness under oath.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 28.

35 Cal. 558–576, 95 Am. Dec. 129, FRANKLIN v. MERIDA.

Tenant in Possession Taking Lease from claimant may dispute landlord's title.

Approved in Hebden v. Bina, 17 N. D. 242, 138 Am. St. Rep. 700, 116 N. W. 87, defendant in action to determine adverse title, may question plaintiff's title; dissenting opinion in Illinois Steel Co. v. Budzisz, 139 Wis. 310, 119 N. W. 942, majority holding purchaser from tenant without notice of relation of landlord and tenant who takes and remains in possession for ten years acquires title as against owner.

Distinguished in Elwert v. Marley, 53 Or. 597, 133 Am. St. Rep. 850, 101 Pac. 671, where pending stay from decree in equitable ejectment defendant leased land from plaintiff's grantee with knowledge of conveyance to grantee, latter could not recover possession under decree.

Denied in Hodges v. Waters, 124 Ga. 232, 110 Am. St. Rep. 166, 52 S. E. 163, 1 L. R. A. (n. s.) 1181, attornment by one in possession estops tenant from denying landlord's title, unless attornment was fraudulent or by mistake of fact.

Right of Tenant in Possession Before Taking Lease to dispute lessor's title. See note, 1 L. R. A. (n. s.) 1182.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 95.

35 Cal. 576–601, 95 Am. Dec. 139, GATES v. SALMON; S. C., 46 Cal. 363.

Statute must be Construed so as to Give Effect, if possible, to every part of it.

Approved in Edwards v. Sweigert, 15 Cal. App. 507, 115 Pac. 258, under San Francisco charter, article 8, chapter 10, sections 2, 3, 4, widow of one who, prior to his death was retired for injuries and received a pension is not entitled to a pension; Primm v. Superior Court, 3 Cal. App. 212, 84 Pac. 788, under Code of Civil Procedure, sections 553 and 946, attachment is continued in force pending appeal by plaintiff from adverse judgment by filing bond as required by section 946.

Holder of Specified Part of Whole Tract, as well as cotenants of his grantor, must be made parties to partition suit.

Distinguished in Middlecoff v. Cronise, 155 Cal. 189, 190, 100 Pac. 234, 235, holding partition cannot be had in one action of two or more tracts unless all parties are cotenants in each tract.

Right of One Out of Possession to partition. See note, 20 L. R. A. 629.

Any Question Affecting Right of Plaintiff or of each and all parties in land may be determined in partition.

Approved in Adams v. Hopkins (Cal.), 69 Pac. 230, and Baca v. Anaya, 14 N. M. 393, 395, 94 Pac. 1020, 1021, both following rule.

Conveyance by One Tenant in Common of specific portion of common lands is not void, but does not prejudice rights of other tenants.

Approved in Kenoye v. Brown, 82 Miss. 612, 100 Am. St. Rep. 645, 35 So. 164, and Jonas v. Weires, 134 Iowa, 57, 111 N. W. 456, both following rule.

Conveyance by One Cotenant of specific part of common property. See note, 100 Am. St. Rep. 650, 652, 653.

35 Cal. 606–620, PEOPLE v. SAN FRANCISCO ETC. R. R. CO.

Right to Wharfage. See note, 70 L. R. A. 208.

35 Cal. 624–634, BEALS v. AMADOR COUNTY.

Legislature may by Later Act Provide for payment of interest on debt due from one county to another, which by prior act it had ordered paid.

Approved in State v. Gunn, 92 Minn. 442, 100 N. W. 99, upholding act of 1901, purporting to legalize certain county orders issued under act of 1895, which had been declared void.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 473.

35 Cal. 634–646, 95 Am. Dec. 152, TYNAN v. WALKER.

Statutes of Limitation should be strictly construed.

Approved in United States v. Ninety-nine Diamonds, 139 Fed. 965, 72 C. C. A. 9, 2 L. R. A. (n. s.) 185, construing customs ad-

ministration act; St. Louis Merchants' Bridge etc. Ry. Co. v. United States, 188 Fed. 193, arguendo.

Intent of Legislature must be Found in statute itself.

Approved in Geimann v. Board of Police Commrs., 158 Cal. 751, 112 Pac. 554, construing charter provision that demands on treasury shall be barred if not presented for payment properly audited within one month after they are due; United States v. Colorado etc. R. Co., 157 Fed. 332, 85 C. C. A. 27, 15 L. R. A. (n. s.) 167, construing safety appliance acts.

Operation of Statute of Limitations is not Suspended by death of party entitled to sue before cause of action accrues.

Approved in Sanford v. Bergin, 156 Cal. 55, 103 Pac. 337, mortgage lien in favor of estate of deceased mortgagee is not suspended by want of or in delay in administration; Alice E. Mining Co. v. Blanden, 136 Fed. 256, discussing limitation of action against administrator under Iowa law.

Distinguished in Hesser v. Taylor, 1 Cal. App. 620, 82 Pac. 978, where mortgage debt not mature at death of decedent and more than four years elapsed from maturity before foreclosure, it is not barred under Code of Civil Procedure, section 353, if foreclosure commenced within one year after letters issued.

Where Material Averments of Complaint are defectively denied, but plaintiff, without objecting to denials, introduces evidence in support of averments of complaint, objections to sufficiency of denials are waived.

Distinguished in Reclamation District v. Hershey, 160 Cal. 693, 117 Pac. 904, rule does not apply to facts alleged in complaint which answer by its silence has admitted to be true, and upon which there was no attempt to join issue.

35 Cal. 653–656, PEOPLE v. ELMORE.

Stock Transfer not Entered on Books of Company is valid as against whole world except bona fide purchasers.

Approved in Nat. Bank of the Pacific v. Western Pac. Ry. Co., 157 Cal. 577, 108 Pac. 678, purchaser of railroad stock not transferred on books at time of attachment thereof may, pending attachment, sue to compel transfer on books and issuance of stock certificate free from attachment lien; Mapleton Bank v. Standrod, 8 Idaho, 749, 71 Pac. 121, 67 L. R. A. 656, bona fide transfer of shares of which possession taken as pledge but transfer not entered on book is preferred to subsequent attachment by creditor of assignor.

Validity of Pledge or Other Transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers. See note, 67 L. R. A. 680.

35 Cal. 656–664, HILL v. GRIGSBY.

Performance or Offer to Perform Contract to convey realty on payment of price is condition precedent to right to insist on performance by other party.

Approved in Michigan Home Colony Co. v. Tabor, 141 Fed. 336, 72 C. C. A. 480, following rule.

35 Cal. 664–671, HORNBLOWER v. DUDEN.

Board of Supervisors may Employ Counsel to assist district attorney in any suit.

Approved in County of Santa Cruz v. Barnes, 9 Ariz. 48, 76 Pac. 622, 623, upholding power of supervisors, with consent of district attorney, to employ special counsel; Freeman v. City of Perry, 11 Okl. 71, 65 Pac. 925, upholding power of council of city of first class to employ assistant to city attorney.

Distinguished in Denman v. Webster (Cal.), 70 Pac. 1064, San Francisco board of education has no power to employ private counsel; Chase v. County Commrs. of Boulder County, 37 Colo. 272, 86 Pac. 1012, county commissioners cannot employ person to discover property omitted from taxation.

35 Cal. 671–677, PEOPLE v. WILLIAMS.

Indictment Should State Facts which, if true, would necessarily import that crime imputed to defendant has been committed.

Approved in People v. Carroll, 1 Cal. App. 5, 81 Pac. 681, information for crime against nature should allege sex of person with whom crime committed.

Larceny of Property Savoring of Realty. See note, 88 Am. St. Rep. 591.

35 Cal. 677–678, PEOPLE v. GERKE.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

35 Cal. 679–684, CAMPBELL v. BEAR RIVER ETC. MINING CO.

Erroneous Overruling of Demurrer to new matter in answer under which no proof introduced at trial is harmless.

Approved in Ferrandini v. Banker's Life Assn. of Des Moines, 51 Wash. 447, 99 Pac. 9, following rule; Peterson v. Hubbard (Cal.), 9 Pac. 108, finding on affirmative defense not supported by proof is unnecessary.

35 Cal. 684–688, ARNOLD v. SKAGGS.

Motions for New Trial on Ground of newly discovered evidence are regarded with disfavor.

Approved in Gruss v. Robertson (Cal.), 37 Pac. 772, upholding grant of new trial for newly discovered evidence; State v. Jones, 32 Mont. 455, 80 Pac. 1099, applying rule in rape case; In re Colbert's Estate, 31 Mont. 487, 107 Am. St. Rep. 439, 80 Pac. 251, upholding denial of new trial in will contest.

Motion for New Trial on Ground of newly discovered evidence must be supported by affidavit of moving party that he did not know of such evidence.

Approved in Smith v. Shook, 30 Mont. 35, 75 Pac. 514, applying rule in action for money loaned.

35 Cal. 692–694, ESTATE OF DEN.

Rule for Computing Interest where partial payments made, stated.

Approved in Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 233, 90 Pac. 41, following rule.

Application of Payments. See note, 96 Am. St. Rep. 71.

35 Cal. 699–710, NICOLSON PAVEMENT CO. v. PAINTER.

Board of Supervisors can Contract for patented pavement under statutes of 1865 only in accordance with law.

Approved in Sarver v. Los Angeles, 156 Cal. 189, 103 Pac. 918, as to right of supervisors to call for patented devices in public construction.

Patented Pavement cannot be Called for in specifications for street work where competition would be cut off thereby.

Approved in Monaghan v. Indianapolis, 37 Ind. App. 290, 76 N. E. 427, holding void contract for paving street with patented paving material; Siegel v. Chicago, 223 Ill. 434, 435, 79 N. E. 282, denying right to prescribe patented material for pavement; Hurley Water Co. v. Vaughan, 115 Wis. 477, 91 N. W. 973, town contract for water supply is not subject to Revised Statutes of 1898, section 921, requiring village contracts for work costing more than fifty dollars to be let to lowest bidder.

Distinguished in Baltimore v. Flack, 104 Md. 142, 64 Atl. 715, Baltimore could put various kinds of pavements in competition and after bids opened to select one of them and award contract to lowest bidder for that kind.

Denied in Dillingham v. Spartanburg, 75 S. C. 558, 117 Am. St. Rep. 917, 56 S. E. 384, 8 L. R. A. (n. s.) 412, and Saunders v. Iowa City, 134 Iowa, 142, 111 N. W. 532, 9 L. R. A. (n. s.) 392, both holding where street paving contract let to lowest bidder, fact that advertisement for bids called for certain patented pavement does not restrict competition; dissenting opinion in Monaghan v. Indianapolis, 37 Ind. App. 318, 319, 76 N. E. 437, majority holding void contract for paving street with patented paving material.

Municipal Contracts for Work or Articles which embody patented invention. See note, 18 L. R. A. 46.

35 Cal. 713–727, PERKINS v. CENTER.

Redemption from Foreclosure Restores Property to original condition except that debt is paid.

Approved in Wemple v. Yosemite Gold Min. Co., 4 Cal. App. 87, 87 Pac. 283, following rule.

Legal Holder of Mortgage may Redeem from prior mortgage.

Approved in North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 492, 138 Am. St. Rep. 717, 117 N. W. 463, holder of mortgage given after act of sale under prior mortgage and before expiration of redemption period is a redemptioner.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 36 CALIFORNIA.

36 Cal. 11-24, BARBER v. BABEL.

After Conveyance of Mortgaged Premises or transfer of interest therein, mortgagor cannot prolong or revive a charge upon the premises while such interest is in another party.

Approved in Newhall v. Hatch (Cal.), 64 Pac. 252, holding mortgagee who had brought foreclosure suit on mortgage when barred and declined to amend to plead new promise could not bring suit on new promise after premises had in meantime been sold on an execution sale; Klauber v. Vigneron (Cal.), 32 Pac. 249, holding one who conveys mortgaged premises in consideration of marriage cannot thereafter substitute new mortgage instead of old; San Antonio etc. Loan Assn. v. Stewart, 27 Tex. Civ. 304, 65 S. W. 667, holding where husband and wife had given lien on homestead, husband alone could not extend its life; Hookway v. Thompson, 56 Wash. 61, 105 Pac. 154, holding declaration of homestead made after man's marriage ineffective as against mortgage given by him before marriage.

Homestead Estate has Most of Unities of Joint Tenancy, the main difference being want of power of one party to homestead to sever the tenancy.

Approved in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 354, 107 Pac. 337, holding joint tenancy of homestead exists during life of both spouses only.

Husband and Wife had Joint Estate in Homestead which can only be devested by concurrent act of both in manner provided by law.

Approved in Cordano v. Wright, 159 Cal. 619, 115 Pac. 231, deed of homestead must by its terms purport to convey interest of each spouse; Downing v. Hartshorn, 69 Neb. 368, 111 Am. St. Rep. 550, 95 N. W. 802, holding husband could not encumber homestead without joinder of wife.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 916, 918.

36 Cal. 28-67, JACKSON v. LODGE.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 782.

Miscellaneous.—Cited in Gunnison v. Chicago etc. Ry. Co., 117 Fed. 643, holding possession of railroad, purchased at judicial sale to satisfy judgment, for ten years bars action by mortgagees on their lien created subsequent to the judgment.

36 Cal. 67–74, BUCKNALL v. STORY.

Tax Sale for Amount in Excess of that for which property is liable is void.

Approved in Rimmer v. Hotchkiss, 14 Cal. App. 561, following rule; Hurt v. Hubbard, 41 Colo. 507, 92 Pac. 908, holding answer showing plaintiff's cause of action extinguished since commencement of suit is good defense.

Injunction Against Collection of Illegal Taxes. See note, 22 L. R. A. 702, 705.

36 Cal. 75–82, ESTATE OF WOOD.

If a Word in a Will is Repugnant to clear intention of testator as shown in other parts of the will, it may be regarded as surplusage or restricted in its application.

Approved in Estate of Goetz, 13 Cal. App. 295, 109 Pac. 492, inserting word "if" to make clear clause in will written by testator.

Transposition of Words in Construction of Wills. See note, 2 Cof. Prob. 521.

One not Named as Executor in Will cannot have letters testamentary issued to him.

Cited in Estate of Bergin, 3 Cof. Prob. 293, arguendo.

What Constitutes a Testamentary Writing. See notes, 89 Am. St. Rep. 490; 5 Cof. Prob. 13.

36 Cal. 94–103, DIKERMAN v. NORRIE.

Objection to Variance Between Evidence and finding of facts cannot first be made in appellate court.

Reaffirmed in Davey v. Southern Pac. Co. (Cal.), 45 Pac. 171.

36 Cal. 104–105, GAFFNEY v. GOUGH.

Whether a Personal Liability may be created for an assessment. See notes, 133 Am. St. Rep. 932; 35 L. R. A. 61.

Necessity of Special Benefit to sustain assessments for local improvements. See note, 14 L. R. A. 759.

36 Cal. 105–112, 95 Am. Dec. 162, BOLANDER v. GENTRY.

Value of Property, in Action to Recover Personal Property, cannot be recovered when, pending the action, defendant has been required to deliver the property to third party who is true owner.

Approved in Pabst Brewing Co. v. Greenberg, 117 Fed. 137, 55 C. C. A. 151, holding in action to recover damages for trespass in taking personal property, where such property was taken by true owners, its value cannot be an element of damage.

36 Cal. 112–117, SUTTER v. SAN FRANCISCO.

Where Demurrer is Sustained With Leave to Amend, which plaintiff declines to do, judgment will not be reversed on appeal to allow amendment.

Approved in Harrison v. Magoon, 16 Haw. 488, refusing to allow amendment after judgment when amendment would be ineffective without new trial.

Necessity of Partition Including All Laws of cotenancy. See note, 114 Am. St. Rep. 81.

36 Cal. 122–127, HASTINGS v. STARK.

In Case of Uncertainty in Calls of Deed, construction put thereon by parties concludes them.

Approved in Grant v. Bannister, 160 Cal. 780, 118 Pac. 255, in case of doubt as to whether deed conveyed interests in common or in partnership, construction put on deed by parties themselves controls as between themselves.

36 Cal. 129–131, TODD v. WINANTS.

Party Alleging Error on Appeal must make it affirmatively appear.

Approved in Evans v. Glencross, 4 Ariz. 226, 36 Pac. 213, holding allegation presumed to be proven unless contrary shown.

Stipulation as to Correctness of Transcript does not preclude respondent from objecting to sufficiency of statement on motion for new trial.

Reaffirmed in Carver v. San Joaquin Cigar Co., 16 Cal. App. 765, 118 Pac. 94.

36 Cal. 132–134, LARCO v. CLEMENTS.

Pleas in Abatement are Strictly Construed.

Approved in Riverdale Mining Co. v. Wicks, 14 Cal. App. 532, 112 Pac. 898, following rule; Reed v. Harshall, 12 Cal. App. 704, 108 Pac. 722, holding plea in abatement properly refused when offered after submission of case; Oahu Lumber etc. Co. v. Ah Yok, 11 Haw. 418, holding pendency of prior action in ejectment does not abate subsequent action between same parties, it not appearing that causes of action are the same.

36 Cal. 135–146, BERNAL v. LYNCH.

Proceedings of Board of United States Land Commissioners, when jurisdiction is once acquired, cannot be collaterally attacked.

Approved in Cahill v. Colgan (Cal.), 31 Pac. 617, holding approval of claim against state by board of examiners and appropriation of money to pay it by legislature conclusive as against controller.

Tax Sale to One in Possession does not affect title to land.

Reaffirmed in Allen v. Evans, 7 Ariz. 361, 64 Pac. 412.

Effect of Tax Sale on Land held by life tenant. See note, 32 L. R. A. 805.

36 Cal. 147–151, 95 Am. Dec. 166, WETHERBEE v. DUNN.

Prima Facie All Who Come into Possession of Land pending action to recover possession must go out under writ of possession, the presumption being that they came in under defendant.

Approved in Baum v. Roper, 1 Cal. App. 439, 82 Pac. 391, and Harrod v. Burke, 76 Kan. 912, 123 Am. St. Rep. 179, 92 Pac. 1129, both following rule.

36 Cal. 151–159, PUTNAM v. LAMPHIER.

Conditional Sale of Personal Property is valid.

Approved in Liver v. Mills, 155 Cal. 462, 101 Pac. 299, holding when contract of sale of personal property reserves title to vendor until payment of purchase money, title carries with it right of possession in case of default.

Objection That Judgment is not Authorized by pleadings may be taken on appeal upon judgment-roll alone.

Approved in Kelly v. Strouse & Bros., 116 Ga. 886, 43 S. E. 286, holding appellate court bound to notice defect appearing on face of pleadings.

36 Cal. 159–168, STEWART v. LEVY.

Constitution Sanctions Imprisonment for Debt on final process in case of fraud.

Distinguished in In re Ruttmann, 11 Haw. 796, holding illegal imprisonment for debt when no fraud is shown.

Constitutionality of Imprisonment for Debt. See note, 34 L. R. A. 642.

Liability of Partnership for Torts. See note, 51 L. R. A. 485.

36 Cal. 168–179, CLARK v. PHOENIX INS. CO.

False Sworn Statement of Insured as to amount of loss must, in order to avoid policy, be such as to show intentional and material overvaluation.

Approved in Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 398, 92 Pac. 333, following rule; Schmidt v. Royal Ins. Co., 10 Haw. 686, holding question of fraud in overvaluation of goods destroyed should go to jury and verdict will not be disturbed on appeal; Hegard v. California Ins. Co. (Cal.), 11 Pac. 597, holding evidence sustains finding that property lost was not overvalued.

36 Cal. 180–187, 95 Am. Dec. 170, McCORMICK v. BROWN.

An Acknowledgment or Promise Made While a Contract is subsisting establishes a continuing contract; and when made after bar of statute of limitations, a new contract.

Approved in National Cycle Mfg. Co. v. San Diego Cycle Co., 9 Cal. App. 113, 98 Pac. 65, holding original liability merely continued by new promise to pay on contract before bar on original promise; Dern v. Olsen, 18 Idaho, 365, 110 Pac. 166, holding acknowledgment of contract not barred continued it; Thisler v. Stephenson, 54 Wash. 607, 103 Pac. 988, holding promise to pay note barred new promise.

Acknowledgment or New Promise to Suspend Running or remove bar of statute of limitations. See note, 102 Am. St. Rep. 768.

Effect of New Promise or Payment on barred judgment. See note, 8 L. R. A. (n. s.) 443.

Running of Limitations does not cancel debt.

Reaffirmed in Dern v. Olsen, 18 Idaho, 367, 110 Pac. 167.

Effect of Statute of Limitations. See notes, 80 Am. St. Rep. 426; 95 Am. St. Rep. 658.

Express Promise on Contract to Enable Creditor to recover, after bar of limitations, must be direct, unqualified admission of debt which party is willing to pay.

Approved in Visher v. Wilbur, 5 Cal. App. 570, 90 Pac. 1068, following rule; Succession of Slaughter, 108 La. 494, 32 So. 379, 58 L. R. A. 408, holding expression of ability to pay barred debt and part payment not to amount to new promise.

Moral Obligation as Consideration for promise. See note, 53 L. R. A. 362.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 690.

36 Cal. 187-192, FARRELL v. PALMER.

Express Promise to Enable Creditor to recover after bar of limitations must be direct, unqualified admission of debt which party is willing to pay.

Reaffirmed in Visher v. Wilbur, 5 Cal. App. 570, 90 Pac. 1068.

Acknowledgment of Debt to Take It from Statute of limitation must be made to creditor or his representative.

Approved in President etc. of California College v. Stephens, 11 Cal. App. 528, 105 Pac. 616, following rule; Visher v. Wilbur, 5 Cal. App. 570, 90 Pac. 1067, holding letters containing new promise, written to heir who subsequently becomes administrator, to pay debt to decedent does not take debt from statute.

Person to Whom Acknowledgment or New Promise must be made to toll statute or remove bar of limitations. See note, 25 L. R. A. (n. s.) 806.

36 Cal. 193-197, YOLO COUNTY v. CITY OF SACRAMENTO.

Nuisance may be Abated and Damages Recovered therefor in same action.

Criticised in Norton v. Colusa Parrot Mining etc. Co., 167 Fed. 204, holding damages could not be recovered for past injuries in addition to injunction in suit in equity to enjoin pollution of stream as nuisance.

Action to Abate Nuisance is an equitable proceeding.

Approved in Learned v. Castle (Cal.), 4 Pac. 192, and Evans v. Ross (Cal.), 8 Pac. 89, both following rule.

Injunction Against Nuisance maintained by municipality. See notes, 23 L. R. A. 302.

Adjudication Respecting Abatement of Nuisance as bar to damage suit. See note, 58 L. R. A. 735.

Public Nuisance may Also be a Private Nuisance, and if so, person injured has action for damages.

Approved in Castle v. Smith (Cal.), 36 Pac. 862, holding, in action to abate nuisance and for damages, findings are unnecessary when plaintiff waives equitable relief; Mountain Copper Co. v. United States, 142 Fed. 644, 73 C. C. A. 621, holding in action to abate copper smelter, court is "unwilling to say appellee could be fully compensated in action at law for damage done" to vegetation; Hoyt v. McLaughlin, 250 Ill. 448, 95 N. E. 467, nuisance created by unlicensed dramshop may be abated at suit of private individual who has suffered special damages.

Abatement of Public Nuisance by private person without suit. See note, 124 Am. St. Rep. 595.

Injunction Against Crime Which is Private Nuisance or which involves property rights. See note, 21 L. R. A. (n. s.) 587.

What are Public Nuisances. See note, 107 Am. St. Rep. 205.

Right to Obstruct or Destroy Rights of navigation. See note, 59 L. R. A. 81.

36 Cal. 197-205, EMMAL v. WEBB.

Findings of Probative Facts from Which Ultimate material facts must inevitably be inferred are sufficient.

Approved in Barry v. Beamer, 8 Cal. App. 203, 96 Pac. 374, holding immaterial certain probative facts not justified by evidence, when findings of ultimate facts found support in evidence; Bryan v. Tormey (Cal.), 21 Pac. 726, ordering correction of findings of probative facts to make consistent with ultimate facts.

36 Cal. 208–214, 95 Am. Dec. 175, LICK v. MADDEN.

Public Officer is not Personally Liable in damages for malconduct unless position of injured party would have been same had not misconduct occurred.

Approved in Black v. Linn, 17 S. D. 336, 96 N. W. 697, commissioners of soldiers' home are personally liable in damages if they wrongfully and maliciously expel member and deprive him of his rights.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 95.

36 Cal. 214–220, BELL v. BED ROCK TUNNEL ETC. CO.

Abandonment of Mining Claim Consists in leaving it without intention of returning.

Approved in Wood v. Etiwanda Water Co., 147 Cal. 234, 81 Pac. 514, holding disuse of dilapidated flume and substitution of iron pipe therefor did not show intention to abandon.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 406, 407, 413.

Failure of Party to Comply With Mining Rule does not work a forfeiture unless rule itself so provides.

Approved in Sturtevant v. Vogel, 167 Fed. 452, 456, 93 C. C. A. 84, holding failure to record notice of location of mining claim does not work forfeiture.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 892.

36 Cal. 220–223, PEOPLE v. DOE G. 1,034.

State cannot Tax Its Own Property.

Approved in Kleinsorge v. Burgbacher, 6 Cal. App. 352, 92 Pac. 202, holding timber lands which have reverted to state for nonpayment of cash price not subject to taxation.

Distinguished in Edwards & Walsh Con. Co. v. Jasper County, 117 Iowa, 374, 94 Am. St. Rep. 301, 90 N. W. 1009, holding courthouse liable for assessment for paving courthouse square; State National Bank v. Memphis, 116 Tenn. 648, 94 S. W. 608, 7 L. R. A. (n. s.) 663, holding state bonds taxable; Orono v. Sigma Alpha Epsilon Soc., 105 Me. 219, 74 Atl. 21, holding chapter house of fraternity on campus of state university not exempt from taxation.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 296, 312, 324.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 37.

36 Cal. 223–230, THORNTON v. HOOK.

Limitation of Cross-examination is not Subject to exact rules and is left to sound discretion of court.

Approved in Orange Co. Fruit Exch. v. Hubbell, 10 N. M. 55, 61 Pac. 121, following rule.

Want of Valuable Consideration to Contract is not fraud per se.

Approved in Schultz v. McLean (Cal.), 25 Pac. 430, reaffirming rule.

36 Cal. 230–239, JONES v. PETALUMA.

Act of July 1, 1864, in Effect Provided for withdrawal of lands in public domain on which towns had been founded from general statutes relating to public domain, and for new system for their disposal.

Approved in Town of Red Bluff v. Walbridge, 15 Cal. App. 783, holding acts of 1860–61, relative to townsite of Red Bluff, to have similar effect.

Right to Change Lot Lines After Entry under townsite act. See note, 30 L. R. A. (n. s.) 184.

Merely Evidentiary Matter should be stricken from complaint.

Approved in Ahlers v. Smiley, 11 Cal. App. 346, 104 Pac. 998, striking record of former suit from complaint as being merely evidence.

Former Judgment is not Bar to Record Action on same subject matter, right to which accrues after judgment.

Reaffirmed in Leet v. Gratz, 124 Mo. App. 413, 101 S. W. 702.

36 Cal. 239–245, MEUSER v. RISDON.

Delegation by City Council of Power to determine width, grade, material, etc., of street, sidewalk, or sewer improvements. See note, 20 L. R. A. 656.

36 Cal. 245–248, PEOPLE v. BOGART.

Indictment may Contain Count for Felonious Conversion and count for felonious taking, when it is doubtful whether offense is larceny or conversion by bailee with intent to steal.

Reaffirmed in Cohoe v. State, 82 Neb. 747, 118 N. W. 1089.

Facts not Vital to Accusation, and constituting merely matter of description, may be stated in indictment as unknown to grand jury, when such is true.

Approved in State v. Quackenbush, 98 Minn. 519, 108 N. W. 955, and Lang v. State, 42 Fla. 598, 28 So. 857, both applying rule to description of property in indictment for larceny.

36 Cal. 249–255, WETHERBEE v. DUNN.

Time for Appeal from Judgment Runs from Date of rendition and entry on minutes of court, and not from date of entry by judgment clerk.

Approved in Brownell v. Superior Court, 157 Cal. 707, 109 Pac. 93, following rule; People v. Schmitz, 7 Cal. App. 345, 94 Pac. 410, holding appeal could be taken before judgment entered at any time after rendition.

Existence of Controverted Boundary Does not Constitute sufficient ground for relief in equity, but peculiar circumstances must exist of such nature that action in ejectment will not afford relief.

Approved in County of Sierra v. County of Nevada, 155 Cal. 11, 99 Pac. 375, holding county may maintain action in equity to restrain another county from exercising jurisdiction over disputed territory when such jurisdiction is actually exercised and boundary line is uncertain; Perry v. Lucas, 11 Haw. 355, holding mere confusion of boundaries and destruction of boundary marks not sufficient to give equity jurisdiction to establish boundaries.

Suit to Ascertain and Declare Boundaries. See note, 119 Am. St. Rep. 67, 70.

36 Cal. 255–267, PEOPLE v. TAYLOR.

Every Instruction Which Correctly Declares Law applicable to case which it supposes, if case can be rationally inferred from testimony, should be given.

Approved in People v. Williamson, 6 Cal. App. 339, 92 Pac. 314, holding improperly refused in homicide case instruction in regard to right of defendant to arm herself when in fear of assault; Spear v. United Railroads, 16 Cal. App. 653, 117 Pac. 964, holding error to refuse requested instruction as to legal duty of motorman to ring bell; State v. Shockley, 29 Utah, 84, 80 Pac. 885, holding weakness of evidence for self-defense no ground for refusal to charge upon it.

Liability for Inducing Breach of Contract. See note, 21 L. R. A. 235.

36 Cal. 268–277, PELL v. McELROY.

Vendor's Lien for Unpaid Purchase Price may be enforced against vendee and grantees having notice of vendor's equities.

Approved in Kuschel v. Hunter (Cal.), 50 Pac. 398, holding vendor's lien obtained prior to mechanic's lien on land holds its priority notwithstanding such vendor failed to comply with section 1192, Code of Civil Procedure, requiring posting of notice by one claiming interest in land to avoid mechanic's lien; Hodgson v. Smith Bros., 136 Iowa, 518, 114 N. W. 40, holding vendor entitled to lien on land sold, as against assignee of vendee's trustee for benefit of creditors, when through mistake full price was not paid.

Open, Notorious and Exclusive Possession and occupation of lands by stranger to vendor's title, as of record at time of conveyance, is sufficient to put purchaser upon inquiry as to such occupant's rights.

Distinguished in Sanguinetti v. Rossen, 12 Cal. App. 632, 107 Pac. 564, holding possession of small portion of land insufficient to charge purchaser with notice of possessor's rights, under facts of case; Austin v. Pulschen (Cal.), 39 Pac. 800, holding facts of case show notice of claim of lien for purchase price to be imparted to mortgagor of land.

Effect of Possession of Real Property as notice. See notes, 104 Am. St. Rep. 345; 13 L. R. A. (n. s.) 56, 57, 58, 116.

36 Cal. 277–281, ESTATE OF GARRAUD.

Final Decree of Probate Court Distributing Estate invests absolute right and title to property distributed in distributees, until reversed or modified on appeal.

Reaffirmed in Goldtree v. Thompson (Cal.), 20 Pac. 414.

Distinguished in Coats v. Harris, 9 Idaho, 468, 75 Pac. 245, holding decree of distribution could not defeat action of one who, not being party to proceedings, could not appeal from decree.

Miscellaneous.—Cited in Estate of Blythe (No. 2), 1 Cof. Prob. 116, to point that fee of attorney for absent heirs may be paid at any time prior to distribution and then charged to party represented.

36 Cal. 281–283, SMITH v. OMNIBUS R. R. CO.

Remedy for Recovering Statutory Penalty must be strictly pursued.

Distinguished in Bisse v. Collins, 12 Idaho, 693, 87 Pac. 1007, holding statute imposing penalty recoverable before justice of peace did not prevent action therefor being brought in district court.

36 Cal. 283–288, FRANCISCO v. MANHATTAN INS. CO.

Supreme Court has No Jurisdiction to Review erroneous order of district court transferring cause to United States court, on application for mandamus to compel district court to proceed with trial.

Distinguished in Scott v. Shields, 8 Cal. App. 19, 96 Pac. 389, holding mandamus lies to compel superior court to enforce taking of deposition of witness for use in another county when witness refuses to answer.

36 Cal. 292–293, CONIFF v. HASTINGS.

Personal Liability to Pay Assessment for local improvement. See note, 35 L. R. A. 61.

36 Cal. 293–299, SHAVER v. MURDOCK.

Materialmen are Bound, as Regards Liens, by terms of original contract of principal contractor.

Approved in Stein v. McCarthy, 120 Wis. 295, 97 N. W. 915, reaffirming rule; Brown Const. Co. v. Central Ill. Const. Co., 234 Ill. 401, 84 N. E. 1039, applying rule to subcontractor.

36 Cal. 299–302, HOOK v. WHITE.

Averment in Complaint That Plaintiff is Still Owner and holder of note sued on is surplusage.

Approved in Kirk v. Roberts (Cal.), 31 Pac. 622, holding that presumption is, that when one acquires interest in chose in action by indorsement or transfer, it is for value, and continues in holder until contrary is shown, and in complaint thereon nonpayment need not be alleged.

Allegation That Defendant Executed to Plaintiff his promissory note is sufficient to import that note was payable to plaintiff.

Approved in Arnot etc. v. Baird (Cal.), 12 Pac. 387, averment as to making of notes considered and held sufficient.

36 Cal. 303–310, STEINBACK v. KRONE.

Nature and Elements of Unlawful Detainer. See note, 120 Am. St. Rep. 35, 58.

36 Cal. 313–322, ROSS v. HEINTZEN.

Rights and Position of Creditors, Purchasers, and other third parties in partnership realty. See note, 28 L. R. A. 172.

36 Cal. 322–327, BARRETT v. ANEREIN.

Purchaser at Tax Sale, Who was Under Obligation to pay tax, cannot thereby strengthen his title.

Approved in Allen v. Evans, 7 Ariz. 361, 64 Pac. 412, reaffirming rule; Barlow v. Hitzler, 40 Colo. 118, 90 Pac. 93, holding party in possession under trust deed and claiming title did not strengthen title by purchase at tax sale.

36 Cal. 328–329, VANCE v. PENA.

Where False Order Denying Rehearing is entered by clerk by mistake, court may recall remittitur, correct mistake, and restore cause to calendar.

Approved in Ott v. Boring, 131 Wis. 492, 111 N. W. 835, reaffirming rule; Nystrom v. Templeton, 17 N. D. 465, 117 N. W. 473, recalling

remittitur to correct mistake; Livesly v. Johnston, 47 Or. 196, 82 Pac. 855, recalling mandate dismissing appeal when issued under stipulation entered into by mistake.

36 Cal. 329–332, ESTATE OF DONAHUE.

Descent or Hereditary Succession is Title whereby a man, on death of ancestor, acquires such ancestor's estate by right of representation as his heir at law.

Approved in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 357, 107 Pac. 338, discussing nature of tenancy of spouses in homestead and application of section 1265 of original Civil Code; Stolenburg v. Diercks, 117 Iowa, 29, 90 N. W. 526, holding personalty as well as realty passed by "inheritance."

36 Cal. 333–341, 95 Am. Dec. 181, MOON v. ROLLINS.

Abandonment Takes Place When Party in possession of realty leaves it without intention to return.

Approved in Willmore Coal Co. v. Brown, 147 Fed. 943, holding failure for twenty-four years to pay royalties and exercise rights under coal leases constituted abandonment of such rights; Sowles v. Minot, 82 Vt. 355, 137 Am. St. Rep. 1010, 73 Atl. 1029, holding nonuser of watercourse not to be abandoned when there was no intention to abandon.

Gain or Loss of Title by abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 891, 892, 903.

36 Cal. 342–362, 95 Am. Dec. 186, WRIGHT v. RYDER.

Agreement in Partial Restraint of Trade restricting it within reasonable limits, or confining it to particular persons and founded on good consideration, is valid.

Approved in Swigert & Howard v. Tilden, 121 Iowa, 655, 100 Am. St. Rep. 374, 97 N. W. 84, 63 L. R. A. 608, upholding contract by which seller of mail order business agreed not to engage in similar business within one hundred miles; Roberts v. Lemont, 73 Neb. 369, 102 N. W. 771, holding void agreement not to engage in particular business not limited in time.

Validity of Agreement in Restraint of Trade, ancillary to sale of business or profession, as affected by territorial scope. See note, 24 L. R. A. (n. s.) 918, 932.

36 Cal. 362–375, RHINE v. ELLEN.

Payment of Consideration Recited in deed, being recital of fact, may be contradicted by extraneous evidence.

Approved in Brixen v. Jorgensen, 33 Utah, 102, 92 Pac. 1006, holding recital of payment in contract of sale could be contradicted.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 114.

36 Cal. 383–390, STOAKES v. MONROE.

To Justify New Trial on Ground of Newly Discovered Evidence, it must appear that diligence was used to discover evidence before trial, that new evidence is not cumulative nor for impeachment, that it is material and would probably have changed result of trial.

Approved in James v. Oakland Traction Co., 10 Cal. App. 803, 103 Pac. 1090, refusing new trial when new evidence could only be cumulative; Weinburg v. Somps (Cal.), 33 Pac. 342, refusing new trial on ground of newly discovered evidence for neglect to summon witnesses before close of trial when such could have been done after materiality of their testimony became known; Libby v. Barry, 15 N. D. 290, 107 N. W. 974, refusing new trial when newly discovered evidence was not material but merely impeaching.

36 Cal. 390–403, ABADIE v. LOBENO.

Purchaser at Execution Sale Acquires Only Interest of judgment debtor in property sold.

Approved in Judson v. Lyford (Cal.), 23 Pac. 59, following rule.

Nature of Title or Estate of Holder of sheriff's certificate before obtaining deed. See note, 15 L. R. A. 68, 69.

Relief of Purchaser upon annulling judicial or execution sale. See note, 69 L. R. A. 44, 57.

Purchaser at Execution Sale does not thereby acquire any interest in the judgment or debt on which it was rendered.

Approved in Hardin v. Kelley, 144 Fed. 354, 75 C. C. A. 355, holding purchaser at execution sale becomes inchoate owner whose interest may ripen into complete title.

Where Purchaser at Execution Sale Treats One not entitled to redeem as redemptioner, such redemption is good, or at least amounts to an assignment of certificate of sale.

Approved in White v. Costigan (Cal.), 63 Pac. 1077, holding where one not authorized to redeem paid redemption money to sheriff, he had right to have his equitable title perfected by conveyance from owner, to whom purchaser thereafter conveyed land.

36 Cal. 404–411, COULIN v. SAN FRANCISCO ETC. R. R. CO.

Defense of Contributory Negligence of Fellow-employee must be pleaded to admit proof.

Reaffirmed in Duff v. Willamette Steel Wks., 45 Or. 482, 78 Pac. 364.

Denied in Wilson v. Charleston etc. Ry. Co., 51 S. C. 95, 28 S. E. 97, holding evidence of negligence of fellow-servant admissible under general denial.

36 Cal. 411–414, HIMMELMANN v. COFRAN.

Superintendent of Streets in San Francisco after fulfillment of contract to improve same is bound to make assessment on lots to cover sum due for such work.

Approved in Union Trust Co. v. State of California, 154 Cal. 727, 99 Pac. 188, 24 L. R. A. (n. s.) 1111, holding no liability can be imposed on state by failure of proper officers to levy and collect assessment on street improvement bonds under act of 1872.

36 Cal. 414–446, WRIGHT v. ROSS.

Assignment of Note and Mortgage for securing sum of money considered and held to be a chattel mortgage and not a pledge.

Approved in Manhattan Life Ins. Co. v. Wright, 126 Fed. 84, 61 C. C. A. 138, holding assignment of insurance policy as collateral security a mortgage thereof.

Statute of Limitations Does not Begin to Run in favor of trustee of express trust so long as trust continues and is not denied, since possession of trustee is in subordination to rights of beneficiary.

Approved in Peterson v. Taylor (Cal.), 33 Pac. 438, holding that certificate that maker thereof holds money to abide settlement of disputes creates express trust and limitations do not begin to run in trustee's favor until owner of money is determined; City of Centerville v. Turner Co., 25 S. D. 303, 126 N. W. 606, holding limitations begin to run against claim of city to part of city taxes, retained by county upon collection as commission, from time of retention.

Pledgee may Purchase Pledged Property at foreclosure sale.

Approved in Reeves v. Bruening, 16 N. D. 401, 114 N. W. 314, holding void purchase of pledged property at foreclosure sale by pledgee without pledgor's consent.

Who may not Purchase at Judicial Execution and other compulsory sales. See note, 136 Am. St. Rep. 811.

36 Cal. 447–455, 95 Am. Dec. 194, WILSON v. WILSON.

Limitations Runs Against Claim of Wife's Separate Estate against husband just as in other claims.

Reaffirmed in Estate of Deaner, 126 Iowa, 703, 102 N. W. 826.

Statute of Limitations Against Claims between husband and wife. See note, 106 Am. St. Rep. 376.

Wife may Sue Husband on note which is her separate property.

Approved in Union Oil Co. v. Stewart, 158 Cal. 155, 110 Pac. 315, wife abandoned by husband may perfect title as against him or his creditors by adverse possession of property left in her hands; Mathewson v. Mathewson, 79 Conn. 32, 63 Atl. 289, 5 L. R. A. (n. s.) 611, holding wife could sue husband for breach of money contract; Rice, Stix & Co. v. Sally, 176 Mo. 122, 75 S. W. 401, holding married woman, under statute giving her right to contract and carry on business on her own account, could contract with husband; Thompson v. C. N. O. etc. Ry. Co., 109 Tenn. 273, 70 S. W. 613, holding husband merely formal party in wife's action for damages for personal injuries.

Right of Wife to Sue Husband on Contract. See note, 5 L. R. A. (n. s.) 613.

Effect of Intermarriage between debtor and creditor. See note, 21 L. R. A. (n. s.) 684.

36 Cal. 455–462, 95 Am. Dec. 199, LONG v. NEVILLE.

Sheriff's Right to Indemnity while executing civil process. See note, 89 Am. St. Rep. 417, 419.

36 Cal. 462–485, KINSEY v. WALLACE.

Where Damages Awarded by Jury are Excessive, appellate court may direct release of part of damages or award new trial.

Approved in Choctaw etc. R. R. Co. v. Burgess, 21 Okl. 674, 97 Pac. 279, reaffirming rule; Hocks v. Sprangers, 113 Wis. 142, 89 N. W. 117, directing release of part of damages; Davis Iron Works Co. v. White, 31 Colo. 85, 71 Pac. 385, holding appellate court could not order remittitur of part of excessive damages granted under influence of prejudice but must order new trial.

When Action Sufficiently at an End to support suit for malicious prosecution. See note, 2 L. R. A. (n. s.) 952.

36 Cal. 489–522, SATTERLEE v. BLISS.

Supreme Court will not Amend Record on appeal by adding thereto facts which occurred during trial.

Approved in Mendocino County v. Peters, 2 Cal. App. 27, 82 Pac. 1123, and People v. Johnson, 9 Cal. App. 235, 98 Pac. 683, both following rule; Warnock Ins. Agency v. Peterson Invest. Co., 35 Utah, 548, 101 Pac. 702, holding trial court could not amend bill of exceptions after expiration of time to settle by adding copy of notice of intention to move for new trial.

Knowledge Acquired by Attorney during relation of attorney and client is not privileged unless acquired in course of and for purposes of employment.

Approved in Hammons v. State, 73 Ark. 500, 108 Am. St. Rep. 66, 84 S. W. 720, 68 L. R. A. 234, holding admissible in rape case letter of accused to wife, intercepted and never delivered to her; Mackel v. Bartlett, 33 Mont. 131, 82 Pac. 797, holding statements made to attorney not to be privileged.

Admissibility of Communications to Persons serving in judicial capacity. See note, 67 L. R. A. 924.

Effect of Judgment in Ejectment against tenant upon landlord not a party, or vice versa. See note, 26 L. R. A. (n. s.) 598.

36 Cal. 522–531, PEOPLE v. TYLER.

In Trial for Rape Evidence That Defendant had beaten prosecuting witness at various times is inadmissible.

Reaffirmed in Ball v. State, 44 Tex. Cr. 492, 72 S. W. 386.

It is Error for District Attorney to Comment upon defendant's failure to testify in his own behalf.

Approved in People v. Morris, 3 Cal. App. 6, 84 Pac. 464, following rule; State v. Taylor, 57 W. Va. 236, 50 S. E. 250, comment by district attorney on accused's refusal to have his wife testify when he himself had testified is reversible error.

Denied in Parker v. State, 39 Tex. Cr. 265, 45 S. W. 813, where defendant brought forward in argument accused's failure to testify, it was not error for district attorney to comment thereon.

Evidence of Good Character of Prosecuting Witness on charge of rape is admissible only when her character for chastity has been attacked.

Reaffirmed in People v. O'Brien, 130 Cal. 6, 62 Pac. 299.

36 Cal. 531–535, PEOPLE v. LEWIS.

Drunkenness is No Excuse for commission of crime.

Approved in People v. Hower, 151 Cal. 641, 643, 91 Pac. 508, holding person voluntarily intoxicated is not relieved from responsibility for acts by reason of insanity so produced; State v. Johnny, 29 Nev. 223, 87 Pac. 9, instruction as to intoxication of defendant in homicide case considered and held correct.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 465.

36 Cal. 535–542, 95 Am. Dec. 205, CANNON v. STOCKMON.

Purchase of an Outstanding Adverse Claim to land by one in possession claiming adversely to all others for purpose of quieting title does not estop him from setting up limitations against a third party also claiming under adverse title.

Approved in Singer Mfg. Co. v. Tillman, 3 Ariz. 128, 21 Pac. 818, taking of quitclaim deed of outstanding claim of title by one in possession under claim of title does not admit title in grantor; Mahukaliilii v. Hobron, 5 Haw. 107, holding taking of deed from supposed heirs of plaintiff's ancestor by defendant who claimed by adverse possession is not fatal to his adverse claim; Boe v. Arnold, 54 Or. 66, 102 Pac. 294, claimant by adverse possession as to all persons but recognizing superior title of United States, which he was seeking to acquire, may assert such title against claimant under prior grant; Silverstone v. Hanley, 55 Wash. 460, 104 Pac. 768, purchase of tax certificate by one claiming by adverse possession land assessed to unknown owner is not recognition of superior title.

Distinguished in Jensen v. Hunter (Cal.), 41 Pac. 17, holding title to ditch diverting water from stream on land of plaintiff's decedent cannot be claimed by adverse possession by one who after three years' use of water acknowledged decedent's title by offering to pay for grant thereof.

Effect of Bar of Statute of limitations. See note, 95 Am. St. Rep. 672.

Adverse Possession of Land for Five Years gives fee simple title.

Approved in Strong v. Baldwin, 154 Cal. 162, 129 Am. St. Rep. 149, 97 Pac. 183, following rule; Rennert v. Shirk, 163 Ind. 554, 72 N. E. 550, one does not lose title acquired by adverse possession by subsequent statement that he did not claim land and offer to buy it.

Party Claiming Title by Adverse Possession may give in evidence his acts and declarations made or done at any time while in possession, for purpose of showing character in which he claimed.

Approved in Murphy v. Dafoe, 18 S. D. 47, 99 N. W. 87, admitting declarations of one in possession that he was acting as agent; Stiles v. Granger, 17 N. D. 509, 117 N. W. 780, arguendo.

36 Cal. 542–552, BRIGGS v. McCULLOUGH.

Life Insurance as Assets of bankrupt or insolvent. See note, 50 L. R. A. 44.

Right to Subject Endowment or tontine policy to claims of creditors. See note, 4 L. R. A. (n. s.) 457.

36 Cal. 552–559, SARGENT v. CAVIS.

County Treasurer cannot be Punished for Contempt for not obeying an order of court directing payment of money to witness, without some proceeding to which treasurer is party.

Approved in Banter v. Superior Court, 6 Cal. App. 196, 91 Pac. 750, holding court issuing mandate to secretary of corporation to produce books is without jurisdiction to punish his successor for disobedience when he was not party to the mandamus proceeding.

36 Cal. 559–562, PAGE v. O'BRIEN.

To Entitle Plaintiff to Recover in Ejectment, he must show prior possession or paper title.

Approved in Froman v. Madden, 13 Idaho, 144, 88 Pac. 895, holding plaintiff entitled to recover upon proof of title and right to possession.

36 Cal. 578–580, MARTINEZ v. PLANEL.

Plaintiff in Action for Personal Injuries cannot prove that another person was injured in same manner under same conditions.

Approved in Moody v. Peirano (Cal. App.), 84 Pac. 784, holding in action for breach of warranty of seeds sold it cannot be shown that defendant sold seed to another party of same kind and warranty during same season as to plaintiff.

36 Cal. 580–585, ROSS v. ROADHOUSE.

Rights to Civil Action for Forcible Entry and detainer. See note, 121 Am. St. Rep. 389.

36 Cal. 585–590, GRIGSBY v. NAPA COUNTY.

Neglect to Serve Summons for Two Years and Eight Months after issuance is ground for dismissal.

Approved in Luke v. Bennion, 36 Utah, 64, 106 Pac. 713, reaffirming rule; State Sav. Bank v. Albertson, 39 Mont. 421, 102 Pac. 694, refusing to review action of trial court on denial of dismissal for want of prosecution.

36 Cal. 590–595, WHEATON v. NORTH BEACH ETC. R. R. CO.

Verdict in Personal Injury Case will not be Disturbed on motion for new trial unless it suggests at first flush passion, prejudice, or corruption.

Approved in Bond v. United Railroads, 159 Cal. 286, 113 Pac. 373, and Scally v. Garratt, 11 Cal. App. 147, 104 Pac. 329, both following rule; Lanigan v. Neely, 4 Cal. App. 772, 89 Pac. 446, holding verdict of eight thousand dollars for breach of promise of marriage not excessive; Hale v. San Bernardino etc. Traction Co., 156 Cal. 715, 106 Pac. 84, holding twelve thousand dollars not excessive for death of young man leaving widow and child; Maloney v. Winston Bros. Co., 18 Idaho, 766, 111 Pac. 1089, holding recovery for personal injuries to be excessive.

Passenger Carriers are Bound to Utmost Care and diligence in transportation of passengers.

Approved in Maxwell v. Fresno City Ry. Co., 4 Cal. App. 747, 89 Pac. 367, holding carrier responsible for injury to passenger while alighting due to its neglect to maintain suitable place to alight; Kline v. Santa Barbara etc. Ry. Co., 150 Cal. 746, 90 Pac. 127, approving instruction in regard to utmost care and diligence in care for passengers.

Negligence in Getting on or Off moving street-car. See note, 38 L. R. A. 789.

36 Cal. 606–620, PIPER v. TRUE.

Uncertain Description in Deed must be Construed most strongly against grantor.

Reaffirmed in Hornet v. Dumbeck, 39 Ind. App. 496, 78 N. E. 696.

36 Cal. 623–625, JOHNSON v. DEWEY.

Power of Lessee or Vendee to subject owner's interest to mechanic's liens. See note, 23 L. R. A. (n. s.) 606.

36 Cal. 625–639, ANDERSON v. FISK.

Right to Compensation for Improvements on land, in good faith, under oral contract or gift. See note, 53 L. R. A. 342.

36 Cal. 639–648, SAN FRANCISCO ETC. WATER CO v. ALAMEDA WATER CO.

Statutory Power to Condemn Private Property for public use must be strictly construed.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 216, 82 Pac. 619, holding city levee commissioners could not condemn lands for levee purposes outside city limits under swamp land act.

36 Cal. 648–651, NEUVAL v. COWELL.

Where Reference in Contract is Made to another writing for specified purpose, such writing becomes a part of the contract for such purpose only.

Approved in Woollacott v. Meekin, 151 Cal. 710, 91 Pac. 615, and Moreing v. Weber, 3 Cal. App. 20, 84 Pac. 222, both following rule.

36 Cal. 658–687, PEOPLE v. WASHINGTON.

Miscellaneous.—Cited in Ex parte Goldman (Cal. App.), 88 Pac. 821, in support of proposition that acts constituting offense charged must be set out in full in indictment when words in statute establishing offense have no precise technical meaning which of itself implies the offense.

36 Cal. 691–700, VASSAULT v. AUSTIN.

Where Important Property Rights have Grown Up under decisions of the supreme court, and correctness of such decisions has been tacitly admitted, they will not be disturbed.

Approved in Schoonover v. Birnbaum, 148 Cal. 551, 83 Pac. 1000, holding as stare decisis rule that homestead cannot be selected upon lands owned by claimant as tenant in common or joint tenant; Hollywood Lumber Co. v. Love, 155 Cal. 274, 100 Pac. 700, holding in absence of statute former decision should be followed as to necessity of notice of ownership by trustee under trust deed to avoid effect of mechanic's lien.

Record of Deed Void as to Any Person is notice to such person of nothing except existence of void instrument.

Approved in Ellis v. White, 3 Haw. 214, following rule.

Title to Community Property may be in name of either spouse.

Reaffirmed in Killian v. Killian, 10 Cal. App. 318, 101 Pac. 808.

Miscellaneous—Cited in Butler v. Austin, 64 Cal. 5, 27 Pac. 788, referring historically to principal case.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 37 CALIFORNIA.

37 Cal. 11–15, MANN v. McATEE.

Under Original Section 214, Practice Act, execution could issue by leave of court upon motion after five years from entry of judgment.

Distinguished in National Bank v. Los Angeles Iron etc. Co., 2 Cal. App. 662, 84 Pac. 468, holding execution after five years will be issued only on motion with notice to judgment debtor.

Section 214, Practice Act, Bars Execution on judgments already defunct by lapse of five years.

Approved in Doehla v. Phillips, 151 Cal. 492, 493, 91 Pac. 332, holding section 685, Code of Civil Procedure, authorizes execution on judgments not barred by five years' limitation at time of passage of amendment; Denny v. Bean, 51 Or. 186, 93 Pac. 696, holding statutory remedy given on lapsed judgment could not have retroactive effect.

37 Cal. 15–33, 99 Am. Dec. 237, BREWSTER v. HARTLEY.

Recital of Facts of Case in Stipulation by Parties renders specifications of errors in record unnecessary on appeal.

Approved in Grunsky v. Field, 1 Cal. App. 626, 82 Pac. 980, holding when stipulation is made that case be submitted on record of former trial, such record cannot be reviewed in appellate court.

Corporation cannot Take Away from Stockholders their statutory power to elect directors.

Approved in Arkansas Valley Sugar Beet etc. Co. v. Ft. Lyon Canal Co., 173 Fed. 605, 97 C. C. A. 551, holding validity of contract with another corporation giving it right to name certain directors cannot be tested in suit in which stockholders of first corporation are not joined; State v. Anderson, 31 Ind. App. 44, 46, 67 N. E. 211, holding stockholders could not be deprived of power of electing officers by provisions of articles of incorporation.

By-law Regulation of Elections by private corporations. See note, 18 L. R. A. 584.

Pledgee of Corporation Stock has no right to vote it.

Reaffirmed in Haskell v. Read, 68 Neb. 112, 93 N. W. 998.

Rights, Remedies and Liabilities of pledgees of corporate stock. See note, 121 Am. St. Rep. 196.

When Charter Provides Mode for Exercise of corporate power, such mode cannot be changed by by-laws.

Approved in Lange v. Royal Highlanders, 75 Neb. 191, 121 Am. St. Rep. 786, 106 N. W. 225, 10 L. R. A. (n. s.) 666, reaffirming rule.

Written Transfer of Title is Essential to valid pledge of incorporeal property.

Approved in American Exchange Nat. Bk. v. Federal Nat. Bk. of Pittsburg, 226 Pa. 489, 134 Am. St. Rep. 1071, 75 Atl. 685, holding book account not pledged by delivery of copy of account without written assignment.

Necessity of Writing to Transfer shares of stock. See note, 2 L. R. A. (n. s.) 804.

General Property of Pledged Stock remains in pledgor.

Approved in Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 358, 112 S. W. 760, following rule; Dickey v. Porter, 203 Mo. 22, 101 S. W. 591, holding pledgor could sue on pledged tax bill; White River Sav. Bk. v. Capital Sav. Bk., 77 Vt. 128, 107 Am. St. Rep. 754, 59 Atl. 199, holding pledgor's interest subject to lien although title had passed to pledgee.

37 Cal. 40–51, MAINE BOYS' TUNNEL CO. v. BOSTON TUNNEL CO.

Where Evidence was Without Substantial Conflict, opposed to verdict, appellate court will order new trial.

Approved in McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 403, 84 Pac. 351, following rule.

37 Cal. 51–53, PEOPLE v. BEDEN.

When Employee in Charge of Livery-stable took horses therefrom, they were taken from possession of his employer and offense was larceny.

Approved in Aabel v. State, 86 Neb. 719, 136 Am. St. Rep. 718, 126 N. W. 319, applying rule to taking of goods by clerk.

Necessity for Lawful Possession in embezzlement. See note, 87 Am. St. Rep. 30.

Larceny from Possession of Servants or agents. See note, 88 Am. St. Rep. 581.

37 Cal. 54–55, PEOPLE v. BLACK DIAMOND COAL MIN. CO.

Possession of and Claim to Public Land of United States is property and as such is taxable to claimant.

Approved in San Francisco v. Flood, 64 Cal. 507, 2 Pac. 266, and Topeka Commercial Security Co. v. McPherson (Okl.), 52 Pac. 400, both following rule.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 348.

What Constitutes Real Estate for purposes of taxation. See note, 15 L. R. A. 297.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

37 Cal. 55–58, MARTIN v. QUINN.

Payment of Debt by Person not Legally Responsible for it is satisfaction thereof, if money is accepted for that purpose.

Reaffirmed in Charnock v. Jones, 22 N. D. 135, 115 S. W. 1073.

Effect of Payment of Debt by Volunteer or stranger to original undertaking. See note, 23 L. R. A. 120.

Persons Between Whom Accord and satisfaction allowed. See note, 100 Am. St. Rep. 397.

37 Cal. 59–61, MORGAN v. HIGGINS.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 406.

37 Cal. 61–66, WORDEN v. HAMMOND.

Where Reference in Contract to Annexed Specifications is false, it cannot be aided by oral evidence.

Approved in Howe v. Schmidt, 151 Cal. 438, 90 Pac. 1057, holding reference in contract to annexed specifications satisfied by pages of specifications attached thereto; Hartwell v. Ganahl Lumber Co., 8 Cal. App. 735, 97 Pac. 902, holding specifications annexed to contract and referred to therein sufficient to sustain contract although signed by contractor only.

Power of Lessee of Vendee to Subject Owner's Interest to mechanics' liens. See note, 23 L. R. A. (n. s.) 606.

Miscellaneous.—Cited in Thorne v. Hammond, 46 Cal. 534, referring historically to principal case.

37 Cal. 69–96, RYDER v. COHN.

Court is Deemed to have Acquired Jurisdiction of parties, unless it appears on face of record that it had not such jurisdiction.

Reaffirmed in Segal v. Reisart, 128 Ky. 129, 107 S. W. 751.

37 Cal. 96–100, 99 Am. Dec. 248, SPENCER v. GEISSMAN.

Homestead Right Does not Depend upon Character of title held by party claiming it, but whatever interest he may have is entitled to protection.

Reaffirmed in Turner v. Brownings, 128 Ky. 85, 107 S. W. 320.

Homestead Rights. See note, 136 Am. St. Rep. 24.

37 Cal. 100–113, PAGE v. FOWLER.

Legal Proposition Decided on First Appeal, whether correct or not, becomes law of case in all subsequent stages and will not be reviewed on second appeal.

Approved in Oklahoma City Elec. etc. Co. v. Bannhoff, 21 Okl. 508, 96 Pac. 760, following rule; People's Lumber Co. v. Gillard, 5 Cal. App. 438, 90 Pac. 557, holding law of case not strictly confined to that portion of opinion of appellate court which can be said to be strictly essential to disposition made of case.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 328.

Party in Actual Possession of Public Land, but without title, is to be deemed owner as against mere intruder without color of title.

Approved in Miller v. Imperial Water Co. No. 8, 156 Cal. 30, 103 Pac. 229, 24 L. R. A. (n. s.) 372, holding occupant of public lands with intent to acquire title is to be deemed owner as against all except government.

Replevin by or Against One in Adverse Possession of land for things severed. See note, 69 L. R. A. 735.

37 Cal. 113–121, 99 Am. Dec. 251, HENDRIE v. BERKOWITZ.

What Circumstances Sufficient to put purchaser of negotiable paper on inquiry. See note, 29 L. R. A. (n. s.) 357.

37 Cal. 121–154, 99 Am. Dec. 256, BAGLEY v. WARD.

In Ejectment, Title Acquired After Suit Begun can only be set up in supplemental answer.

Reaffirmed in Bush v. Pioneer Mining Co., 3 Alaska, 615.

Redemption from Sheriff's Sale is a transfer of the certificate of sale.

Approved in White v. Costigan (Cal.), 63 Pac. 1077, holding quitclaim deed to owner by purchaser at mortgage sale operates as a redemption.

Levy of Execution on Realty During Life of judgment lien fails when sale is not made thereon during life of lien.

Approved in Miller & Co. v. Melone, 11 Okl. 256, 67 Pac. 484, 56 L. R. A. 620, holding proceeding ancillary to judgment failed when judgment lien expired pending the proceeding; Boggs v. Dunn, 160 Cal. 285, 116 Pac. 744, arguendo.

Judgment is Lien on Defendant's Lands and levy is unnecessary.

Approved in Britannia Co. v. United States F. & G. Co., 43 Mont. 100, 115 Pac. 48, reaffirming rule.

Duration of Judgment Lien. See note, 81 Am. St. Rep. 679.

Duration of Attachment Lien. See notes, 109 Am. St. Rep. 469; 124 Am. St. Rep. 849.

Necessity of Recording Execution. See note, 80 Am. St. Rep. 408.

37 Cal. 154–167, MECHAM v. McKAY.

Although Orders Entered by Consent will not be reviewed on appeal, yet if it appear by fair construction of stipulation consenting to order denying new trial that it was only intended to facilitate appeal, and not to abandon right to contest order, such order will be reviewed.

Approved in County of Placer v. Freeman, 149 Cal. 742, 87 Pac. 629, holding judgment of dismissal not consent judgment when demand was reduced to twenty dollars by striking out parts of complaint, and both parties thereupon admitted that court had no jurisdiction of such amount; Hibernia Savings etc. Society v. Waymire, 152 Cal. 287, 92 Pac. 646, refusing to consider appeal from consent judgment.

A Pleading Superseded by Amended Pleading is not an admission on trial of case.

Approved in Wiley v. Northern Pac. R. Co., 60 Wash. 599, 111 Pac. 802, following rule.

Distinguished in Pollitz v. Wickersham, 150 Cal. 248, 88 Pac. 915, holding as admission statements in verified claim presented against

estate, which, when denied, was superseded by a second claim; Lane v. Choctaw etc. R. Co. 19 Okl. 328, 91 Pac. 884, holding superseded petition could be offered as evidence at trial, but not as an admission of record.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 403.

Nature and Elements of Unlawful Detainer. See note, 120 Am. St. Rep. 34.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 204.

Miscellaneous.—Cited in Bernard v. Pittsburg Coal Co., 137 Mich. 285, 100 N. W. 398, questioning right to introduce original declaration in evidence against plaintiff.

37 Cal. 168–176, MARTIN v. WADE.

Agreement by Which Money is Advanced to candidate for public office on condition of sharing emoluments thereof is void as against public policy.

Approved in Le Tourneaux v. Gilliss, 1 Cal. App. 551, 82 Pac. 629, holding void note given to obtain money to carry out lobbying contract between maker and payee.

37 Cal. 176–183, ESTATE OF DELANEY.

Petition of Wife for Probate Homestead must set forth what was homestead at time of husband's death and its value then.

Approved in Estate of McVay, 14 Idaho, 72, 93 Pac. 33, upholding petition for probate homestead.

Surviving Wife is Entitled to Probate Homestead of actual residence, on which homestead was declared, but amount set off is determined by value at death of husband, and not at time of declaration.

Denied in Brewington v. Brewington, 211 Mo. 59, 109 S. W. 727, holding homestead could not be revalued on death of housekeeper.

Revaluation or Reassignment of Homestead for appreciation or depreciation. See note, 44 L. R. A. 401, 402.

Homestead and Tests by Which it is ascertained are same whether question arises between husband and wife or one of them and third party.

Distinguished in Estate of Green, 1 Cof. Prob. 451, holding probate homestead is governed by Code of Civil Procedure, section 1465, and voluntary homestead by Civil Code, section 1262.

Miscellaneous.—Cited in Blood v. Munn, 155 Cal. 232, 100 Pac. 696, discussing application of state laws relating to homestead in bankruptcy proceedings in federal court; Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 359, 107 Pac. 339, to point that right of homestead secured by constitution requires legislation to make it effectual, and legislature has power over subject.

37 Cal. 183–189, LAWRENCE v. MONTGOMERY.

Covenant Against Encumbrances in Warranty Deed is broken when made if encumbrance exists on land conveyed when deed is delivered.

Approved in Dahl v. Stakke, 12 N. D. 335, 96 N. W. 357, following rule.

What Covenants Run With the Land. See note, 82 Am. St. Rep. 676.

Covenants of Seisin. See note, 125 Am. St. Rep. 448, 449, 452, 456.

Necessity of Eviction to Maintenance of action on warranty of title or seisin. See note, 17 L. R. A. (n. s.) 1183, 1185.

37 Cal. 190–192, ESTATE OF WHITE.

Judge Interested in Probate Case is Disqualified from hearing and deciding same.

Approved in Johnson v. German-American Ins. Co., 150 Cal. 338, 88 Pac. 986, holding void order extending time to serve bill of exceptions made by judge disqualified to act; dissenting opinion in Jones v. Williamsburg etc. Ins. Co., 83 Kan. 690, 112 Pac. 829, majority holding no prejudice shown when party was compelled to go to trial before disqualified judge.

Probate Judge Who is Interested in Estate should grant change of venue.

Approved in Spreckels v. De Bolt, 16 Haw. 479, holding Organic Act, section 84, does not prevent judge who had ordered nonsuit which was set aside by supreme court from hearing motion for change of venue on ground of local prejudice.

Limited in United Real Estate etc. Co. v. Barnes, 159 Cal. 247, 113 Pac. 169, property owner who failed to appear before council and make objection that commissioners appointed to assess benefits and damages under act of 1889 were disqualified because they owned property in assessment district, waived the obligation.

37 Cal. 193–197, CARROLL v. SIEBENTHALER.

Salary of an Office is Incident to Its Title and not to its occupation.

Approved in Chubbuck v. Wilson, 151 Cal. 164, 90 Pac. 528, holding de jure officer has right of action against intruder for recovery of salary and fees received; Merkley v. Williams, 3 Cal. App. 270, 84 Pac. 1016, holding under Political Code, section 936, officer de jure entitled to salary only after determination of contest; Bannerman v. Boyle, 160 Cal. 199, 200, 116 Pac. 732, 733, under Political Code, sections 936, 937, as amended in 1891, de facto officer has no right to salary unless he has title to office; Ransom v. Boston, 192 Mass. 306, 78 N. E. 484, holding party can maintain action against city for wages which he would have earned had he been continuously employed by city under civil service rules.

Denied in Brown v. Tama County, 122 Iowa, 750, 101 Am. St. Rep. 296, 98 N. W. 564, and Stearns v. Sims, 23 Okl. 632, 104 Pac. 47, both holding de jure officer wrongfully suspended could not recover salary for period of such suspension, when it had been paid to de facto officer,

Effect of Payment to De Facto Officer upon right of officer de jure to salary. See note, 19 L. R. A. 689.

Auditor Should Refuse to Draw Warrant for claim not presented to supervisors within one year after it became due.

Approved in Kelley v. Sersanous (Cal.), 46 Pac. 300, reaffirming rule.

37 Cal. 197–202, JACOB v. KETCHAM.

Award of Arbitrators to be Valid must be certain and decisive as to matters submitted, and thus avoid further litigation.

Approved in Boyd v. Bargagliotti, 12 Cal. App. 238, 107 Pac. 154, holding award not final because arbitrators failed to find on contract submitted.

37 Cal. 202-207, LAWTON v. GORDON.

Withdrawal of Deed from Recorder's Office after filing suspends constructive notice consequent upon recording until redeposited.

Approved in Watkins v. Wilhoit (Cal.), 35 Pac. 650, holding deed is not constructive notice until actually spread on record-book and then it relates back to time of filing.

Effect of Destruction or Cancellation, or redelivery to grantor for that purpose, of delivered but unrecorded deed. See note, 18 L. R. A. (n. s.) 1169.

37 Cal. 208-222, MARTIN v. BERRY.

Proceedings Under State Insolvency Law are valid if begun at any time before taking effect of national bankruptcy act.

Approved in Grunsfeld Bros. v. Brownwell, 12 N. M. 201, 76 Pac. 312, holding valid proceeding under state law to set aside conveyance alleged in fraud of creditors commenced before taking effect of national bankruptcy act.

Relation of Bankrupt Law to assignments and insolvent proceedings under state laws. See note, 45 L. R. A. 187.

37 Cal. 223-228, KETCHUM v. CRIPPEN.

Equity will not Enjoin Enforcement of judgment when judgment debtor has plain, speedy and adequate remedy at law.

Reaffirmed in Donovan v. McDevitt, 36 Mont. 64, 92 Pac. 50.

Equity cannot be Invoked to Relieve from judgment when statutory remedy of motion to set aside exists.

Approved in Estudillo v. Security Loan etc. Co., 149 Cal. 563, 87 Pac. 22, holding relief in equity from judgment may be granted after failure of motion to set aside; Chielovich v. Krauss (Cal.), 9 Pac. 946, holding where in quiet title suit plaintiff's title is founded on fraudulent judgment, it must be made to appear that parties defrauded took proper steps to set judgment aside in order to avoid its consequences.

Equitable Jurisdiction in Regard to Injunctions against judgments. See note, 32 L. R. A. 328.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 126.

Effect of Unaccepted Tender on Lien of mortgage or pledge. See note, 33 L. R. A. 232.

37 Cal. 236-242, BOGGS v. CLARK.

Question of Due Diligence in Prosecuting Motion for new trial is in sound discretion of court.

Reaffirmed in Dorcy v. Brodis, 153 Cal. 675, 96 Pac. 279.

Judgment cannot Operate as Estoppel except where given between same parties or their privies.

Reaffirmed in Silva v. Hawkins, 152 Cal. 139, 92 Pac. 73.

37 Cal. 250-257, JOSEPH v. HOLT.

Contract in Writing may be Declared on According to legal effect or in haec verba. When the latter, it must show on face, in direct terms, all facts which would have to be alleged in the former mode of pleading.

Approved in Hill v. McCoy, 1 Cal. App. 161, 81 Pac. 1016, holding special averments properly made in complaint in support of contract pleaded in haec verba; Santa Rosa Bank v. Paxton, 149 Cal. 198, 86 Pac. 194, holding promissory notes properly pleaded by copying in full in complaint; Linton v. Brownsville etc. Co., 46 Tex. Civ. App. 228, 102 S. W. 435, holding when ambiguous contract is pleaded in haec verba, pleader should put construction upon it.

When a Party Calls upon a Court to compel another to do a particular thing, he ought to allege that the other can do it.

Approved in Bell v. Bank of California, 153 Cal. 239, 94 Pac. 892, holding insufficient complaint for redemption of property pledged which showed on face that pledgor could not comply with contract of pledge.

Mere Note or Memorandum in Writing, subscribed by vendor or agent, containing names of parties and summary of terms of sale, is all that is necessary to take contract for sale of land from statute of frauds.

Approved in Harper v. Goldschmidt, 156 Cal. 247, 249, 134 Am. St. Rep. 124, 104 Pac. 452, 453, holding "party to be charged" under statute of frauds refers to whichever party may be called to account in court.

37 Cal. 263–268, RICHARDSON v. KIER.

Appropriator of Water may Use Natural Channel on another's property, so long as not objected to, to conduct the water appropriated to point of use.

Approved in Lower Tule River Ditch Co. v. Angiola Water Co., 149 Cal. 498, 86 Pac. 1082, holding simple cut in levee sufficient for appropriation of water without construction of headgates or ditch.

Use of Natural Stream to Convey appropriated water. See note, 51 L. R. A. 931.

37 Cal. 268–271, CROWLEY v. DAVIS.

One Court cannot Enjoin Execution of decree of another court of co-ordinate jurisdiction.

Approved in In re Burton, 5 Cof. Prob. 237, denying jurisdiction of equity court to vacate orders in probate.

37 Cal. 271–273, PEOPLE v. PENNIMAN.

Justification of Sureties Forms No Part of their contract on a recognizance.

Approved in San Francisco v. Hartnett, 1 Cal. App. 654, 82 Pac. 1065, and State v. Baird, 13 Idaho, 136, 89 Pac. 301, both reaffirming rule.

37 Cal. 277–282, PEOPLE v. DICK.

Motion in Arrest of Judgment must Specifically state defects in indictment which are basis of motion to entitle action of lower court thereon to be reviewed on appeal.

Approved in Hall v. State, 110 Tenn. 369, 75 S. W. 717, holding general motion in arrest of judgment, failing to point out matters complained of, properly overruled.

Proof of Corpus Delicti. See note, 68 L. R. A. 46.

37 Cal. 282-327, NEVADA COUNTY ETC. CANAL CO. v. KIDD.

Prayer in Complaint may be Consulted for purpose of ascertaining kind of relief intended.

Approved in Green v. Thornton, 8 Cal. App. 164, 96 Pac. 384, holding prayer in action to redeem from mortgage by deed absolute shows pleading intended to include remedy by ejectment.

Claimant's Right to Water Becomes Perfected when ditch or work is completed, and then relates back, if diligently prosecuted, to time work was commenced.

Approved in McFarland v. Alaska Perseverance Min. Co., 3 Alaska, 336, following rule; Miles v. Butte Electric etc. Co., 32 Mont. 69, 79 Pac. 554, holding no action lay by claimant to water before his ditch was completed against one making later adverse claim.

Right of Prior Appropriator of Water See note, 30 L. R. A. 677.

Miscellaneous.—Cited in Lux v. Haggin (Cal.), 4 Pac. 933, to point that water rights under local mining rules are too well settled to admit of any doubt.

37 Cal. 349-354, 99 Am. Dec. 278, SAN FRANCISCO v. FULDE.

Five Years' Continuous Adverse Holding is essential to establish title by prescription.

Approved in Big Three Min. and Mill Co. v. Hamilton, 157 Cal. 140, 137 Am. St. Rep. 118, 107 Pac. 306, holding title by prescription to mining claim not established where adverse holding was interrupted during five year period.

37 Cal. 354-363, OROVILLE ETC. R. R. CO. v. PLUMAS COUNTY.

Complaint to Authorize Mandamus must show existing duty and failure to perform same on demand.

Approved in Meyer v. San Francisco, 150 Cal. 134, 88 Pac. 723, 10 L. R. A. (n. s.) 110; Moseley v. Collins, 133 Ala. 329, 32 So. 132, and Grieve v. Gulick, 5 Haw. 79, all following rule; Shirley v. Board of Trustees of Cottonwood School Dist. (Cal.), 31 Pac. 366, refusing mandamus to compel board of education to pay salary to teacher wrongfully dismissed when no demand was made upon them; Rizer v. People, 18 Colo. App. 48, 69 Pac. 317, where duty is strictly public, demand is not necessary.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 853.

In Action by Alleged Corporation defendant may inquire into fact of existence by raising issue in answer.

Approved in Milwaukee Gold etc. Co. v. Gordon, 37 Mont. 216, 95 Pac. 997, following rule.

Mere Allegation That Party is a Corporation does not put its existence as corporation beyond reach of inquiry.

Cited in Fegtly v. Village Blacksmith Min. Co., 18 Idaho, 540, 111 Pac. 130, arguendo.

37 Cal. 364-366, EIDENMULLER v. EIDENMULLER.

Alimony may be Granted in Divorce based upon defendant's earnings or ability to pay.

Approved in Messervy v. Messervy, 80 S. C. 285, 61 S. E. 445, holding lack of estate or personal income could not absolve husband from duty to support wife; Bailey v. Bailey, 76 Vt. 266, 104 Am. St. Rep. 935, 56 Atl. 1015, 65 L. R. A. 332, holding court could consider pension of husband in fixing alimony.

37 Cal. 366–380, BROOKS v. HYDE.

Act of 1864, Relating to Limitations of Actions for recovery of real estate in San Francisco, is not invalid as being local legislation.

Approved in Boise Irr. etc. Co. v. Stewart, 10 Idaho, 51, 77 Pac. 28, holding act to regulate appropriation and diversion of public waters not to be local or special law; Rambo v. Larrabee, 67 Kan. 646, 73 Pac. 919, upholding act relating to criminal appeals in counties of over six thousand five hundred population; Picton v. Cass County, 13 N. D. 254, 100 N. W. 715, upholding act which applied to all counties, but left administrative discretion to county board; Smith v. State, 54 Tex. Cr. 304, 113 S. W. 291, upholding act providing for drawing of jurors in counties of over thirty thousand population.

37 Cal. 389–400, VALENTINE v. MAHONEY.

When Landlord Assumes Defense in Action of ejectment against tenant, he is bound by judgment therein by way of estoppel.

Approved in Reay v. Butler (Cal.), 7 Pac. 672, 673, holding intervener in ejectment acting as attorney for defendants could have himself substituted as codefendant with them; Lochner v. Garborina, 3 Ind. Ter. 669, 64 S. W. 571, holding landlord not bound by judgment against tenant in ejectment when he was witness at trial, and disclaimed interest in premises through mistake as to property.

Effect of Judgment Against Tenant as res judicata. See note, 112 Am. St. Rep. 27, 28, 29.

Effect of Judgment in Ejectment against tenant upon landlord not a party, or vice versa. See note, 26 L. R. A. (n. s.) 597.

37 Cal. 400–409, 99 Am. Dec. 282, KLINE v. CENTRAL PACIFIC R. R. CO.

Rule That Plaintiff cannot Recover for Personal Injury if his own wrong has contributed to the injury is confined to cases where his wrong or negligence has immediately or proximately contributed to result.

Approved in Williams v. Southern Pac. R. Co. (Cal.), 9 Pac. 157, holding railroad not liable for death of person who was killed while lying on track in state of gross intoxication; Tobin v. Omnibus Cable Co. (Cal.), 34 Pac. 127, in discussing charge on degree of contributory negligence to serve as defense.

Injuries in Getting on and Off railroad trains. See note, 21 L. R. A. 355.

Principal is Liable for Damage resulting from act of agent within general scope of authority, or specially approved by principal.

Approved in Brennan v. Merchant Co., Inc., 205 Pa. 263, 54 Atl. 893, holding it question for jury whether act of driver in knocking boy from truck was in line of duty.

Age of Injured Party may be Considered in determining whether he was bound to exercise ripe judgment in doing act which contributed to his injury.

Approved in Dubiner v. City Ry. Co., 44 Or. 238, 74 Pac. 918, and Rice v. Tilton, 14 Wyo. 118, 82 Pac. 581, both following rule; Folley v. Chicago, R. I. etc. R. R. Co., 16 Okl. 39, 84 Pac. 1093, holding railroad liable for injury to boy of fifteen who while trespassing on moving train was compelled to leap off by threats of conductor.

Conductor may Use Force Without Liability for injury to prevent one from wrongfully boarding car, but once on car care must be exercised in his removal.

Approved in Penas v. Chicago etc. Ry. Co., 112 Minn. 215, 127 N. W. 930, holding question of liability for injury to boy, who was really, though not apparently, trespasser on train, and was thrown off by brakeman, was for jury; Bucci v. Waterman, 25 R. I. 128, 54 Atl. 1060, holding driver of vehicle bound to exercise reasonable care in removing trespassing child therefrom.

Liability of Railroad for Negligence in ejecting trespasser from moving train. See note, 13 L. R. A. (n. s.) 365, 366, 369.

Civil Responsibility for Wrongful or Negligent Act of servant or agent toward one not sustaining contractual relation. See note, 27 L. R. A. 188.

37 Cal. 409–424, NEEDHAM v. SAN FRANCISCO ETC. R. R. CO.

Whenever Negligence of Plaintiff Contributed directly and proximately to injury, there can be no recovery in personal injury suit.

Approved in Esrey v. Southern Pacific Co., 88 Cal. 406, 26 Pac. 213, holding person injured when standing on three-foot space between track and platform while train passes contributorily negligent; Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, holding person injured while lying asleep on track guilty of such negligence as to preclude recovery.

Reason for Rule Relieving Defendant from payment of damages in personal injury suit when plaintiff is contributorily negligent is impossibility if successfully apportioning damages between guilty parties.

Approved in Fujise v. Los Angeles Ry. Co., 12 Cal. App. 212, 107 Pac. 320, following rule.

One is Bound to Conduct Himself with reasonable care and prudence toward a wrongdoer, and failure to do so when possible renders him liable for injury so caused.

Approved in Braly v. Fresno City Ry. Co., 9 Cal. App. 430, 99 Pac. 406, holding conductor had no right to assault plaintiff while ejecting him for refusing to pay fare.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 515, 536.

37 Cal. 424–431, 99 Am. Dec. 290, WALLS v. WALKER.

Right to Rents on Lease of intestate's property. See note, 40 L. R. A. 323.

37 Cal. 432–437, MORE v. MASSINI.

Decree of Federal Court Confirming Mexican Land Grant and patent issued thereon should be construed together in determining the lands patented.

Reaffirmed in People v. San Francisco (Cal.), 15 Pac. 750, 751.

Call for Seashore as Boundary is More Definite and Certain, and will prevail over call for station and for courses and distances.

Approved in United Land Assn. v. Knight (Cal.), 23 Pac. 271, holding boundaries of grant in San Francisco county, specified as being bay and ocean in decree confirming Mexican grant, prevail over those given in survey and granting clause of patent; De Guyer v. Banning (Cal.), 25 Pac. 255, holding patent is but execution of decree of confirmation and should conform therewith; Kleven v. Gunderson, 95 Minn. 254, 104 N. W. 7, holding call for natural object prevailed over call for course and distance.

Title to Land Between High and Low water mark. See note, 45 L. R. A. 240.

Location of Boundaries. See note, 129 Am. St. Rep. 993.

37 Cal. 437–452, **LICK v. DIAZ.**

Order of Proof is Largely at Discretion of trial court, and rulings of lower court will not be disturbed except in case of manifest abuse of discretion.

Approved in Brady v. Ranch Mining Co., 7 Cal. App. 183, 94 Pac. 85, following rule.

37 Cal. 458–464, **QUIVEY v. PORTER.**

Where Sheriff's Return of Summons Shows Service upon party by wrong Christian name, but judgment recites that such party has been duly served, judgment is not open to collateral attack on ground of no service of summons.

Approved in Quivey v. Baker, 37 Cal. 470, following rule.

37 Cal. 465–472, **QUIVEY v. BAKER.**

When Mortgage by Mistake Described Lot not owned by mortgagor and same mistake was carried into judgment on foreclosure, an action lies to correct mistakes in mortgage, foreclosure, and deed.

Approved in Bacon v. Bacon, 150 Cal. 487, 89 Pac. 321, holding equity will review decree of distribution of estate of deceased person when procured by mistake; Dillard v. Jones, 229 Ill. 126, 82 N. E. 209, correcting deed given under master's decree of sale when mistake ran through entire judicial proceedings ending in the sale.

Reformation of Sheriff's Deeds. See note, 109 Am. St. Rep. 38, 39, 40.

Quitclaim Deeds. See note, 105 Am. St. Rep. 857.

Miscellaneous.—Cited in Gambert v. Hart, 44 Cal. 549, 99 Am. Dec. 300, referring historically to principal case.

37 Cal. 475–517, **HUTTON v. FRISBIE.**

Pre-emptor of Land has No Title or Right that cannot be abrogated by the government at any time before final entry and payment.

Approved in Messenger v. Kingsbury, 158 Cal. 618, 112 Pac. 68, applicant for purchase of tide lands who merely files affidavit and applicant for purchase of tide lands, who merely files affidavit and vested right as prevents repeal of law authorizing sale; Graham v. Great Falls W. P. & T. Co., 30 Mont. 401, 76 Pac. 811, holding preferential right given successful contestant of right to enter land was not vested right which could be enforced against the government.

Distinguished in Cooper v. Wilder (Cal.), 41 Pac. 27, holding heirs of one who died two years after making entry under timber culture claim lose equitable interest in land.

37 Cal. 518–521, LAWRENCE v. BALLOU.

Grantee of Specific Quantity of Land from larger tract, but not segregated, becomes tenant in common in the land.

Approved in Fisher v. Wailehua, 16 Haw. 157, 2 Ann. Cas. 916, holding valid deed for fifty acres out of larger tract but not specified as to location.

Erroneous Ruling at Nisi Prius is not binding on court when same question again arises.

Approved in Cusachis v. Dugue, 113 La. 272, 36 So. 964, following rule; Reilly v. Perkins, 6 Ariz. 191, 56 Pac. 735, holding order overruling general demurrer not bar to its vocation at subsequent term and entry of judgment on pleadings for defendant.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 328, 347.

Quitclaim Deeds as Passing grantor's title. See note, 105 Am. St. Rep. 856.

37 Cal. 522–523, HOAG v. WORDEN.

Complaint Against Sheriff Alleging Money was collected and execution not returned but not alleging nonpayment of money to plaintiff is defective.

Approved in Witham v. Blood, 124 Iowa, 699, 100 N. W. 559, holding nothing would be assumed in favor of pleader not averred or implied from averments.

37 Cal. 524–526, PEOPLE v. ARGUELLO.

A Sum Payable upon a Contingency is not a debt.

Approved in In re Ellis, 143 Fed. 106, 74 C. C. A. 297, holding subcontractor has no provable claim in bankruptcy against contractor for work and material furnished when by contract such subcontractor was not to be paid until contractor was paid by owners; Swanson v. City of Ottumwa, 118 Iowa, 171, 91 N. W. 1052, 59 L. R. A. 620, holding obligations incurred in entering into contract for construction of waterworks not debt within meaning of constitutional provision limiting city's indebtedness.

37 Cal. 527–529, MURDOCK v. DE VRIES.

Collection of Default Judgment will not be Enjoined on ground of fraud where no promise or misrepresentation is shown by which defendant was misled to make default.

Distinguished in Gantz v. Gease, 82 Ohio St. 45, 91 N. E. 874, holding court had power to grant relief against excessive judgment in favor of guardian against ward on showing of concealment.

Equitable Jurisdiction in Regard to injunctions against judgments. See notes, 30 L. R. A. 704, 792; 32 L. R. A. 326, 328.

Staying of Execution Otherwise than by statutory proceedings. See note, 127 Am. St. Rep. 708.

Personal Liability to Pay Assessment for local improvement. See note, 35 L. R. A. 61.

Miscellaneous.—Cited in Chase v. Christianson, 41 Cal. 256, referring historically to principal case.

37 Cal. 529–532, HEYN v. PHILLIPS.

Contract to Find Purchaser for Land considered and held not to be contract for sale of land or any interest in land under statute of frauds.

Approved in Hicks v. Post, 154 Cal. 27, 96 Pac. 880, Bradford v. Laffey, 11 Haw. 464, 465, and Friedman v. Suttle, 10 Ariz. 63, 85 Pac. 728, 9 L. R. A. (n. s.) 933, all following rule.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 236.

Validity of Parol Partnership for dealing in lands. See note, 16 L. R. A. 750.

Necessity That Authority of Agent to purchase or sell realty be written to enable him to recover compensation. See note, 9 L. R. A. (n. s.) 934.

Real Estate Broker's Commissions as affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 602.

37 Cal. 532–534, PEOPLE v. SEXTON.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 903.

37 Cal. 534–537, MORGAN v. OVERMAN SILVER MIN. CO.

Where One Company Took Title to Property of another on condition that it would pay such other's debts, the first company can be sued directly by a creditor of the second.

Approved in Whitney v. American Ins. Co. (Cal.), 56 Pac. 52, holding agreement of insurance company to pay losses of another as quickly as its own renders such company directly liable to insured of other.

37 Cal. 543–609, 99 Am. Dec. 300, MINERS' DITCH CO. v. ZELLERBACH.

Deed of Corporation Signed by Its Trustees as such with corporate seal affixed is prima facie evidence of regularity and due execution of same.

Approved in Potts Drug Co. v. Benedict, 156 Cal. 327, 104 Pac. 434, 25 L. R. A. (n. s.) 609, following rule; Greve v. Echo Oil Company, 8 Cal. App. 283, 96 Pac. 907, holding deed of corporation executed by president and secretary with corporate seal attached prima facie evidence it was authorized by board of directors.

Corporation Organized for Purpose of Owning Ditches for conveyance and sale of water may sell all its corporate property if sale is made for lawful purposes.

Distinguished in South Pasadena v. Pasadena Land etc. Co., 152 Cal. 584, 586, 93 Pac. 492, 493, holding quasi-public corporation engaged in supplying water for public use cannot sell its plant without legislative sanction.

Sale by Corporation of All Its Assets. See note, 103 Am. St. Rep. 551, 552, 553, 557, 560, 570, 571.

When Act of Corporation for Specific Purpose is ultra vires for that purpose, right of corporation to avail itself of ultra vires as defense depends on circumstances of case.

Approved in Wykes v. City Water Co., 184 Fed. 755, following rule; Bell v. Kirkland, 102 Minn. 219, 224, 120 Am. St. Rep. 621, 113 N. W.

273, 276, 13 L. R. A. (n. s.) 793, upholding city contract which was ultra vires only in small portion; Horst v. Lewis, 71 Neb. 376, 103 N. W. 462, when corporation pleaded ultra vires in defense, reply could plead facts showing corporation empowered to enter into contract; Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank, 69 Neb. 234, 95 N. W. 824, holding banking corporation could plead ultra vires to act of cashier in signing as surety in replevin proceedings.

Right of Disposal of Corporate Property attaches as incident to right to hold.

Approved in Traer v. Prospecting Co., 124 Iowa, 119, 99 N. W. 295, and Germer v. Triple-State etc. Oil Co., 60 W. Va. 152, 159, 54 S. E. 513, 516, both holding corporation could sell all its property and take in payment stock in another's corporation.

Distinguished in dissenting opinion in Germer v. Triple-State etc. Oil Co., 60 W. Va. 185, 186, 54 S. E. 526, 527, majority holding corporation could sell all its property.

In Suit in Equity by Stockholders to restrain misappropriation of corporate funds, their rights are analogous to those of partners as between themselves.

Approved in Applegate v. Wellsburg Banking etc. Co., 68 W. Va. 480, 69 S. E. 902, subscriber to capital stock of corporation, after payment therefor, may compel issuance of certificate by suit for specific performance; dissenting opinion in Germer v. Triple-State etc. Oil Co., 60 W. Va. 159, 54 S. E. 516, majority holding stockholder participating in meeting of stockholders is estopped to deny legality of meeting.

37 Cal. 614–630, PEOPLE v. TILTON.

Where Person is in Charge of Office and is authorized to discharge its duties temporarily, governor has no power to appoint to such office, since no vacancy exists under article V, section 8, Constitution.

Approved in State v. Acton, 31 Mont. 39, 40, 42, 77 Pac. 300, 301, holding no vacancy existed in office when candidates had equal votes therefor.

Distinguished in People v. Nye, 9 Cal. App. 157, 98 Pac. 243, holding governor could appoint state controller after death of former controller who died after being elected to second term but before qualifying; Attorney General v. Remick, 73 N. H. 30, 111 Am. St. Rep. 594, 58 Atl. 874, holding vote of council declaring office of city clerk vacant was effective to remove incumbent from office.

Incumbent of Office may Perform Duties after end of his term until successor is elected and qualified.

Approved in State v. Gormley, 53 Wash. 551, 102 Pac. 438, State v. Acton, 31 Mont. 41, 77 Pac. 301, and State v. Fabrick, 16 N. D. 98, 112 N. W. 76, all following rule.

37 Cal. 634–639, 99 Am. Dec. 340, DAVIS v. McFARLANE.

Growing Crops are Personalty, but not Goods and chattels within meaning of statute of frauds, requiring immediate manual delivery or change of possession to render sale thereof valid.

Approved in Rosenberg Bros. & Co. v. Ross, 6 Cal. App. 759, 93 Pac. 286, following rule; Allen v. Bryant, 4 Cal. App. 375, 88 Pac. 296, holding growing crops personalty; Johnson v. Johnson, 31 Utah,

413, 88 Pac. 231, holding statute of frauds did not apply to agreement to give grantor one-half crops of land for life in consideration of deed.

Passing of Crops by Deed, devise or descent of lands. See note, 131 Am. St. Rep. 618.

As to Whether Contract for Sale of growing crops or reservation thereof by a grantor must be in writing. See note, 23 L. R. A. (n. s.) 1219.

37 Cal. 657–669, LORD v. HOUGH.

Testamentary Guardian cannot Take Custody of Person of ward so long as there is mother competent and willing to have such custody.

Approved in Guardianship of Taylor, 3 Cof. Prob. 107, 109, appointment of stranger as guardian of minor does not estop relative, who had no notice, to petition for revocation of stranger's letters and for his own appointment; Estate of Harris, 3 Cof. Prob. 7, guardian ad litem need not be appointed for minors in will contest when their mother, who is general guardian, has no adverse interest.

Effect of Attempt by Father to Appoint Guardian for child against surviving mother. See note, 13 L. R. A. (n. s.) 291.

Chancery Court has Power to Control and direct guardian in the performance of his trust.

Reaffirmed in Matter of Ross, 6 Cal. App. 599, 92 Pac. 672.

37 Cal. 670–676, JOHNSTON v. RUSSELL.

Advances to Notes and other obligations given for gambling debts. See note, 119 Am. St. Rep. 173.

Legality of Wagers, Betting. See note, 18 L. R. A. 859, 860, 864.

37 Cal. 676–704, PEOPLE v. SCOGGINS.

Party may Peremptorily Challenge Juror for good cause shown after jury has been sworn, but not after it is completed.

Approved in People v. Schmitz, 7 Cal. App. 347, 94 Pac. 411, holding it is error to allow peremptory challenge to juror after being sworn, in absence of showing of good cause; People v. Lee, 1 Cal. App. 171, 81 Pac. 970, holding court could require defendant to exercise his right to challenge both peremptorily and for cause, as to each juror, immediately upon his appearance; Hawkins v. United States, 116 Fed. 574, 53 C. C. A. 663, holding challenge to juror for cause after jury sworn and opening statement of district attorney comes too late.

In Homicide Case, Where It is Doubtful which party began the affray, threats made by deceased, although uncommunicated to other party, are admissible as tending to show which was first assailant.

Approved in People v. Lamar, 148 Cal. 574, 575, 83 Pac. 997, holding admissible evidence of reputation of deceased as being violent and dangerous, although such reputation was unknown to defendant, whenever evidence of uncommunicated threats could be received; State v. Beird, 118 Iowa, 479, 92 N. W. 696, holding evidence of aggressive acts of aggressor toward other persons in course of progress to scene of affray improperly excluded; State v. Peace, 121 La. 1081, 47 So. 31, holding evidence of uncommunicated threats

properly excluded when there was no question as to who was aggressor; State v. Jackman, 29 Nev. 409, 91 Pac. 144, holding admissible threats of deceased made an hour before the killing although not communicated to defendant.

Distinguished in State v. Quen, 48 Or. 349, 86 Pac. 792, holding, in absence of proof of conspiracy, evidence of threats to kill made in presence of third party by one who thereafter kills person against whom threats were made, is inadmissible against accused.

Evidence of Threats in Prosecution for homicide. See notes, 89 Am. St. Rep. 709; 17 L. R. A. 656; 3 L. R. A. (n. s.) 525, 527.

Number and Agreement of Jurors Necessary to valid verdict. See note, 43 L. R. A. 89.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 38 CALIFORNIA.

38 Cal. 3–24, EUSTACE v. JAHNS.

Estate is not Liable for Administrator's Neglect of a personal duty.

Approved in Renwick v. Garland, 1 Cal. App. 238, 82 Pac. 90, executrix could not bind estate by contract to drill well.

Liability of Executor or Administrator to third persons for negligence. See note, 133 Am. St. Rep. 374.

Capacity in Which Executor or Administrator may be sued for personal tort. See note, 51 L. R. A. 263.

Before Action can be Brought Against Administrator on claim of any character, demand must have been presented to him.

Disapproved in Miller & Lux v. Katz, 10 Cal. App. 579, 102 Pac. 947, no presentation of claim for stockholder's liability, incurred while estate holds stock, is necessary.

Liability of Property Owners to persons injured by nonrepair of streets. See notes, 115 Am. St. Rep. 993; 3 L. R. A. (n. s.) 85.

38 Cal. 24–30, 99 Am. Dec. 344, SMITH v. LAWRENCE.

Where a Party Agrees not to Sue upon demand until happening of a certain event, statute of limitations is suspended.

Approved in Daniels v. Daniels, 3 Cal. App. 299, 85 Pac. 136, rule applicable to notes held in escrow.

38 Cal. 44–51, 99 Am. Dec. 347, FALLON v. KEHOE.

Owner of Land may Convey It by any name.

Approved in Emery v. Kipp, 154 Cal. 86, 129 Am. St. Rep. 141, 97 Pac. 19, 19 L. R. A. (n. s.) 983, upholding judgment quieting title against woman sued by her maiden name; Clark v. Wyche, 126 Ga. 25, 54 S. E. 910, person suing under assumed name is bound by judgment; Taylor v. Bowen, 84 Mo. App. 618, chattel mortgage signed with husband's name prefixed by "Mrs." is valid.

Use of Fictitious Name as Affecting validity of instrument. See note, 39 L. R. A. 424.

Contract Entered into under assumed name. See note, 118 Am. St. Rep. 433.

Conveyance, Under Rightful Name, though different from that under which property was acquired, will, when duly recorded, give constructive notice.

Approved in Loser v. Plainfield Sav. Bk., 149 Iowa, 683, 128 N. W. 1105, 31 L. R. A. (n. s.) 1112, mere fact that name of heir is listed in probate record in certain form does not prevent record of conveyance by him of his interest in estate in another form from being constructive notice; Brayton v. Beall, 73 S. C. 312, 53 S. E. 643, record of chattel mortgage executed under one name is constructive notice to person taking subsequent mortgage from same party under another name.

Distinguished in Huff v. Sweetser, 8 Cal. App. 695, 97 Pac. 708, bona fide purchaser of property acquired by judgment debtor under one name is not affected by judgment docketed against her in another name.

Form of Christian Name required by recording acts. See note, 24 L. R. A. 543.

38 Cal. 51–60, McFADDEN v. WALLACE.

Declarations of a Party are always admissible against himself or those claiming under him.

Approved in Frink v. Roe (Cal.), 7 Pac. 486, declarations in disparagement of declarant's title admissible.

38 Cal. 72–75, SHEPARD v. McNEIL.

That Judgment is Broader than Facts alleged and found is no ground for new trial.

Approved in Hayford v. Wallace (Cal.), 46 Pac. 302, point that findings do not support judgment cannot be considered on appeal from order denying new trial; Raskin v. Robarts (Cal.), 35 Pac. 764, sufficiency of findings not reviewable on appeal from order denying new trial.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 908.

38 Cal. 78–80, GARRISON v. McGLOCKLEY.

If Instructions to Jury are not Brought before supreme court, they are presumed to be correct.

Reaffirmed in Buttner v. Smith (Cal.), 36 Pac. 653.

38 Cal. 80–84, DURFEE v. PLAISTED.

One Who Does not Connect Himself with source of title cannot attack patent valid on its face.

Approved in dissenting opinion in Williams v. City of San Pedro, 153 Cal. 51, 94 Pac. 237, majority permitting defendants to show that certificate of purchase covered tide lands not subject to sale.

38 Cal. 85–89, 99 Am. Dec. 352, GURNEE v. MALONEY.

Probate Court has Exclusive Jurisdiction of claims for services rendered and moneys advanced for benefit of estate.

Approved in In re Burton, 5 Cof. Prob. 238, denying equity jurisdiction to set aside orders in probate proceedings; Estate of Chittenden, 1 Cof. Prob. 2, probate court has exclusive power to fix fees of attorney employed by executor in probating will.

Distinguished in Elizalde v. Murphy, 4 Cal. App. 118, 87 Pac. 245, court of equity may require accounting from administrator of deceased administrator.

Administrator, not Estate, is Liable for compensation of attorney. Approved in Besancon v. Wegner, 16 N. D. 242, 112 N. W. 965, and Clark v. Sayre, 122 Iowa, 593, 98 N. W. 485, both reaffirming rule.

Liability of Estate to Attorney employed by executor or administrator. See note, 25 L. R. A. (n. s.) 73.

Miscellaneous.—Cited in Estate of Blythe (No. 2), 1 Cof. Prob. 116, as to power of probate court to appoint attorney for absent heirs.

38 Cal. 89–90, AINSWORTH v. RITT.

Destruction of Building terminates lease.

Approved in Snook etc. Furniture Co. v. Steiner, 117 Ga. 375, 43 S. E. 777, lessee of buildings held to have no interest in land after buildings destroyed.

Distinguished in Harvey v. Weisbaum, 159 Cal. 267, 113 Pac. 657, tenant cannot, upon destruction of building, recover rent paid in advance; Nashville etc. R. R. Co. v. Heikens, 112 Tenn. 385, 79 S. W. 1040, where both building and land are leased, destruction of building does not terminate lease.

Rights and Liabilities of Tenant on destruction of leased building. See note, 22 L. R. A. 613.

38 Cal. 93–99, DUNN v. KETCHUM.

Any Officer Having General Authority to administer oath may take oath where statute does not designate particular officer.

Approved in People v. Mullaley, 16 Cal. App. 46, 116 Pac. 89, notary may verify complaint before magistrate.

38 Cal. 99–111, FULLER v. REED.

If Part of an Entire Contract is Void under the statute of frauds, it is void in toto.

Approved in Bonicamp v. Starbuck, 25 Okl. 486, 106 Pac. 840, parties to written contract within statute of frauds cannot alter it by subsequent oral agreement.

Damages for Breach of Parol Contract to convey realty. See note, 2 L. R. A. (n. s.) 713, 768.

Distinguished in Pearsall v. Henry, 153 Cal. 326, 95 Pac. 157, holding conveyance by one party to contract for exchange of lands to be such part performance as would remove bar of statute.

Necessity That Authority of Agent to purchase or sell realty be written to enable him to recover compensation. See note, 9 L. R. A. (n. s.) 935.

38 Cal. 111–119, 99 Am. Dec. 354, WAGNER v. HANNA.

Grant of Easement is Always Made for the benefit of other premises.

Approved in The McCarthy Company v. Moir, 12 Cal. App. 444, 107 Pac. 630, where lots are sold as fronting on street, easement in street passes as appurtenant to the grant; Houston v. Zahm, 44 Or. 619, 620, 76 Pac. 644, 65 L. R. A. 799, agreement for opening of highway held not to run with land.

An Easement may be Created by Grant or it may be acquired by prescription.

Approved in Yuba Cons. Goldfields v. Hilton, 16 Cal. App. 232, 116 Pac. 714, discussing proscriptive right to right of way to carry driftwood from river.

Creation and Conveyance of easements appurtenant. See note, 136 Am. St. Rep. 685.

A Right of Way in Gross is not assignable.

Approved in Field v. Morris, 88 Ark. 151, 114 S. W. 207, reservation of use of tract for running machinery held to be personal.

38 Cal. 119–132, HOLDEN v. ANDREWS.

One in Possession of Land under contract to purchase is estopped from denying his vendor's title.

Approved in Garvey v. Lashells, 151 Cal. 532, 91 Pac. 501, rule applicable to vendee in possession who purchases outstanding title.

The Privity of Estate upon Which Plaintiff in ejectment relies is destroyed by his conveyance of estate.

Approved in Salcido v. Genung, 5 Ariz. 26, 43 Pac. 528, one who has sold land cannot maintain ejectment against third person.

38 Cal. 141–143, PEOPLE v. TORRES.

One Who, Intending to Kill One Person, shoots another, is guilty of assault with intent to murder the latter.

Approved in State v. Thomas, 127 La. 586, 53 So. 872, following rule; In re Breen, 30 Nev. 172, 93 Pac. 998, 17 L. R. A. (n. s.) 572, and In re Maestretti, 30 Nev. 190, 93 Pac. 1005, both arguendo.

Distinguished in State v. Shanley, 20 S. D. 22, 104 N. W. 524, under indictment for assault with intent to kill A, conviction cannot be had for shooting of A with intent to kill B or C.

38 Cal. 145–151, 99 Am. Dec. 360, PEOPLE v. KELLY.

State Court has No Jurisdiction Over Perjury committed before register of United States land office.

Approved in Commonwealth v. Kitchen, 141 Ky. 659, 133 S. W. 588, applying rule to perjury before federal commissioner.

38 Cal. 151–154, KENNEDY v. HIBERNIA SAVINGS ETC. SOCIETY.

Service of Process upon Teller is not sufficient to bind banking corporation.

Approved in Karns v. State Bank etc. Co., 31 Nev. 175, 178, 101 Pac. 566, 567, service upon assistant cashier is not sufficient; Buckingham v. North German etc. Ins. Co., 149 Fed. 623, service upon "general and statutory agent" of foreign corporation insufficient.

38 Cal. 158–163, KIRSTEIN v. MADDEN.

Amendments to Pleadings Should be Allowed with great liberality.

Approved in Mitchell v. California etc. S. S. Co., 156 Cal. 580, 105 Pac. 592, relieving from default arising from mistake of law by lawyer's clerk in procuring orders extending time to plead.

When Denials on Information and Belief are permissible. See note, 133 Am. St. Rep. 124.

38 Cal. 163–166, HIMMELMANN v. REAY.

Setoff Against Assigned Claim of debtor's demand against assignor. See note, 23 L. R. A. 308.

38 Cal. 166-175, PEOPLE v. THE PRESIDENT AND TRUSTEES OF THE COLLEGE OF CALIFORNIA.

Corporation may Dispose of All of Its Property for any lawful purpose.

Reaffirmed in Tash v. Ludden, 88 Neb. 305, 129 N. W. 422.

President and Trustees of the College of California had power to dissolve corporation and devote property to state university.

Approved in Knight v. Michigan Female Seminary, 152 Mich. 618, 116 N. W. 186, trustees of insolvent seminary corporation could sell its property to pay debts.

38 Cal. 183-191, PEOPLE v. FRANCIS.

Affidavit for Continuance, on Information and Belief, must set forth reasons for belief and nature of information.

Reaffirmed in Eytinge v. Territory, 12 Ariz. 136, 100 Pac. 444.

Temporary Insanity is not Presumed to Continue.

Approved in In re Murphy's Estate, 43 Mont. 373, 116 Pac. 1009, if testator was of sound mind when will executed, his previous and subsequent mental condition is immaterial.

Presumption of Continuance of Insanity. See note, 35 L. R. A. 119, 120.

38 Cal. 191-194, CASE v. CODDING.

If One Pays Part of Purchase Money of land to which another takes title, a resulting trust is created pro tanto.

Approved in Moultrie v. Wright, 154 Cal. 523, 98 Pac. 259, reaffirming rule; Gerety v. O'Sheehan, 9 Cal. App. 449, 99 Pac. 546, fact that defendant gave mortgage for part of purchase price will not enlarge his interest.

Distinguished in Olepau v. Raliapa, 7 Haw. 178, fact that three purchasers of land contributed unequally to purchase money does not of itself create resulting trust.

38 Cal. 196-201, BOURKE v. McLAUGHLIN.

Specific Performance will be Decreed whenever the parties or the subject matter is within the jurisdiction of the court.

Approved in Epperly v. Ferguson, 118 Iowa, 49, 91 N. W. 816, reaffirming rule; Wait v. Kern River Mining etc. Co., 157 Cal. 22, 106 Pac. 101, specific performance of contract for delivery of shares in corporation doing business in state may be had, though owner is nonresident; Dickson v. Loehr, 126 Wis. 645, 106 N. W. 794, 4 L. R. A. (n. s.) 986, foreclosing mortgage of land in foreign state.

38 Cal. 203-216, WHEELER v. FARMER.

Actual Intention is Necessary to constitute partnership.

Approved in Hicks v. Post, 154 Cal. 27, 96 Pac. 880, evidence held to show merely agreement of agency for sale of land.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 414, 431.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 973, 993, 994.

Attachment Papers may be Prepared before complaint.

Approved in Martinovich v. Marsicano, 150 Cal. 602, 119 Am. St. Rep. 254, 89 Pac. 334, writs of attachment may be issued to different counties at different times on same affidavit and bond.

It is Unnecessary for Affidavit in Attachment to state probative facts.

Approved in Mayer Co. v. Ferguson, 17 N. D. 104, 114 N. W. 1092, 14 L. R. A. (n. s.) 1126, affiant need not have personal knowledge.

38 Cal. 216–230, GARWOOD v. HASTINGS.

Allegation in Complaint That Plaintiff is the owner of the land sued for is sufficient.

Approved in Bryan v. Tonney (Cal.), 21 Pac. 726, and Atwater v. Spalding, 86 Minn. 102, 91 Am. St. Rep. 331, 90 N. W. 371, both reaffirming rule; Corea v. Higuera, 153 Cal. 455, 95 Pac. 884, 17 L. R. A. (n. s.) 1018, allegation that plaintiff is owner of right of way is sufficient.

Party Against Whom Tax is Levied cannot purchase at tax sale.

Reaffirmed in Brooks v. Garner, 20 Okl. 257, 94 Pac. 702.

Presumption of Death from Absence of Intelligence from husband is not raised where wife was for seventeen years absent from his last place of residence and lived under assumed names.

Approved in Bradley v. Modern Woodmen of America, 146 Mo. App. 442, 124 S. W. 73, presumption of death from seven years' absence of person may be rebutted by evidence of his unhappy domestic relations.

Presumption of Death. See notes, 104 Am. St. Rep. 208; 2 Cof. Prob. 12.

38 Cal. 230–234, 99 Am. Dec. 363, ALTHOF v. CONHEIM.

Wife is not Proper Party to Action affecting community property.

Approved in Reade v. de Lea, 14 N. M. 451, 95 Pac. 133, in absence of statute, husband may convey community property by his personal deed.

Until Contrary Appears, Presumption is that all property acquired during coverture is common property.

Approved in Strong v. Eakin, 11 N. M. 118, 66 Pac. 541, following rule; Estate of Hale, 2 Cof. Prob. 202, money borrowed by married man and not secured by his separate property is community property.

Burden of Proof as to Community Property. See note, 82 Am. St. Rep. 365.

38 Cal. 234–242, TEVIS v. HICKS.

It is the Duty of the Sheriff under a writ of assistance, to remove defendants and all persons holding, or claiming to hold, under them.

Approved in Fox v. Stubenrauch, 2 Cal. App. 93, 83 Pac. 84, deed of commissioner cannot be impeached upon application for writ of assistance.

Jurisdiction of Equity to Put Party in possession in aid of decree. See note, 93 Am. St. Rep. 164.

38 Cal. 242–259, BELLOE v. DAVIS.

Provision That Principal Shall Become Due upon default in payment of interest is in the nature of a penalty which creditor may enforce or waive.

Approved in Core v. Smith, 23 Okl. 923, 102 Pac. 118, reaffirming rule; Trinity County Bank v. Haas, 151 Cal. 556, 91 Pac. 386, right to exercise option lost by tender of overdue interest; Congregational

Church v. Osborn, 153 Cal. 201, 94 Pac. 883, statute of limitations does not begin to run until election to declare forfeiture; Lovell v. Goss, 45 Colo. 310, 132 Am. St. Rep. 184, 101 Pac. 74, 22 L. R. A. (n. s.) 1110, where creditor elected to declare principal sum due, cause of action accrued on date of default and not on date of election; First Nat. Bank v. Park, 37 Colo. 307, 86 Pac. 107, statute of limitations does not begin to run until election to declare forfeiture.

Disapproved in Green v. Frick, 25 S. D. 347, 126 N. W. 581, where mortgage securing several notes provides that entire sum shall become due upon default in payment of principal or interest, statute of limitations begins to run from default.

Effect of Delivery of Bond unsigned by principal obligor. See note, 12 L. R. A. (n. s.) 1119.

38 Cal. 259–263, RUSSELL v. MALLON.

In Ejectment Against Tenant, if landlord assumes defense, judgment binds him by estoppel.

Approved in Reay v. Butler (Cal.), 7 Pac. 673, one claiming title paramount to both plaintiff and defendant cannot intervene in ejectment.

Effect of Judgment in Ejectment against tenant upon landlord not a party, or vice versa. See note, 26 L. R. A. (n. s.) 597.

38 Cal. 263–265, HURT v. WILSON.

Assignment of Indebtedness transfers security therefor.

Approved in Odell v. Petty, 19 S. D. 534, 104 N. W. 250, assignee of judgment in replevin is entitled to sue on redelivery bond.

38 Cal. 265–278, GALLAND v. GALLAND.

If a Husband Fails to Provide for his wife, she may pledge his credit to procure necessaries.

Approved in Whittle v. Whittle, 5 Cal. App. 700, 91 Pac. 171, she may use his funds in her possession for that purpose.

A Court of Equity may Decree Alimony to a wife in an action which has no reference to divorce or separation.

Approved in Paxton v. Paxton, 150 Cal. 671, 89 Pac. 1084, enforcing by action in equity right of indigent adult children to be supported by parents; Hiner v. Hiner, 153 Cal. 257, 94 Pac. 1046, nonresident wife may bring action for maintenance where she has cause for divorce; Dole v. Gear, 14 Haw. 556, equity may grant maintenance to wife without special statutory authority and independently of suit for divorce or separation.

Distinguished in Bedal v. Sake, 10 Idaho, 281, 77 Pac. 642, 66 L. R. A. 60, wife who leaves husband and procures divorce in another state cannot maintain action in Idaho for division of community property.

As to Whether Alimony Terminates on death of husband. See note, 2 L. R. A. (n. s.) 232.

38 Cal. 278–285, SPANAGEL v. DELLINGER.

If One Party Reads Portion of Written Document in evidence, other party is entitled to read remaining portions.

Approved in dissenting opinion in Bryan v. Pinney, 3 Ariz. 40, 21 Pac. 335, where one party introduces part of probate court record, other party may introduce the remainder (majority not passing upon point).

Motion for New Trial is collateral proceeding.

Approved in People v. Bank of San Luis Obispo, 159 Cal. 82, 112 Pac. 873, judgment which has become final may be pleaded though motion for new trial pending; Hedderich v. Hedderich, 18 N. D. 493, 123 N. W. 278, notice of appeal from judgment does not bring up order denying new trial.

38 Cal. 286–287, FAIRCHILD v. DATEN.

Objection That Appeal was not Taken at proper time not waived by failure to state it in motion to dismiss.

Approved in Paakuku v. Komoikehuehu, 3 Haw. 643, counsel have no authority to stipulate that appeal may be taken after time to appeal has elapsed; Coleman v. Coleman, 5 Haw. 301, rule requiring costs to be paid without ten days as preliminary to appeal cannot be waived by counsel.

38 Cal. 287–291, DOLL v. GOOD.

If Several Material Facts are Stated conjunctively, an answer which undertakes to deny these averments as a whole is evasive.

Approved in Bartlett Estate Co. v. Fraser, 11 Cal. App. 375, 105 Pac. 131, reaffirming rule; Kinney v. Maryland Casualty Co., 15 Cal. App. 573, 115 Pac. 457, denial by negative pregnant insufficient; Le Breton v. Stanley Contracting Co., 15 Cal. App. 434, 114 Pac. 1030, denial, on information and belief, of matter of court record is not permissible; Zany v. Rawhide Gold Min. Co., 15 Cal. App. 376, 114 Pac. 1027, defense that defendant did not know that it entered into contract, or that plaintiff performed his part of agreement, is not permissible; Duckworth v. Watsonville Water etc. Co., 150 Cal. 530, 89 Pac. 343, answer denying that party is "the owner and entitled to the exclusive use of all the waters" of lake, insufficient; Blodgett v. Scott, 11 Cal. App. 311, 104 Pac. 843, answer denying plaintiff's lawful possession of entire tract at date stated and denying entry and withholding of possession without right, insufficient.

38 Cal. 300–321, 99 Am. Dec. 365, MARTIN v. ZELLERBACH.

The Capital of a Corporation cannot be turned over to the stockholders, except in the manner provided by law.

Approved in McIver v. Young Hardware Co., 144 N. C. 489, 119 Am. St. Rep. 970, 57 S. E. 173, transfer of corporate property for stock of purchasing corporation held void as to creditors; Tacoma Ledger Co. v. Western Home etc. Assn., 37 Wash. 472, 79 Pac. 994, such transaction fraudulent as to creditors, though purchaser did not know of insolvency of selling corporation; O'Dea v. Hollywood Cemetery Association, 154 Cal. 68, 97 Pac. 7, arguendo.

Distinguished in Burne v. Lee, 156 Cal. 228, 104 Pac. 441, upholding contract of stockholders to sell corporate property and dispose of proceeds as contemplating legal dissolution.

A Transaction in Violation of Law cannot be validated by estoppel.

Approved in Lukens v. Nye, 156 Cal. 506, 105 Pac. 596, beneficiaries under appropriation act not estopped by agreement with governor to accept less than sum specified.

To Raise Estoppel Party Estopped must mislead another to his prejudice.

Approved in Lindley v. Blumberg, 7 Cal. App. 146, 93 Pac. 897, wife not estopped by knowledge of improvements made by lessee on

faith of option, where she had no knowledge of option; Rihner v. Jacobs, 79 Neb. 749, 113 N. W. 223, no estoppel in favor of creditor of fraudulent grantee, where reliance was placed upon latter's unsupported statement, though record would have supported same.

The Capital Stock of a Corporation is the capital on which it transacts business.

Approved in Cooper v. Utah Light & Power Co., 35 Utah, 593, 136 Am. St. Rep. 1075, 102 Pac. 210, transfer of corporate property upon consideration running to stockholders is fraudulent as to creditors.

Where Case Involving Questions of Law and of equity is brought before court for trial, it is more regular first to dispose of equitable branch of case.

Approved in Cotton v. Butterfield, 14 N. D. 469, 105 N. W. 236, 237, where answer, in action at law, interposes equitable counterclaim, latter should be heard first.

38 Cal. 325–334, DREW v. SMITH.

What Municipal Corporations are Answerable for injuries due to defects in streets and other public places. See note, 108 Am. St. Rep. 167.

38 Cal. 335–340, 99 Am. Dec. 384, MILES v. THORNE.

On Demurrer, Founded upon Statute of limitations, if complaint fails to show whether contract was verbal or in writing, it will be presumed to have been in writing.

Approved in Logan v. Brown, 20 Okl. 342, 95 Pac. 444, 20 L. R. A. (n. s.) 298, contract within statute of frauds presumed to be in writing unless complaint shows contrary.

Statute of Limitations Does not Run in favor of trustee under express trust until he has repudiated same.

Approved in Levy v. Ryland, 32 Nev. 465, 470, 109 Pac. 906, 908, following rule; Felkner v. Dooly, 28 Utah, 239, 78 Pac. 366, statute of limitations begins to run from time cestui que trust receives notice of repudiation of trust.

Distinguished in Norton v. Bassett, 154 Cal. 418, 129 Am. St. Rep. 162, 97 Pac. 897, where estate of trustee devolved on another by inheritance, statute of limitations began to run without any repudiation.

Defense of Statute of Frauds cannot be Set up by demurrer unless complaint shows on face that agreement was not in writing.

Reaffirmed in Levy v. Ryland, 32 Nev. 469, 109 Pac. 908.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 518.

Validity of Contract for Services to procure legislation. See note, 30 L. R. A. 741.

38 Cal. 340–356, 99 Am. Dec. 399, DONOHOE v. GAMBLE.

Rights of Pledgor and Pledgee as to sale of collateral bonds and commercial paper. See notes, 53 L. R. A. 863, 864.

38 Cal. 356–362, HENLEY v. WADSWORTH.

Rights of Lien Claimants are controlled by contract between owner and original contractor.

Approved in Brown Const. Co. v. Central Ill. Const. Co., 234 Ill. 401, 84 N. E. 1039, where original contract provided that work should be delivered free of liens subcontractors held to have waived liens; Stein v. McCarthy, 120 Wis. 295, 97 N. W. 915, evidence held to show that subcontractors agreed to do work according to original contract.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

38 Cal. 372–383, 99 Am. Dec. 404, HUNT v. LOUCKS.

Execution for More Than Judgment calls for is not void, but only voidable.

Approved in Doehla v. Phillips, 151 Cal. 496, 91 Pac. 333, reaffirming rule; Hamant v. Creamer, 101 Me. 229, 63 Atl. 739, execution not invalidated by slight excess in amount where sufficient appears to identify judgment; Kipp v. Burton, 29 Mont. 104, 101 Am. St. Rep. 544, 74 Pac. 88, 63 L. R. A. 325, failure to affix seal to execution makes it voidable only.

Distinguished in Bigham v. Dover, 86 Ark. 324, 126 Am. St. Rep. 1096, 110 S. W. 217, joint execution upon two separate judgments is void.

Validity of Sales under satisfied judgment. See note, 137 Am. St. Rep. 1098.

Amending Writs of Execution. See note, 101 Am. St. Rep. 555, 560, 562.

Collateral Attack on Executions. See note, 82 Am. St. Rep. 198.

Effect of Death of Party After Judgment upon remedy by execution. See note, 61 L. R. A. 363, 393.

38 Cal. 383–385, 99 Am. Dec. 413, ROBERT v. ADAMS.

Exemption of Horses, Cattle and Farming Implements applies only to judgment debtors engaged in farming at date of levy.

Approved in Howell v. Boyd, 2 Cal. App. 490, 84 Pac. 317, reaffirming rule; Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 751, 108 Pac. 718, same person not entitled to both farmer's and teamster's exemptions.

Exemption from Execution of Oxen, horses or mules applies only to such as are suitable and intended for ordinary farm work.

Approved in Tishomingo Sav. Institution v. Young, 87 Miss. 480, 112 Am. St. Rep. 454, 40 So. 11, 3 L. R. A. (n. s.) 693, horses used by business man in going to place of business and in taking his family about for pleasure are not "work horses" within exemption statute; Wabash Ry. Co. v. Bowring, 103 Mo. App. 164, 77 S. W. 107, exemption of hogs does not cover hog chiefly valuable for exhibition purposes.

Purpose for Which Horses are Used as affecting exemption under statute specifically exempting horses. See note, 3 L. R. A. (n. s.) 693.

Exemptions of Household Furniture, wearing apparel and provisions apply to all classes of judgment debtors.

Distinguished in Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 751, 108 Pac. 718, same person not entitled to both farmer's and teamster's exemptions.

38 Cal. 385–393, 99 Am. Dec. 415, SMITH v. WALKER.

Surviving Partner of Firm Owning Realty is trustee for purpose of winding up affairs of firm, and is accountable for value of use and occupation of lands of firm.

Approved in Estate of Blythe, 2 Cof. Prob. 161, denying right of administrator to expend money to preserve Mexican lands from forfeiture under conditions of grants.

Position of Surviving Partners in partnership realty. See note, 28 L. R. A. 130.

38 Cal. 397–407, JONES v. PETALUMA.

Right to Change Lot Lines After Entry under townsite act. See note, 30 L. R. A. (n. s.) 183.

38 Cal. 407–410, BELL v. SACKETT.

First and Last Days in Computation of Time. See note, 49 L. R. A. 208.

38 Cal. 410–423, SHELBY v. HOUSTON.

To be an Occupant Within the Statute against forcible entries, personal presence is not necessary.

Approved in Knowles v. Crocker Estate Co., 149 Cal. 284, 86 Pac. 717, fences which, with natural barrier, made substantial inclosure, constituted sufficient possession; McCauley v. Town of McCauleyville, 111 Minn. 425, 127 N. W. 191, one held to be occupant of farm though living in village near by.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 389, 400.

38 Cal. 423–426, WEBSTER v. COOK.

Under Practice Act, Appeal might be taken upon rendition of judgment.

Approved in People v. Schmitz, 7 Cal. App. 345, 94 Pac. 410, applying rule to criminal case.

Allegation That Rent was "Payable Monthly" is not an averment that it was payable in advance.

Cited in Farmers' Bank v. Johnson, 134 Ga. 494, 137 Am. St. Rep. 242, 68 S. E. 88, where check was drawn on bank located in town other than that of drawee's residence and marked "payable through" bank in another city, drawee bank not required to pay check when not presented through latter bank.

38 Cal. 428–439, MOORE v. MARTIN.

If District Court has Jurisdiction of person and of subject matter, its judgment is not void.

Approved in Baldwin v. Foster, 157 Cal. 646, 108 Pac. 716, reaffirming rule; Matter of Hughes, 159 Cal. 365, 113 Pac. 686, judgment based on complaint which does not state cause of action is not void; Philbrook v. Newman, 148 Cal. 175, 82 Pac. 773, rule applicable to order affirming order denying new trial.

Law Providing That All Judicial Sales of realty thereafter to be made shall be subject to redemption is constitutional.

Questioned in Johnson v. Taylor, 150 Cal. 205, 119 Am. St. Rep. 181, 88 Pac. 905, 10 L. R. A. (n. s.) 818, rights of owner of land sold

for taxes not affected by law abrogating requirement of notice of application for tax deed.

38 Cal. 442–450, MAYO v. MAZEAUX.

When Ruling on Evidence is Suspended and evidence subsequently rejected, reasons for rejection should be given.

Distinguished in Preston v. Hirsch, 5 Cal. App. 488, 90 Pac. 966, failure of court to give reasons not prejudicial error under circumstances.

Location of Boundaries. See note, 129 Am. St. Rep. 1013.

Miscellaneous.—Cited in Snooks v. Wingfield, 52 W. Va. 445, 44 S. E. 278, plat referred to in deed becomes part thereof, and is not explainable by evidence aliunde.

38 Cal. 450–455, SENTER v. DAVIS.

Specific Performance will not be Decreed except where plaintiff has no plain, speedy and adequate remedy at law.

Approved in Sherwood v. Wallin, 1 Cal. App. 534, 537, 82 Pac. 567, 568, granting specific performance of contract to convey stock, books, papers, etc., of corporation; Flood v. Templeton, 148 Cal. 378, 83 Pac. 150, refusing specific performance of agreement by mortgagee to devise mortgaged premises to mortgagor; Herzog v. Atchison, Topeka etc. R. R. Co., 153 Cal. 502, 95 Pac. 900, 17 L. R. A. (n. s.) 428, refusing specific performance of contract for location of railroad station; Wait v. Kern River Mining etc. Co., 157 Cal. 23, 24, 106 Pac. 101, specifically enforcing contract for delivery of mining stock which had no market value; Ridenbaugh v. Thayer, 10 Idaho, 669, 80 Pac. 231, specifically enforcing contract for cutting and delivery of wood.

Distinguished in Shannon v. Cavanaugh, 12 Cal. App. 438, 107 Pac. 576, semble, that, since amendment of 1874, specific performance may be granted though remedy at law is adequate.

One Who Relies upon an Exception to a general rule must state the facts which bring his case within it.

Approved in Gavin v. Pacific Coast Marine Firemen's Union, 2 Cal. App. 639, 84 Pac. 270, rule applicable to mandamus proceeding to procure inspection of corporate books; Bird v. Utica Gold Min. Assn., 2 Cal. App. 677, 84 Pac. 258, assumption of risk by employee is affirmative defense.

38 Cal. 456–457, DOYLE v. STURLA.

Showing for New Trial on Ground of newly discovered evidence held insufficient.

Approved in Hill v. McKay, 36 Mont. 446, 93 Pac. 347, new trial properly denied where diligence to procure witnesses not shown and no motion made for continuance or to have case reopened; Coombs v. Barker, 31 Mont. 560, 79 Pac. 12, one present at redemption of property by directors charged with knowledge that transaction was constructively fraudulent against corporation and stockholders; Kroger v. Ryan, 83 Ohio St. 306, 94 N. E. 431, motion properly denied where party did not ascertain what his witness really knew and, when surprised, did not move for continuance; Kelleher v. Kenney (Cal.), 4 Pac. 1095, new trial properly denied where newly discovered evidence cumulative and contradicted by counter-affidavits.

38 Cal. 457–461, PRICE v. REEVES.

One Who Purchases Trust Property, with knowledge of the trust, occupies the same position as the original trustee.

Approved in Moultrie v. Wright, 154 Cal. 523, 98 Pac. 259, where mortgagee had knowledge of trust, mere purchase by his administratrix at foreclosure cannot make her innocent purchaser.

Where Reconveyance cannot be Decreed, measure of damages is value of trust property.

Distinguished in Clapp v. Vatcher, 9 Cal. App. 467, 99 Pac. 551, where plaintiff elects to sue for proceeds, she cannot recover value of property.

38 Cal. 461–467, PEOPLE v. WHARTENBY.

Levying of Tax on Money, as well as on property mortgaged to secure it, is not double taxation.

Approved in Hackfeld v. Luce, 4 Haw. 186, reaffirming rule.

Power to Tax Mortgages. See note, 16 L. R. A. 59, 60.

Situs for Purpose of Taxation of Debts evidenced by notes and mortgages. See note, 16 L. R. A. 730.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

38 Cal. 467–481, PEOPLE v. WEBB.

If Accused has been Once Acquitted, he cannot be held to answer again for the same offense.

Approved in dissenting opinion in People v. Stoll, 143 Cal. 699, 77 Pac. 822, majority granting new trial after acquittal under instruction upon opening statement of prosecution.

Jeopardy Attaches Where a Party is once placed upon trial before a competent court and jury, upon a valid indictment.

Approved in People v. Nash, 15 Cal. App. 325, 114 Pac. 786, defendant who consents to discharge of jury waives right to plead once in jeopardy; Kepner v. United States, 195 U. S. 131, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655, right of government to appeal from judgment of acquittal in Philippine Islands taken away by act of July 1, 1902; Oliveros v. State, 120 Ga. 244, 47 S. E. 630, where judge had expressed opinion upon weight of evidence, he could not order mistrial over protest of accused.

Distinguished in People v. Ammerman, 118 Cal. 26, 50 Pac. 15, no jeopardy where fatally defective information was dismissed after jury sworn; People v. Disperati, 11 Cal. App. 473, 105 Pac. 618, no jeopardy where jury discharged because unable to agree.

Where a Constitutional Provision with a settled judicial interpretation is adopted, it will be presumed that such interpretation was likewise adopted.

Approved in Lewis v. State, 58 Tex. Cr. 362, 127 S. W. 813, applying rule to re-enactment of statute for punishing violations of liquor laws.

Right of State to Appeal in a criminal case. See note, 19 L. R. A. 343.

38 Cal. 481–492, WALSH v. HILL.

The Only Rule of Construction of Much Value is to place ourselves as nearly as possible in the seats of the parties at the time the instrument was executed.

Approved in Burnett v. Piercy, 149 Cal. 189, 86 Pac. 607, holding limitations and conditions not repugnant to grant but descriptive of estate conveyed; Hurwitz v. Gross, 5 Cal. App. 618, 91 Pac. 110, applying rule to agreement to assume payment of chattel mortgages; Dickson v. Wildman, 183 Fed. 401, phrase "interest in lands" passes all rights of grantor; A. Leschen & Sons Rope Co. v. Mayflower etc. Co., 173 Fed. 857, 97 C. C. A. 465, holding agreement that debt is to be paid by note to be subject to condition that note is subsequently paid; American Bonding Co. v. Pueblo Inv. Co., 150 Fed. 28, 80 C. C. A. 97, construing together lease and bond of surety thereon; Speed v. St. Louis etc. R. Co., 86 Fed. 237, 30 C. C. A. 1, applying rule to trusts in deed; Killgore v. Cranmer, 35 Colo. 487, 84 Pac. 71, "acting sheriff" in trust deed held to designate acting sheriff of county in which parties were resident; Triplett v. Williams, 149 N. C. 397, 63 S. E. 80, 24 L. R. A. (n. s.) 514, rule that granting habendum and tenendum clauses of a deed are independent portions thereof has been superseded; Elliott v. Jefferson, 133 N. C. 215, 45 S. E. 561, 64 L. R. A. 135, survey of land made in contemplation of deeds dividing it does not control calls in deeds subsequently made.

One Entering into Actual Possession of portion of tract, under deed calling for whole, has constructive possession of entire tract.

Reaffirmed in Owsley v. Matson, 156 Cal. 404, 104 Pac. 984.

The Starting Point in a Description is not of more dignity than succeeding calls if they are readily ascertainable.

Approved in Hubbard v. Whitehead, 221 Mo. 683, 121 S. W. 72, starting point rejected as utterly inconsistent with other calls.

38 Cal. 507–514, CAMPBELL v. JONES.

Where It Appears That Defendant rightfully came into possession of property, allegation of demand and refusal is necessary.

Approved in Daggett v. Gray (Cal.), 40 Pac. 961, in action for conversion of property by unlawful detention, where original possession lawful, complaint must allege demand and refusal; Burke v. Maguire, 154 Cal. 470, 98 Pac. 27, rule applicable to trust fund coming into hands of administrator.

38 Cal. 514–522, 99 Am. Dec. 423, GRAIN v. ALDRICH.

Assignee of Part of Chose in Action may sue thereon in equity and make assignor and other assignees parties to suit.

Approved in Rogers v. Penobscot Min. Co., 154 Fed. 615, 83 C. C. A. 380, reaffirming rule; Lake Erie & Western Ry. Co. v. Hobbs, 40 Ind. App. 514, 81 N. E. 92, insurer having equitable assignment may file cross-complaint in action brought by insured against one who caused loss; Kithcart v. Kithcart, 145 Iowa, 558, 124 N. W. 308, claim for personal injuries is assignable; Ryland v. Arkansas City Milling Co., 19 Okl. 442, 92 Pac. 163, under proceedings in aid of execution, judgment debtor cannot be compelled to apply property belonging to third party; Fireman's Ins. Co. v. Oregon R. Co., 45 Or. 59, 76 Pac. 1076, 67 L. R. A. 161, where insurer pays under policy less than entire loss of insured from fire and takes subrogation assignment for sum paid, insurer and insured may prosecute joint action against one who caused loss.

Legal and Equitable Relief is Administered in the same form and according to the same general plan.

Approved in Redpath v. Evening Express Co., 4 Cal. App. 368, 88 Pac. 289, partial breach of contract, capable of being fully compensated, no defense at law; Graham v. Light, 4 Cal. App. 402, 88 Pac. 374, pledgor of note may sue thereon, making pledgee a party; Lantz v. Fishburn (Cal. App.), 91 Pac. 819, rule that he who seeks equity must do equity applies to action to quiet title; Nevada Nat. Bk. v. Board of Supervisors, 5 Cal. App. 643, 91 Pac. 124, arguendo.

A Complaint is not Demurrable for want of facts if upon facts stated plaintiff is entitled to any relief.

Approved in Hayden v. Collins, 1 Cal. App. 261, 81 Pac. 1121, where complaint states cause of action in ejectment, it is immaterial that it also shows cause of action in unlawful detainer; Kingston v. Walters, 14 N. M. 373, 93 Pac. 702, specific performance may be granted though prayer asks only for damages.

If All the Parties to a Demand, of which part has been assigned, are not made parties, the objection to the complaint is not that it lacks facts but that it lacks parties.

Approved in Graham v. Light, 4 Cal. App. 402, 88 Pac. 374, pledgor of note cannot sue thereon without making pledgee a party; Russ v. Tuttle, 158 Cal. 230, 110 Pac. 814, arguendo.

38 Cal. 522–527, PARKER v. PAGE.

Where Garnishee Denies Indebtedness in good faith, the court can only authorize judgment creditor to institute action against him.

Approved in Phillips v. Price, 153 Cal. 149, 94 Pac. 619, creditor may bring creditor's bill where garnishee denies debt.

Where Garnishee Denies Indebtedness in bad faith, his denial may be disregarded.

Approved in Finch v. Finch, 12 Cal. App. 283, 107 Pac. 597, treating denial of indebtedness by garnishee as legal conclusion.

38 Cal. 528–539, 99 Am. Dec. 427, PRINCE v. LYNCH.

Court cannot Re-examine Evidence after it has once filed its findings and rendered judgment.

Approved in United States v. Ramsey, 158 Fed. 493, where cause has been referred to referee by consent, court has no power to modify, but only to confirm or reject, his findings; Brown v. Capital Townsite Co., 21 Okl. 590, 96 Pac. 589, where court sets aside judgment rendered at same term, it cannot, at subsequent term, render judgment without another trial.

A Release Under Seal of One of several joint, or joint and several, debtors or obligors, is a release as to all.

Approved in Spencer v. Houghton (Cal.), 6 Pac. 856, applying rule to sureties on guardianship bond.

38 Cal. 541–548, BERGSON v. BUILDERS' INS. CO.

Assignment of Insurance Policy will be upheld as equitable assignment of contingent right to the money.

Approved in Bank of Yolo v. Bank of Woodland, 3 Cal. App. 568, 86 Pac. 822, upholding assignment of profits to be realized on sale of cargoes.

Fire Insurance as Security for mortgagee or other lienholder. See note, 135 Am. St. Rep. 745.

Assignability of Insurance Agent's Right to commissions on renewal premiums. See note, 18 L. R. A. (n. s.) 195.

Payment of Premium is Condition Precedent to right to recover for loss.

Overruled in Raulet v. Northwestern etc. Ins. Co., 157 Cal. 222, 107 Pac. 295, allowing recovery where credit extended for premium and payment waived after loss.

Acknowledgment in Policy of receipt of premium may be contradicted.

Approved in Palmer v. Continental Ins. Co. (Cal.), 61 Pac. 785, upholding condition in policy that insurer should not be liable while any note for premiums remained past due and unpaid.

Insurance Company may Consider Policy canceled on day specified in notice of cancellation without further act.

Approved in American Glove Co. v. Pennsylvania Ins. Co., 15 Cal. App. 82, 113 Pac. 690, reaffirming rule.

Return of Premium as Condition of canceling insurance. See note, 13 L. R. A. (n. s.) 888.

38 Cal. 550–553, **BROWN v. PFORR.**

Agency to Sell Land is Revocable at any time before sale.

Approved in Blumenthall v. Goodall (Cal.), 25 Pac. 132, purchaser must be ready to make purchase upon terms embraced in authority; Johnson v. Wright, 124 Iowa, 64, 99 N. W. 104, where owner of land lists same with broker, reserving right to sell it himself, sale through another broker revokes authority; Norton v. Sjolseth, 43 Wash. 329, 86 Pac. 574, where owners for valuable consideration gave brokers exclusive right to sell real estate for certain period, such right was revocable within that time.

Revocation of Power of Attorney. See note, 110 Am. St. Rep. 855.

38 Cal. 553–560, **ALEMANY v. PETALUMA.**

Town Trustees Could not Under Act of July 1, 1864, convert into street land privately occupied.

Approved in Scully v. Squier, 13 Idaho, 431, 90 Pac. 577, surveyor of townsite located on public domain had no right to establish street upon land occupied by inprovements; McCloskey v. Pacific Coast Co., 160 Fed. 798, 22 L. R. A. (n. s.) 672, 87 C. C. A. 568, trustee of townsite cannot as against individual occupants dedicate land for street.

Distinguished in Petaluma v. White, 152 Cal. 194, 92 Pac. 179, line of street is that delineated on map, not that established by fences.

Right to Change Lot Lines after entry under townsite act. See note, 30 L. R. A. (n. s.) 183.

If Land was Part of Street as laid down in plan of town when occupation began, occupation was not bona fide within meaning of act of March 1, 1867.

Approved in Red Bluff v. Walbridge, 15 Cal. App. 763, 116 Pac. 81, rights of settlers on public lands held subordinate to right of public in streets on plat of patented townsite.

38 Cal. 560–562, MAHE v. REYNOLDS.

In Action by Indorsee of Promissory Note against maker, where pleadings are not verified, general denial puts due indorsement of note in issue.

Reaffirmed in Gumaer v. Sowers, 31 Colo. 165, 71 Pac. 1103.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 525.

38 Cal. 563–564, HAUXHURST v. LOBREE.

At Expiration of Term Tenant holding over becomes tenant at sufferance.

Approved in Bristow v. Carriger, 24 Okl. 328, 103 Pac. 598, tenant at sufferance held not entitled to emblements.

Holding Over by Tenant at Sufferance as unlawful detainer. See note, 120 Am. St. Rep. 42.

38 Cal. 564–567, PEOPLE v. NORTH SAN FRANCISCO HOMESTEAD ETC. ASSN.

Where Suit is Instituted in Name of state, upon relation of real party in interest, attorney general has no power to control same.

Approved in People ex rel. Van Valer v. Jacob (Cal.), 12 Pac. 223, reaffirming rule.

As to Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 623.

38 Cal. 575–577, McCLORY v. McCLORY.

Document in Which Judge States Case, testimony and reasons for his decision is opinion and not finding.

Distinguished in In re Bullard's Estate (Cal.), 31 Pac. 1120, findings will not be set aside because intermixed with evidence, argument and conclusions of law.

38 Cal. 577–579, HEMPHILL v. DAVIES.

Declaratory Statement of Pre-emptioner confers no title.

Approved in Balsz v. Liebenow, 4 Ariz. 231, 232, 36 Pac. 210, duplicate receiver's receipt issued to homesteader does not entitle latter to maintain ejectment.

Distinguished in Cooper v. Wilder (Cal.), 41 Pac. 27, timber culture claimant who died two years after entry had equitable interest, capable of devise.

38 Cal. 579–582, LOGAN v. GEDNEY.

Liability of Owner for Trespass of Cattle. See note, 22 L. R. A. 56, 60.

38 Cal. 583–584, WELLMAN v. ENGLISH.

No Demand is Necessary Before Suing Sheriff for personal property tortiously taken.

Approved in McNally v. Connolly (Cal.), 9 Pac. 170, one acquiring title to real property not entitled to possession until he makes demand therefor.

Disapproved in Marriner v. Wasser, 17 N. D. 364, 138 Am. St. Rep. 714, 117 N. W. 344, sheriff not guilty of conversion of property found

in possession of execution debtor until he receives notice of actual ownership.

When Replevin or Claim and Delivery is sustainable. See note, 80 Am. St. Rep. 753.

Construction of Exemption Statutes. See note, 96 Am. St. Rep. 371.

38 Cal. 590–595, 99 Am. Dec. 435, **BLOOD v. MARCUSE.**

Power of Agents to Indorse negotiable paper. See note, 27 L. R. A. 405.

38 Cal. 596–608, **MURDOCK v. BROOKS.**

Failure of Sureties to Justify is no defense in action on bond.

Distinguished in San Francisco v. Hartnett, 1 Cal. App. 654, 82 Pac. 1065, bail bond void where amount thereof fixed by warrant and bond clerk.

A Copy of Undertaking Sued on may be set out in body of complaint.

Approved in Santa Rosa Bank v. Paxton, 149 Cal. 198, 86 Pac. 194, instrument sued on may be attached to complaint as exhibit.

Surety on Appeal Bond is Liable though no execution issued against principal or demand made upon him.

Approved in Palmer v. Caywood, 64 Neb. 376, 89 N. W. 1035, reaffirming rule.

38 Cal. 608–611, **STICH v. DICKINSON.**

Right of Intervener to Appeal arises upon sustaining of demurrer to complaint in intervention.

Approved in More v. Miller (Cal.), 53 Pac. 1078, and Dollenmayer v. Pryor, 150 Cal. 3, 87 Pac. 617, both reaffirming rule; Robert v. Rousseau, 28 R. I. 337, 67 Atl. 331, decree that petitioner has mechanic's lien and referring cause to master is appealable; Ex parte Gray, 157 Ala. 364, 131 Am. St. Rep. 62, 47 So. 288, arguendo.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 752.

In Suit by Holder of Promissory Note against maker, third person claiming to be rightful owner of note may intervene.

Approved in Potlatch Lumber Co. v. Runkel, 16 Idaho, 197, 101 Pac. 397, 23 L. R. A. (n. s.) 536, owner of property attached may intervene to assert his right thereto.

Nature and Elements of intervention. See note, 123 Am. St. Rep. 287, 301, 314.

38 Cal. 611–619, **ROBINSON v. TEVIS.**

When Partnership Property Resold under execution against partner, only interest of partner, after payment of partnership debts, passes.

Distinguished in Finch v. Finch, 12 Cal. App. 283, 107 Pac. 597, garnishee is not discharged by payment to sheriff under subsequent garnishment.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 485, 490.

38 Cal. 619–623, **WARBURTON v. DOBLE.**

Setoff or Counterclaim is not Admissible in actions for forcible entry and detainer.

Reaffirmed in Hunter v. Porter, 10 Idaho, 83, 77 Pac. 437.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 382.

38 Cal. 623–629, BORKHEIM v. NORTH BRITISH ETC. INS. CO.

Stipulation not in Writing and filed with clerk or entered in minutes of court at time it was made is not binding.

Approved in McWhirter v. Donaldson, 36 Utah, 302, 104 Pac. 734, refusing to enforce oral stipulation to extend time to answer; Eisenberg v. Nichols, 57 Wash. 562, 107 Pac. 371, refusing to enforce oral "street" stipulation between counsel that if execution was stayed supersedeas bond would be filed.

38 Cal. 629–630, ELLIS v. COMMISSIONERS OF THE FUNDED DEBT OF SAN FRANCISCO.

Commissioners of Funded Debt are Exclusive Judges of necessity for sale or lease of property.

Approved in Mansfield v. District Agr. Assn. No. 6, 154 Cal. 149, 97 Pac. 152, deed in trust to sell does not require sale for cash.

38 Cal. 631–635, 99 Am. Dec. 438, BAKER v. KINSEY.

Master is not Responsible for Acts of servant not done in execution of authority given by master.

Approved in St. Louis etc. Ry. Co. v. Harvey, 144 Fed. 808, 75 C. C. A. 536, and Russell v. Oregon Short Line R. Co., 155 Fed. 27, 83 C. C. A. 618, relation of master and servant ceased after working hours.

Who is Keeper or Harborer of a Dog. See note, 17 L. R. A. (n. s.) 433.

38 Cal. 637–643, SENTER v. DE BERNAL.

One not a Party to an Action cannot be a party aggrieved.

Approved in dissenting opinion in Kerns v. Dean (Cal.), 6 Pac. 705, to point that party aggrieved may move for new trial, though judgment in his favor.

An "Adverse Party" Who is Entitled to notice of appeal is one whose interest in the subject matter of the appeal is adverse to a reversal or modification.

Approved in Spokane Ranch etc. Co. v. Beatty, 37 Mont. 349, 97 Pac. 838, following rule; Bell v. San Francisco Savings Union, 153 Cal. 71, 94 Pac. 228, adverse party served with notices of intention to move for new trial does not cease to be such by his death; Estate of Young, 149 Cal. 175, 85 Pac. 145, devisees are adverse parties to petition for partial distribution brought by children not provided for; Ford v. Cannon, 5 Cal. App. 187, 89 Pac. 1072, codefendant whose interest will be affected by reversal is adverse party on appeal from order appointing receiver; Ford & Sanborn Co. v. Braslan Seed etc. Co., 10 Cal. App. 765, 103 Pac. 947, codefendants alleged to be jointly liable are adverse parties; De Arnaz v. Jaynes (Cal.), 34 Pac. 224, one consenting to judgment may be adverse party where he would be injuriously affected by reversal; Diamond Bk. v. Van Meter, 18 Idaho, 247, 108 Pac. 1044, notice of appeal by one of parties against whom joint judgment has been rendered must be served on the others;

Titiman v. Alamanche Min. Co., 9 Idaho, 242, 74 Pac. 529, dismissing appeal where notice of appeal not served on nonresident defaulting defendant; Merk v. Bowery Min. Co., 31 Mont. 304, 78 Pac. 521, lessee held under circumstances not "adverse party" to appeal by sublessees from judgment in favor of lessors; Griffin v. Southern Pacific Co., 31 Utah, 298, 87 Pac. 1092, on appeal from judgment for plaintiff, defendant, who had defaulted, entitled to notice of appeal where it did not appear from record that he would not be injuriously affected by reversal; dissenting opinion in Nelson Bennett Co. v. Twin Falls Land etc. Co., 13 Idaho, 777, 779, 92 Pac. 982, 983, majority holding certain defendants not entitled to notice of appeal where court made no finding in their favor or against them.

38 Cal. 649–659, 99 Am. Dec. 441, BLOOD v. LIGHT.

Purchaser at Sheriff's Sale is Required only to show sale and authority of officer to make it.

Approved in Noland v. Coon, 1 Alaska, 41, marshal's certificate of sale does not take place of deed.

The Power of the Sheriff to sell comes from the judgment and execution, and is not measured by his proceedings under the writ.

Approved in Weldon v. Rogers, 157 Cal. 413, 108 Pac. 267, correctness of return is collateral to appeal from order of sale; Shepard v. Schrutt, 163 Mich. 490, 128 N. W. 774, levy is not avoided by failure of officer to make proper indorsement upon execution; Burton v. Kipp, 30 Mont. 287, 76 Pac. 566, failure to give notice does not invalidate sale under execution; Hyman v. Landry, 135 Wis. 604, 128 Am. St. Rep. 1044, 116 N. W. 238, any overt act by officer holding execution showing purpose to appropriate real property to satisfaction of writ is efficient levy; dissenting opinion in Satterwhite v. Melczer, 3 Ariz. 170, 24 Pac. 186, majority holding levy by constable under execution from district court to be invalid.

38 Cal. 659–666, UTTER v. CHAPMAN.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 83.

Remedy of Wrongfully Discharged Servant by action for breach of contract. See note, 6 L. R. A. (n. s.) 82, 94, 100, 116.

38 Cal. 666–669, POLACK v. McGRATH.

If upon Second Appeal Substantially Same State of facts is presented, former decision settles law of case.

Distinguished in Lorimer v. Fairchild, 68 Kan. 342, 343, 75 Pac. 128, supreme court may, under special circumstances, reconsider decision of court of appeals on former appeal in same case.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 328.

38 Cal. 672–676, CANNON v. UNION LUMBER CO.

Nature and Elements of Unlawful Detainer. See note, 120 Am. St. Rep. 34.

38 Cal. 676–679, BRAWLEY v. RISDON IRON WORKS.

Right to Civil Action for Forcible Entry and detainer. See note, 121 Am. St. Rep. 372, 392, 397, 400, 403.

38 Cal. 679–683, HIBERNIA SAV. & LOAN SOCIETY v. ORDWAY.

When Instrument Constituting Cloud is a tax deed, name of instrument is sufficient for purpose of showing an apparent validity.

Reaffirmed in Elliott v. Hudson, 84 Kan. 9, 113 Pac. 308.

38 Cal. 683–685, POLLOCK v. CUMMINGS.

An Action for Trespass on Real Property is within the jurisdiction of a justice of the peace.

Reaffirmed in Fisch v. Nice, 12 Cal. App. 62, 106 Pac. 599.

38 Cal. 689–691, NUNAN v. SAN FRANCISCO.

Damages, in Excess of Its Value, for destruction of a subscription list cannot be recovered, where no special damage alleged.

Approved in Razzo v. Varni (Cal.), 21 Pac. 763, loss of profits must be specially pleaded; Harron, Rickard & McCone v. Wilson etc. Co., 4 Cal. App. 500, 88 Pac. 516, allegation that defendant had sustained damages to certain amount by breach of warranty, insufficient.

38 Cal. 691–692, DU PRATT v. LICK.

Owner of Property is not Liable for negligence of independent contractor.

Approved in Stewart v. California Imp. Co. (Cal.), 61 Pac. 282, city which hired use of steam roller and engineer liable for negligence of latter.

General Rules as to Absence of Liability of employer for torts of independent contractor. See note, 65 L. R. A. 622, 650.

38 Cal. 693–697, BUEL v. FRAZIER.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 391.

38 Cal. 699–701, PEOPLE v. BONILLA.

Designation of Day of Execution in judgment is not illegal.

Approved in Oriemon v. Territory of Hawaii, 13 Haw. 418, part of sentence fixing day of execution may be stricken therefrom.

38 Cal. 702–712, EX PARTE SMITH.

Legislature may Prohibit Presence of females or playing of musical instruments in saloons during certain hours.

Approved in Bryant, Commr., v. Skillman Hardware Co., 76 N. J. L. 49, 69 Atl. 25, upholding child labor law.

Power to Exclude Women from Saloons. See note, 18 L. R. A. (n. s.) 657, 658.

Discrimination Against Women in public regulations. See note, 49 L. R. A. 112, 113.

Legislature may Confine Remedy to Places where wrong exists and to persons by whom it is wrought.

Approved in Picton v. Cass County, 13 N. D. 254, 100 N. W. 715, upholding statute giving county commissioners discretionary authority to take proceedings to enforce payment of taxes on real property.

Municipal Power as to Nuisances affecting public morals, decency, peace and good order. See note, 39 L. R. A. 524, 527, 528.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 39 CALIFORNIA.

39 Cal. 3–13, CHRISTY v. SUPERVISORS OF SACRAMENTO CO.

Legislature may Extend Term of Incumbent of elective office, provided whole term when extended does not exceed term limited by constitution.

Approved in Common Council v. Schmid, 128 Mich. 393, 92 Am. St. Rep. 468, 87 N. W. 388, holding legislature could postpone for one year election for city officers; State v. Plasters, 74 Neb. 656, 105 N. W. 1093, 3 L. R. A. (n. s.) 887, holding legislature could not extend terms of county officers.

Distinguished in dissenting opinion in State v. Plasters, 74 Neb. 663, 105 N. W. 1096, 3 L. R. A. (n. s.) 887, majority holding legislature could not extend term of county officers.

Power to Extend Term of Officer by postponing time for election. See note, 3 L. R. A. (n. s.) 889.

39 Cal. 13–22, SEPULVEDA v. SEPULVEDA.

Possession is Necessary to Maintain Action to quiet title to land under Practice Act, section 254.

Reaffirmed in Lange v. Robinson, 148 Fed. 804, 79 C. C. A. 1.

39 Cal. 23–24, BROWN v. PERRY.

Acts Tending to Constitute Breach of Peace amount to forcible entry.

Approved in Knowles v. Crocker Estate Co., 149 Cal. 286, 86 Pac. 718, holding entry upon land of another during his absence and tearing away fences amounts to forcible entry.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 410.

39 Cal. 24–51, BRUMAGIM v. BRADSHAW.

Trial Court has Large Discretion in fixing limits of cross-examination.

Approved in Estate of Higgins, 156 Cal. 264, 104 Pac. 9, and Orange Co. Fruit Exch. v. Hubbell, 10 N. M. 55, 61 Pac. 121, both following rule.

What Constitutes Inclosure and Dominion over land to establish adverse possession varies with character and use of land.

Approved in Ill. Steel Co. v. Jeka, 123 Wis. 428, 101 N. W. 402, holding that breaking of ground on outlying city lot showed hostile intent to possess same.

Natural Barrier may Constitute Part of the inclosure of land to establish possession.

Approved in Knowles v. Crocker Estate Co., 149 Cal. 284, 86 Pac. 717, holding a bluff may be part of inclosure of land to establish actual possession; Polk v. Beaumont Pasture Co., 26 Tex. Civ. App. 247, 64 S. W. 62, holding inclosure of large pasture range with one fence and use of natural barriers not such visible possession as to establish adverse possession; Hyde v. McFaddin, 140 Fed. 442, 72 C. C. A. 655, holding inclosure of large tract of land by means chiefly of natural boundaries and a small amount of connecting fencing does not constitute adverse possession.

Actual Possession of Land is a Subjection to will and dominion of claimant, usually evidenced by occupation, substantial inclosure, cultivation or appropriate use.

Approved in Lofstad v. Murasky, 152 Cal. 68, 91 Pac. 1008, following rule; Jensen v. Hunter (Cal.), 41 Pac. 17, holding possession under license of owner of water right did not constitute adverse possession; Rennert v. Shirk, 163 Ind. 549, 72 N. E. 548, holding possession of adjoining land through mistake in locating boundary constituted adverse possession.

The Words "Against Law" in Code of Civil Procedure, section 657, subdivision 6, includes no cause falling within any other subdivision of that section.

Approved in People v. Amer, 151 Cal. 307, 90 Pac. 700, holding misconduct of district attorney on trial is not ground for new trial within meaning of statutes; Gagnier v. City of Fargo, 12 N. D. 226, 96 N. W. 843, holding specification of error that "verdict is against law" means verdict was rendered in disregard of instructions; Williams v. Alaska Commercial Co., 2 Alaska, 52, holding motion for new trial on ground "against the law" is not supported by showing verdict not supported by evidence.

Where Statement on Motion for New Trial fails to specify wherein evidence was sufficient to justify verdict, appellate court cannot inquire into subject.

Approved in Fearon v. Mullins, 38 Mont. 55, 98 Pac. 653, question of sufficiency of evidence to sustain verdict not presented when ground of motion for new trial was that plaintiff was guilty of contributory negligence.

39 Cal. 52–57, PEOPLE v. MURPHY.

Indictment must be Tested by Criminal Practice Act and not by common law.

Approved in State v. Sly, 11 Idaho, 113, 80 Pac. 1126, upholding indictment for murder as sufficiently alleging death ensued from act.

39 Cal. 58–61, HAYWARD v. STEARNS.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 757, 785, 788, 790.

39 Cal. 65–69, PEOPLE v. CASTRO.

In Action to Collect Special School Tax, allegation and proof that election was held to authorize its assessment are essential to jurisdiction of court.

Distinguished in Cerini v. De Long, 7 Cal. App. 404, 94 Pac. 585, holding certificate of clerk to additional registration after that certified to forty days before election not essential to jurisdiction in ordering election for change of county boundary line.

39 Cal. 71–72, PITTSBURG COAL MINING CO. v. GREENWOOD.

Complaint Praying for Recovery of Land and to procure injunction does not entitle plaintiff to damages on default.

Approved in Herzog v. Atchison, Topeka etc. R. R. Co., 153 Cal. 499, 95 Pac. 899, 17 L. R. A. (n. s.) 428, holding complaint states cause of action for specific performance of contract to establish station, and not for damages for its breach.

39 Cal. 72–74, NORRIS v. ELLIOTT.

In Action for Slander, Proof of Repetition of words after suit was brought is admissible to show malice.

Approved in Paxton v. Woodward, 31 Mont. 212, 107 Am. St. Rep. 416, 78 Pac. 218, following rule; Davis v. Hearst, 160 Cal. 181, 116 Pac. 547, holding instruction that when defendant republishes libel in answer and fails to prove truth at trial and did not in good faith expect to prove truth, he intensifies original wrong, is not misleading.

39 Cal. 75–80, PEOPLE v. TRIM.

Crime of Arson and who may commit same. See note, 101 Am. St. Rep. 22.

39 Cal. 87–92, STUART v. HAIGHT.

Duties, Performance of Which may be compelled by mandamus. See note, 125 Am. St. Rep. 499.

Mandamus to Governor. See note, 6 L. R. A. (n. s.) 752.

39 Cal. 93–98, TAY v. HAWLEY.

A Judgment cannot Bind a Man until he has had his day in court.

Approved in Holt Mfg. Co. v. Collins, 154 Cal. 271, 97 Pac. 518, holding owner of threshing machine necessary party in action to enforce lien thereon for labor of threshing hands.

Service of Process Sufficient to Constitute due process of law. See note, 50 L. R. A. 596.

39 Cal. 98–102, 2 Am. Rep. 427, IN RE CONNER.

"Common-law Jurisdiction" defined.

Cited in In re Wolf, 188 Fed. 520, county courts of Tennessee are not courts of common-law jurisdiction.

County Courts have Common-law Jurisdiction within meaning of naturalization act.

Distinguished in In re Wolf, 188 Fed. 521, county courts of Tennessee are not courts of common-law jurisdiction.

Powers of State Legislatures and Courts as to naturalization. See note, 30 L. R. A. 763.

39 Cal. 112–116, OAKLAND v. WHIPPLE.

Owner of Property is Personally Liable to county for taxes assessed thereon.

Approved in dissenting opinion in William Ede Co. v. Heywood, 153 Cal. 620, 96 Pac. 83, 22 L. R. A. (n. s.) 562, holding purchaser of realty who pays taxes assessed on interest of mortgagee under mortgage executed by his grantor to release land from lien cannot recover same from such mortgagee, there being no contractual relation between them.

As to Where Ships are Taxable. See note, 37 L. R. A. 518.

39 Cal. 116–120, PRESTON v. SONORA LODGE.

Granting or Refusing Application to Reopen Case to hear further proof is largely in discretion of trial court and will not be reviewed except when shown that such discretion has been abused.

Approved in Hohn v. Pauly, 11 Cal. App. 733, 106 Pac. 269, holding discretion not abused in reopening case after decision.

Mechanics' Liens have Priority in order of creation.

Approved in Pacific States Savings etc. Co. v. Duboise, 11 Idaho, 327, 83 Pac. 515, holding existing mortgage lien prior to those of mechanic's

Distinguished in dissenting opinion in Pacific States Savings etc. Co. v. Dubois, 11 Idaho, 333, 83 Pac. 517, majority holding existing mortgage lien prior to those of mechanics.

When Mechanics' Liens Superior to earlier mortgages. See note, 14 L. R. A. 305.

39 Cal. 120–123, DE LEVILLAIN v. EVANS.

Where Gift is for Benefit of Donee, he is presumed to have accepted it.

Approved in Goelz v. People's Sav. Bank, 31 Ind. App. 74, 67 N. E. 235, following rule; Varley v. Sims, 100 Minn. 337, 117 Am. St. Rep. 694, 111 N. W. 270, 8 L. R. A. (n. s.) 828, applying rule to gift causa mortis.

Delivery of Deed to Third Person or record, or delivery for record, by grantor. See note, 54 L. R. A. 892.

39 Cal. 123–125, CAPURO v. BUILDERS' INS. CO.

Facts Constituting Fraud When Relied on, either in support or defense of an action, must be pleaded.

Approved in Fox v. Hale etc. Min. Co. (Cal.), 53 Pac. 36, and Thomason v. De Greayer (Cal.), 31 Pac. 567, both following rule; Virginia etc. Co. v. Glenwood Lumber Co., 5 Cal. App. 260, 90 Pac. 49, holding evidence of fraudulent sale improperly admitted in support of complaint in conversion when no allegations of facts constituting fraud are set forth.

39 Cal. 125–134, MANDEVILLE v. SOLOMON.

Tenant in Common Who Purchases Outstanding Title holds it for common benefit of all tenants if they exercise reasonable diligence in electing to participate in its benefits.

Approved in Smith v. Goethe, 159 Cal. 635, 115 Pac. 226, following rule; Stevensen v. Boyd, 153 Cal. 36, 96 Pac. 287, 49 L. R. A. (n. s.) 525, holding right to participate in benefits of outstanding title lost by laches of tenant in common in claiming such benefit; Ryason v. Dunten, 164 Ind. 97, 99, 73 N. E. 78, holding son who purchased land held by himself and mother as cotenants at mortgage sale and asserted no rights against mother for some years after his majority,

could not in equity assert any right against mother's remote grantee; Nalle v. Parks, 173 Mo. 625, 73 S. W. 598, where cotenant failed to pay share of purchase price paid by other cotenant at sales under deeds of trust to which land was subject, he abandoned right to share in title thus acquired; Likens v. Likens, 136 Wis. 327, 117 N. W. 801, failure of coheir for ten years to assert claim against coheirs who purchased mortgaged premises of ancestor barred his right in such land.

Laches as Affecting Cotenant's Right to benefit of purchase of outstanding title. See note, 19 L. R. A. (n. s.) 526.

39 Cal. 134–136, SOHER v. CALAVERAS CO.

Implied Liability of County for Interest on its obligations. See note, 17 L. R. A. (n. s.) 557.

39 Cal. 137–144, HASTINGS v. CUNNINGHAM.

Execution may be Issued and Served before docketing judgment.

Approved in Baum v. Roper, 1 Cal. App. 437, 82 Pac. 391, holding valid writ of possession issued after filing of decision but before entry of judgment.

39 Cal. 145–150, HIBBARD v. SMITH.

Order Sustaining or Overruling a Demurrer is not appealable.

Approved in Litch v. Kerns, 8 Cal. App. 748, 97 Pac. 898, holding appeal must be dismissed when no judgment has been entered upon overruling demurrer.

Malice on Part of Judge Trying Case is not in itself ground for reversal.

Denied in Day v. Day, 12 Idaho, 563, 86 Pac. 533, reversing order refusing change of venue asked on ground of prejudice of judge.

39 Cal. 151–153, 2 Am. Rep. 430, COWELL v. LUMLEY.

Rights and Liabilities of Tenant on destruction of leased building. See note, 22 L. R. A. 614.

39 Cal. 151–153, 2 Am. Rep. 430, COWELL v. LUMLEY.

A Tenant is not Relieved from Obligation to pay rent because deprived of beneficial enjoyment of rented premises by inevitable casualty.

Approved in Meek v. Cunha, 8 Cal. App. 100, 96 Pac. 107, refusing to apportion rent when crop on leased land was destroyed by flood.

Rights and Liabilities of Tenant on destruction of leased building. See note, 22 L. R. A. 614.

39 Cal. 157–168, DE GODEY v. GODEY.

Wife's Interest in Community Property is so vested in her that husband cannot deprive her of it by last will or alienate merely for purpose of devesting her interest.

Approved in Estate of Moffitt, 153 Cal. 361, 95 Pac. 654, 20 L. R. A. (n. s.) holding wife takes one-half of community property as heir; Tabler v. Peverill, 4 Cal. App. 676, 88 Pac. 996, after divorce husband and wife are tenants in common to community property not disposed of in decree; dissenting opinion in Reade v. de Lea, 14 N. M. 474, 95 Pac. 142, majority upholding deed of husband alone to community property.

Distinguished in Reade v. de Lea, 14 N. M. 463, 95 Pac. 137, upholding deed of husband alone to community property.

Effect of Divorce on Community Property in absence of adjudication. See note, 11 L. R. A. (n. s.) 103.

When Divorce is Granted Neither Party is thereby deprived of his or her interest in community property.

Approved in Coats v. Coats, 160 Cal. 679, 118 Pac. 445, decree annulling marriage in action in which no property rights were in issue does not estop wife from suing for portion of community accumulations; Ambrose v. Moore, 46 Wash. 466, 90 Pac. 589, 11 L. R. A. (n. s.) 103, holding husband and wife to be tenants in common of community property after divorce, where decree failed to determine property rights.

Where Wife is Sued for Divorce and by Fraud is prevented from defending and decree does not settle community rights, she may sue for recovery of her interest.

Distinguished in Bedal v. Sake, 10 Idaho, 278, 280, 77 Pac. 641, 642, 66 L. R. A. 60, where wife abandoned husband in one state and secured divorce and remarried in another, she could not sue to recover any interest in community with first husband.

Dissolution or Continuing in Force of Preliminary Injunction after answer is filed is largely within discretion of court.

Approved in Humphrey v. Buena Vista Water Co., 2 Cal. App. 543, 84 Pac. 297, holding preliminary injunction properly sustained after sustaining demurrer to complaint when amended complaint was filed before hearing motion to dissolve injunction.

39 Cal. 169–178, WAUGENHEIM v. GRAHAM.

Time for Performance of Simple Contract in writing may be waived or extended by subsequent oral agreement.

Overruled in Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 752, 103 Pac. 940, holding parol evidence inadmissible to vary terms of written option by showing extension thereof.

If Pleading Contains No Cause of Action or defense, adverse party may object at trial to introduction of evidence thereunder.

Approved in Coram v. Ingersoll, 148 Fed. 173, 78 C. C. A. 303, holding judgment of dismissal on sustaining objection to introduction of evidence on ground that complaints did not state cause of action equivalent to judgment on general demurrer.

39 Cal. 179–189, BRENHAM v. STORY.

Upon Death of Ancestor Heir Becomes at Once Vested with the full property, subject only to temporary possession of administrator for purposes of administration.

Approved in Raulet v. Northwestern etc. Ins. Co., 157 Cal. 227, 107 Pac. 297, and Estate of Vance, 152 Cal. 763, 93 Pac. 1011, both following rule; Trippet v. State, 149 Cal. 530, 86 Pac. 1087, 8 L. R. A. (n. s.) 1210, holding right of state to inheritance tax vests on death of decedent, but state cannot have possession without due appraisement and notice; Estate of Kennedy, 157 Cal. 522, 108 Pac. 282, holding sole devisee under will took title subject to payment of allowance for support of family and to homestead set apart by court; Noon's Estate, 49 Or. 291, 88 Pac. 675, holding rights of devisees once fixed upon death of devisor could not be altered by legislation subjecting realty to sale for debts.

It is Duty of Administrator to Take Charge of estate to settle claims and when satisfied to pass it over to heir.

Approved in Estate of Blythe, 2 Cof. Prob. 162, denying right of administrator to expend money to preserve Mexican lands from forfeiture under conditions of grants.

Causes for Which Decedent's Real Estate may be sold. See note, 79 Am. St. Rep. 90.

Liability of Heir or Devisee for debt of ancestor. See note, 112 Am. St. Rep. 1021.

39 Cal. 189–223, 2 Am. Rep. 432, HARPENDING v. HAIGHT.

Mandamus Lies to Compel Governor to perform ministerial acts required by law and not included within powers confided to his discretion by Constitution.

Approved in State v. Brooks, 14 Wyo. 414, 84 Pac. 491, 6 L. R. A. (n. s.) 750, reaffirming rule; Elliott v. Pardee, 149 Cal. 520, 86 Pac. 1089, holding mandamus lies to compel governor to pass upon petition of electors of sixth class city to appoint election commission when city has failed to hold election; Directors of Insane Asylum v. Wolfly, 3 Ariz. 133, 22 Pac. 383, 8 L. R. A. 188, refusing mandate at instance of directors of territorial asylum to compel governor to sign warrant on treasurer for funds for asylum.

Denied in Rice v. Draper, 207 Mass. 578, 93 N. E. 822, mandamus does not lie to compel governor to perform any part of official duties.

Mandamus to Governor. See note, 6 L. R. A. (n. s.) 752.

Mandamus to Compel Delivery of Copy or to require promulgation of statute. See note, 22 L. R. A. (n. s.) 1089.

Motives of Legislature are not Proper subject for judicial inquiry in passing on construction of statute.

Approved in Lukens v. Nye, 156 Cal. 505, 105 Pac. 596, following rule.

Return of Bill by Governor to House in which it originated with objections must be within ten days to allow such house to enter objections and reconsider bill.

Approved in State v. Wheeler, 172 Ind. 587, 89 N. E. 5, holding bill returned too late on last day of session to constitute valid return; Casey v. Deadman, 191 Mass. 371, 77 N. E. 717, holding invalid veto of bill by return in statutory time without objections stated; State v. Junkin, 79 Neb. 538, 113 N. W. 258, holding governor retained power to approve or veto bills for statutory time so long as they remained in his possession.

Bill Regularly Transmitted to Governor, and not recalled by houses nor vetoed by governor becomes law.

Reaffirmed in City of Ensley v. Simpson, 166 Ala. 385, 52 So. 67.

39 Cal. 224–232, GEARY v. SIMMONS.

Court may Grant Nonsuit After Evidence on both sides has been heard, where, if nonsuit had been denied, and verdict found for plaintiff, it would have been set aside as contrary to evidence.

Approved in Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 624, 91 Pac. 116, holding nonsuit properly granted at close of all the evidence in action for wrongful death, where it appeared plaintiff was guilty of contributory negligence.

39 Cal. 233–246, BANKS v. MORENO.

Grant of Tract of Land by Name will Convey whole title when its boundaries are notorious and well defined.

Approved in Togni v. Slocomb, 12 Cal. App. 737, 108 Pac. 725, holding sufficient description that identified land by calls of instrument or descriptive features of grant.

39 Cal. 247–256, MACK v. WETZLAR.

Mortgage Does not Convey Legal Title for any purpose, either before or after condition broken.

Approved in Stearns-Rogers Co. v. Aztec Co., 14 N. M. 332, 93 Pac. 714, mortgagee has no such title in land as to require him to post notice of nonliability under mechanic's lien law.

39 Cal. 256–260, ECKART v. CAMPBELL.

Failure on Part of Applicant for Purchase of State Lands to pay first installment of price forfeits right to purchase.

Approved in Messenger v. Kingsbury, 158 Cal. 615, 112 Pac. 67, applicant for purchase of tide lands, who merely files affidavit and application to purchase without making payment, acquires no such vested right as prevents repeal of law authorizing sale.

39 Cal. 287–291, SAUNDERS v. WEBBER.

Discretionary Power Under Deed of Trust cannot be delegated to stranger.

Approved in Cramton v. Rutledge, 157 Ala. 148, 47 So. 216, holding power of sale given in will could not be delegated to probate court.

Judgment in Forcible Entry and Detainer against husband is sufficient to put out wife who claimed land as sole trader and was not party to action.

Approved in Delacey v. Commercial Trust Co., 51 Wash. 547, 130 Am. St. Rep. 1112, 99 Pac. 576, holding writ of possession in ejectment could be executed against members of defendant's family who entered pendente lite.

Distinguished in Gustin v. Crockett, 44 Wash. 541, 87 Pac. 840, holding judgment for possession against husband, wife not being party, of community property, not to be bar to action by husband and wife to have deed, executed by them prior to suit for possession, declared mortgage and judgment set aside.

39 Cal. 292–304, AGARD v. VALENCIA.

Perpetual Injunction Against Judgment in Ejectment will not be granted on grounds which could have been set up as legal defense in the action at law.

Approved in Brum v. Ovins, 154 Cal. 21, 129 Am. St. Rep. 137, 96 Pac. 878, refusing to enjoin execution on default judgment on ground that defendant was served under error in name which he could have pleaded in defense.

In Suit for Specific Performance it must be affirmatively shown that the contract is fair and just and inequity will not arise from its enforcement.

Approved in White v. Sage, 149 Cal. 615, 616, 87 Pac. 194, Winchester v. Becker, 8 Cal. App. 369, 97 Pac. 75, and Elliott v. Eliott, 3 Alaska, 364, all following rule; Porter v. Anderson, 14 Cal. App. 721, 113 Pac. 347, holding complaint for specific performance insuffi-

cient in not alleging fairness of contract; Martin v. Condrey, 13 Cal. App. 620, 110 Pac. 457, refusing to reform and specifically enforce contract where not averred that it was fair and just; Marsh v. Lott, 8 Cal. App. 392, 97 Pac. 166, refusing specific performance on option as being unfair; Herzog v. Atchison, Topeka etc. R. R. Co., 153 Cal. 501, 95 Pac. 900, 17 L. R. A. (n. s.) 428, refusing to enforce contract for location of railroad station, which would serve private interests, but interfere with public service of road; Kaiser v. Barron, 153 Cal. 790, 96 Pac. 807, refusing to sustain specific performance where finding that contract was fair and reasonable was not supported by allegation and proof; Sunrise Land Co. v. Root, 160 Cal. 98, 116 Pac. 73, mere allegation that contract for sale of land was in writing and that sale was "legally and fairly" made is insufficient; Marks v. Gates, 2 Alaska, 527, refusing specific performance of contract for sale of land as being inequitable; Burke v. Mead, 159 Ind. 257, 64 N. E. 882, refusing specific performance of contract under which plaintiff's duty was uncertain.

Appeal Does not Lie from Order sustaining demurrer, but such ruling may be reviewed on appeal from judgment.

Reaffirmed in Hadsall v. Case, 15 Cal. App. 542, 115 Pac. 331.

39 Cal. 304–305, HUNT v. DOHRS.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 741.

39 Cal. 306–309, ESTATE OF LEWIS.

Probate Court may Compel Execution of conveyance by administrator in conformity with sale under its order.

Cited in Estate of Johnson, 4 Cof. Prob. 502, arguendo.

39 Cal. 309–314, BENSLEY v. ELLIS.

Practice Act, Section 68, as Amended in 1866, completely superseded former section whose words it re-enacted.

Approved in dissenting opinion in People v. McNulty (Cal.), 28 Pac. 823, holding Penal Code amendment of 1891, directing execution to be carried out by wardens of state penitentiaries, ex post facto as to prisoners awaiting execution.

39 Cal. 315–318, HIRSCH v. RAND.

Act of Deputy Marshal in Official Capacity is the act of his principal.

Reaffirmed in People v. Vasquez, 9 Cal. App. 547, 99 Pac. 983.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 129.

39 Cal. 320–325, COGSWELL v. BULL.

Nothing will be Assumed in Favor of pleader which is not averred or may be implied from averments.

Approved in Witham v. Blood, 124 Iowa, 699, 100 N. W. 559, holding plaintiff presumed to have stated case in pleading as strongly as facts will justify.

39 Cal. 326–336, PEOPLE v. PHIPPS.

When Independent Facts are Relied on to identify accused as person committing offense, each essential independent fact in the series

relied on to create presumption of guilt must be established beyond reasonable doubt.

Distinguished in People v. Bond, 13 Cal. App. 182, 109 Pac. 154, holding rule applies to jury rather than to appellate court, and rational inference of guilt from record is all that is essential.

Circumstantial Evidence. See note, 97 Am. St. Rep. 779.

Where Acts Constituting Offense are Stated in indictment, it is sufficient although wrong appellation is given.

Reaffirmed in Brady v. Territory, 7 Ariz. 17, 60 Pac. 699.

39 Cal. 336–338, CRUESS v. FESSLER.

Price Actually Paid on Contract is Immaterial in suit for damages for fraud, the purchaser being entitled to full value of whatever articles purchased were represented to be.

Approved in Spreckels v. Gorrill, 152 Cal. 390, 92 Pac. 1015, following rule; Bechtel v. Chase, 156 Cal. 711, 106 Pac. 82, holding party induced to exchange property by fraud could bring action for deceit and recover value goods received by him would have had were representations true.

Misrepresentation as to Value of Goodwill of business knowingly made by vendors is fraudulent.

Approved in Collins v. Chipman, 41 Tex. Civ. App. 578, 95 S. W. 674, holding as fraudulent false representation as to value of stock made by president of corporation to purchaser.

Distinguished in Craig v. Wade, 159 Cal. 173, 112 Pac. 891, holding report in form of circular to stockholders concerning business and assets of corporation was not fraudulent within Civil Code, section 316.

Expression of Opinion as Fraud. See note, 35 L. R. A. 426.

39 Cal. 345–354, 2 Am. Rep. 451, POORMAN v. D. O. MILLS & CO.

Advances on Notes and Other Obligations given for gambling debts. See note, 119 Am. St. Rep. 178.

Effect of Transfer of Negotiable Instrument to secure money for gambling. See note, 22 L. R. A. (n. s.) 629.

39 Cal. 354–359, REILY v. LANCASTER.

Judgment Reciting That All Owners and claimants of property have been summoned and have defaulted is conclusive on that point on collateral attack, although one owner was not summoned.

Distinguished in White v. White, 66 W. Va. 82, 135 Am. St. Rep. 1013, 66 S. E. 4, decree reciting service on and appearance of all adult defendants construed as applying only to those actually served with summons, where some defendants were nonresidents and proceeded against by publication.

Defendant in Ejectment can Only Set Up Title acquired pendente lite by amending answer and averring title as so acquired.

Approved in Bush v. Pioneer Mining Co., 179 Fed. 80, 102 C. C. A. 372, holding in ejectment evidence of title acquired after commencement of action could only be offered under supplemental complaint setting up such title; Bush v. Pioneer Mining Co., 3 Alaska, 615, holding title obtained by plaintiff in ejectment after filing complaint can only be pleaded by supplemental complaint.

Party Whose Duty It Was to Pay Taxes cannot avail himself of title acquired through tax deed.

Approved in Brooks v. Garner, 20 Okl. 257, 94 Pac. 702, and Oppenheimer v. Levi, 96 Md. 306, 54 Atl. 76, 60 L. R. A. 729, both following rule.

Right of Tenant to Acquire Title not inconsistent with landlord's at commencement of tenancy. See note, 54 L. R. A. 939.

What Constitutes Real Estate for purposes of taxation. See note, 15 L. R. A. 297.

39 Cal. 360–369, 2 Am. Rep. 456, McGARY v. HASTINGS.

Covenant of Warranty in Deed is not broken without eviction.

Approved in Hayden v. Patterson, 39 Colo. 19, 88 Pac. 438, holding covenant of seisin and lawful right broken when made where grantor had no title.

Breach of Covenant of Warranty by eviction. See note, 122 Am. St. Rep. 855, 857, 858.

Damages for Breach of Warranty when there has been actual loss of premises is purchase money and interest.

Distinguished in Madden v. Caldwell Land Co., 16 Idaho, 64, 100 Pac. 359, 21 L. R. A. (n. s.) 332, holding damages for breach of warranty to be adequate compensation for injury sustained.

39 Cal. 370–380, PEOPLE v. TURNER.

After Issue of Fact Joined in Criminal Case every step taken to determine issue up to and including verdict must be regarded as arising "during course of trial" under section 440, Criminal Procedure Act.

Approved in People v. White, 5 Cal. App. 340, 90 Pac. 476, holding visit of jury to scene of crime a proceeding in course of trial; Green v. Duvergey, 146 Cal. 385, 80 Pac. 236, holding order of court requiring plaintiff to make deposit in court as condition to going to trial reviewable as error of trial.

Objections to Indictment Which are Properly Presented on motion to set aside are deemed waived by plea.

Approved in Oligschlager v. Territory, 15 Okl. 145, 79 Pac. 915, following rule; Shivers v. Territory, 13 Okl. 475, 74 Pac. 902, objection that indictment was not "found" or "indorsed" cannot be raised for first time on appeal.

Motion to Set Aside Indictment may be made on ground of bias of grand jurors.

Approved in Parker v. Territory, 5 Ariz. 290, 52 Pac. 364, holding such motion improperly made unless grounds were not set forth; State v. Mott, 29 Mont. 297, 300, 304, 74 Pac. 730, 731, 732, bias of juror when sworn, concealed on voir dire, is ground for new trial.

39 Cal. 381–385, MORRISON v. LODS.

False Representation Inducing Contract is not Ground for rescission unless injury is shown to result from performance.

Approved in United Real Estate etc. Co. v. Barnes, 159 Cal. 247, 113 Pac. 169, appointment of interested persons as commissioners to assess damages and benefits under act of 1889 is not actual fraud on property owners; Sonnesyn v. Akin, 14 N. D. 256, 104 N. W. 1029, holding injury not shown.

Real Estate Broker's Commissions as affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 604.

39 Cal. 389–393, **HIMMELMANN v. SPANAGEL.**

In Complaint in Foreclosure, Allegation that defendants had or claimed to have interest in premises is sufficient.

Approved in Wardlow v. Middleton, 156 Cal. 586, 105 Pac. 738, holding as sufficient to show defendants other than mortgagor to be proper parties allegation that they "had or claimed some interest in premises subsequent and subject to mortgage."

No Setoff can be had Against a Tax unless specially allowed by statute.

Distinguished in Bodley etc. v. Finley's Executor, 111 Ky. 621, 64 S. W. 440, holding setoff may be pleaded against claim of contractor for cost of street improvement although governmental power of taxation is exercised in his favor.

Damages for Injury to Property Against which street assessment issued cannot be set up as counterclaim in action for assessment.

Approved in Engebretson v. Gay, 158 Cal. 29, 109 Pac. 880, in action to foreclose street assessment lien, owner cannot cross-complain for damages arising from piling of dirt by contractor on land.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 918, 923.

Miscellaneous.—Cited in Holl v. Achi, 18 Haw. 176, to point that in absence of statutory method for foreclosing statutory lien it may be foreclosed in equity.

39 Cal. 393–401, **PEOPLE v. JOSSELYN.**

In Trial for Abortion Alleged to have Been Produced by instrument, use of instrument is gist of action and evidence of its use given by prosecuting witness must be corroborated.

Approved in People v. Wah Hing, 15 Cal. App. 207, 114 Pac. 421, holding corroboration of means not essential but only of criminal intent.

Who is an Accomplice. See note, 138 Am. St. Rep. 273, 277.

39 Cal. 401–402, **HIMMELMANN v. SPANAGEL.**

Default to Complaint Confesses Its Allegations.

Reaffirmed in Madison v. Octave Oil Co., 154 Cal. 770, 99 Pac. 177.

Objections to Sufficiency of Statement of Facts in complaint but not to sufficiency of facts themselves must be presented by special demurrer.

Reaffirmed in Union Ice Co. v. Doyle, 6 Cal. App. 288, 92 Pac. 114.

39 Cal. 403–405, **PEOPLE v. AMES.**

To Obtain Conviction on Evidence of Accomplice, there must be corroborative evidence tending to criminate accused, aside from and without aid of testimony of accomplice.

Approved in People v. Leavens, 12 Cal. App. 184, 106 Pac. 1106, holding testimony corroborating that of accomplice need not be sufficient of itself to establish guilt, but must tend to implicate de-

fendant and connect him with the crime; People v. Larsen (Cal.), 34 Cal. 516, holding accomplice evidence in case not independently corroborated; State v. Gordon, 105 Minn. 219, 117 N. W. 484, holding accomplice's testimony corroborated; Cooper v. Territory, 19 Okl. 501, 91 Pac. 1034, holding accomplice's testimony not sufficiently corroborated.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 168, 169.

39 Cal. 405–407, PEOPLE v. TOWNSLEY.

Indictment for Grand Larceny in Stealing Horse need not state value of horse.

Approved in State v. La Chall, 28 Utah, 83, 77 Pac. 4, upholding indictment for robbery by forcibly taking money from person of another which did not state amount taken.

39 Cal. 407–410, PHELPS v. UNION COPPER MINING CO.

Motion for New Trial on ground of insufficiency of evidence to justify verdict is addressed to discretion of court, and will be reversed only for manifest abuse of discretion.

Approved in Kerr v. Kerr (Cal.), 13 Pac. 655, and Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486, both following rule.

39 Cal. 411–412, BEGUHL v. SWAN.

Mandamus as Proper Remedy against public officers. See note 98 Am. St. Rep. 890.

39 Cal. 412–427, 2 Am. Rep. 462, PAGE v. FOWLER.

In Action to Recover Personal Property of fluctuating value measure of damages is highest market value within reasonable time after taking of property, with interest from time of estimation of such value.

Approved in McCrea v. McGrew, 9 Idaho, 385, 75 Pac. 68, reaffirming rule; Lynch v. McGham, 7 Cal. App. 134, 93 Pac. 1044, holding interest on value of property converted is allowed by code in lieu of damages for its detention; Benjamin v. Huston, 16 S. D. 576, 577, 94 N. W. 586, and Lindsey v. Hewitt, 42 Ind. App. 579, 86 N. E. 448, both holding measure of damages in suit on replevin bond is value of property at time replevied plus legal interest.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 42.

Successful Plaintiff in Ejectment cannot Recover crop grown and harvested while defendant was in possession, but may recover for use and occupation.

Approved in Snyder v. Harding, 38 Wash. 674, 80 Pac. 792, reaffirming rule; Johnson v. Cook, 96 Mo. App. 447, 70 S. W. 526, holding purchaser at execution sale of land could not claim growing crops from lessee of judgment debtor.

Distinguished in Hartshorne v. Ingles, 23 Okl. 541, 101 Pac. 1047, 23 L. R. A. (n. s.) 531, successful plaintiff entitled to matured unsevered crop standing at time of delivery of possession; Myer v. Roberts, 50 Or. 83, 126 Am. St. Rep. 733, 89 Pac. 1052, 12 L. R. A. (n. s.) 194, one who secured and maintained possession of land by injunction wrongfully issued after landlord had re-entered for con-

ditions broken not entitled to crops grown thereon and harvested by him.

Right of Owner Out of Possession to crops grown by occupant. See note, 126 Am. St. Rep. 737.

39 Cal. 428–432, PEOPLE v. DOSS.

Indictment Presented Against Superintendent of schools considered and held to sufficiently designate office held by defendant.

Approved in Showers v. Caddo County, 14 Okl. 160, 77 Pac. 189, upholding indictment against director and clerk of school district.

Evidence in Embezzlement must Show that accused occupied fiduciary relation implying special trust and confidence.

Approved in State v. Ives, 128 La. 275, 54 So. 796, following rule.

39 Cal. 434–439, CHABOT v. TUCKER.

Failure to Prosecute Motion for New Trial for three months is not such laches as will warrant interference with discretion of court in granting motion.

Approved in Boin v. Spreckels Sugar Co., 155 Cal. 615, 102 Pac. 939, holding failure to orally direct court's attention to grounds of motion for new trial, and submission on bill of exceptions did not justify refusal to consider motions.

Debt Barred by Limitations is Sufficient Consideration for new promise to pay.

Approved in Hoover v. Wasson, 11 Cal. App. 595, 105 Pac. 948, holding note barred by statute supported contract to convey land.

Moral Obligation as Consideration for promise. See note, 53 L. R. A. 362.

Opinion of Court in Support of Decision is not subject to review by appellate court.

Approved in Bouchard v. Abrahamsen, 4 Cal. App. 431, 88 Pac. 384, holding opinion of trial court no part of record on appeal.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 690.

39 Cal. 439–441, EITEL v. FOOTE.

Constructive Service on Persons Without the State may be had in order to reach property within the state.

Approved in Hoffman v. Superior Court, 151 Cal. 392, 90 Pac. 941, upholding service by publication under "McEnerney Act."

Service of Process Sufficient to Constitute due process of law. See note, 50 L. R. A. 599.

Validity of Judgment in Tax Suit is subject to same rules, and to attack in same mode as judgment in any other kind of action.

Approved in Taylor v. Huntington, 34 Wash. 460, 461, 75 Pac. 1106, following rule.

39 Cal. 442–447, O'ROURKE v. O'CONNOR.

Possession of Property by Owner or His Tenant puts all persons dealing therewith on inquiry, and such are chargeable with notice of all facts that could be ascertained with proper diligence.

Approved in Zenda Mining etc. Co. v. Tiffin, 11 Cal. App. 66, 104 Pac. 12, holding voluntary purchaser from naked trustee having notice of trustee proceedings cannot acquire title, and purchaser at judicial sale with notice can consequently take no title.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 72, 100.

39 Cal. 449–450, PEOPLE v. REINHART.

Oral Evidence is Inadmissible to Prove previous conviction of crime of witness examined in his own behalf.

Approved in People v. Buckner (Cal.), 4 Pac. 489, following rule; People v. Elster (Cal.), 3 Pac. 889, holding it error to impeach witness by proof of arrest on charge of crime.

Previous Conviction of Witness Examined in own behalf cannot be shown by his own testimony on cross-examination or by other witnesses, the record being best evidence.

Approved in Lewis v. Territory of Arizona, 7 Ariz. 58, 60 Pac. 696, holding defendant in homicide testifying in own behalf could not be compelled to testify on cross-examination in regard to previous conviction.

Cross-examination as Proper Mode of Proving Conviction of crime for purposes of impeachment. See note, 30 L. R. A. (n. s.) 850.

39 Cal. 456–459, WELTON v. PALMER.

Deed by Trustee by Assent of Cestui Que Trust in writing vests entire estate in grantee, and cestui que trust cannot thereafter complain that there was no consideration.

Reaffirmed in Schultz v. McLean (Cal.), 25 Pac. 427, 430.

39 Cal. 459–469, SULLIVAN v. TRIUNFO ETC. MINING CO.

Assessments on Paid-up Stock. See note, 45 L. R. A. 649, 653.

Miscellaneous.—Cited in Von Horst v. American Hop etc. Co., 177 Fed. 979, under California statutes, fully paid-up corporate stock is subject to assessment by corporation for payment of debts.

39 Cal. 473–484, SAN FRANCISCO v. SPRING VALLEY WATER WORKS.

A Plaintiff may Plead Facts of Previous Adjudication and also the adjudication without waiving benefit of such adjudication.

Approved in Harding v. Harding, 148 Cal. 401, 83 Pac. 436, holding in divorce action benefit of decree of maintenance in another state which was pleaded in defense is not waived by defendant's examining witnesses as to merits of plaintiff's case.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 92.

39 Cal. 485–490, LEVY v. BRANNAN.

Actual Malice must be Proven in action for malicious prosecution.

Approved in Stone v. Hutchinson, 4 Haw. 127, following rule.

Action in Good Faith, Under Advice of Counsel, after fair and full statements of facts rebuts evidence showing want of probable cause in malicious prosecution.

Approved in Cooper v. Fleming, 114 Tenn. 50, 84 S. W. 803, 68 L. R. A. 849, following rule.

Advice of Counsel as Defense to Action for malicious prosecution. See note, 18 L. R. A. (n. s.) 51.

39 Cal. 490–492, TRUMPLER v. BEMERLY.

Statutes Prescribing Modes for devesting title to property without owner's consent must be construed strictly.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 216, 82 Pac. 619, 620, holding city levee commissioners under acts of May 13, 1861, and April 9, 1862, have no power to condemn land outside city limits for levee purposes.

Summary Proceedings to Impound and sell animals. See note, 90 Am. St. Rep. 217.

39 Cal. 493–495, 2 Am. Rep. 473, JONES v. GOODWIN.

Party Writing Name on Back of Note to which he is not a party, before delivery, becomes an indorser, and is entitled to demand and notice to fix his liability.

Approved in Yun Lung & Co. v. Burke, 9 Haw. 145, following rule.

Liability of Stranger Indorsing Commercial Paper before delivery. See note, 18 L. R. A. 33.

39 Cal. 501–504, 2 Am. Rep. 476, CHOYNSKI v. COHEN.

Judgment by Default will be Reversed on appeal if complaint exhibits no cause of action.

Approved in Dame v. Cochiti Reduction etc. Co., 13 N. M. 15, 79 Pac. 298, following rule.

Terms in Common Use to Designate a Trade or occupation cannot be exclusively appropriated as trademark.

Approved in Italian Swiss Colony v. Italian Vineyard Co., 158 Cal. 257, 110 Pac. 915, denying right to appropriate Italian word "typo" as expressing type of particular wine.

What Words or Phrases may Constitute a valid trademark. See note, 85 Am. St. Rep. 115.

Relief Against Infringement of Trade Name not used in connection with manufactured article. See note, 15 L. R. A. (n. s.) 630.

39 Cal. 529–531, ESTATE OF CURRY.

"Children" as Used in Statute of Descents is confined to immediate offspring.

Approved in Brown v. Brown, 71 Neb. 210, 115 Am. St. Rep. 568, 98 N. W. 722, following rule.

39 Cal. 536–540, 2 Am. Rep. 478, TAYLOR v. SHEW.

Action on Foreign Judgment may be had in This State although appeal is pending, unless judgment is suspended or execution stayed.

Approved in Dowdell v. Carpy, 137 Cal. 338, 70 Pac. 169, holding judgment appealed from could be used as counterclaim when no stay of execution granted.

Judgments of Courts of other states. See note, 103 Am. St. Rep. 323.

In Absence of Proof, Foreign Law is Presumed to be same as domestic.

Reaffirmed in Wilhite v. Skelton, 5 Ind. Ter. 630, 82 S. W. 935.

39 Cal. 540–542, IRON MOUNTAIN CO. v. HAIGHT.

First and Last Days in computation of time. See note, 49 L. R. A. 243.

39 Cal. 543–550, WINGARD v. BANNING.

Lien of Carrier for Freight is Lost by surrender of possession.

Approved in Lembeck v. Jarvis Terminal Cold Storage Co., 68 N. J. Eq. 497, 59 Atl. 362, following rule.

Where Common Carrier Sues Out Attachment against property on which it has lien for freight, it thereby forfeits its lien when affidavit avers no security for freight.

Distinguished in Bennett Bros. Lumber Co. v. Robinson, 159 Fed. 916, 87 C. C. A. 90, holding attachment of lumber by railroad for freight did not forfeit its lien thereon when affidavit did not allege it had no lien.

Waiver of Lien by Attachment or execution. See note, 50 L. R. A. 721.

39 Cal. 555–558, DELMAS v. MARTIN.

Party Surprised at Trial must Apply for Relief at earliest practicable moment.

Approved in Lihue Plantation Co. v. Kepalai, 13 Haw. 517, refusing new trial on ground of surprise when party surprised by unexpected testimony of his own witness takes no steps at time to avert consequences.

39 Cal. 565–570, DICKEY v. DAVIS.

Where Judge is Convinced Verdict is Clearly against weight of evidence, he should set it aside, even though there was some conflict in evidence.

Approved in Clark v. Great Northern R. R. Co., 37 Wash. 541, 79 Pac. 1109, following rule; Herzog v. Julien (Cal.), 4 Pac. 501, sustaining order of trial court, granting new trial in damage suit although evidence was conflicting; Williams v. Alaska Commercial Co., 2 Alaska, 51, holding conflict of evidence sufficient to sustain order of trial court refusing new trial.

Distinguished in Lowry v. Piper, 20 N. D. 638, 127 N. W. 1046, upholding denial of new trial on conflicting evidence, though one item of evidence is of documentary nature.

39 Cal. 573–579, BROWN v. McALLISTER.

Judgment will be Reversed When Instructions to jury are contradictory and repugnant.

Approved in Watts v. Murphy, 9 Cal. App. 569, 99 Pac. 1107, and Hayden v. Consolidated Min. etc. Co., 3 Cal. App. 139, 84 Pac. 423, both following rule.

When Sewage is Cast upon Defendant's Lot by natural flow and from there passes to and injures plaintiff's land, defendant is not liable for injury in absence of any positive act of his tending to produce it.

Approved in Stewart v. Birchfield, 15 Cal. App. 381, 114 Pac. 1000, land owner not liable for injury to adjacent land by blowing of sand across line, after clearing his land of brush; Watson v. Colusa-Parrot M. & S. Co., 31 Mont. 517, 79 Pac. 15, where stream was polluted by discharge from works of several mining reduction works, each was liable only to extent of injury due to its discharge.

Rights as to Flow of surface water. See note, 21 L. R. A. 605.

39 Cal. 582–585, PHILLIPS v. PEASE.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 56.

39 Cal. 585–587, McCARTHY v. YALE.

In Action of Ejectment Against Tenant at Will by landlord, complaint need not state tenancy, termination, nor notice.

Approved in Casci v. Ozalli, 158 Cal. 283, 110 Pac. 933, in quiet title suit where answer denies specifically the allegation of ownership and possession, judgment on pleadings cannot be entered; Hayden v. Collins, 1 Cal. App. 261, 81 Pac. 1121, complaint considered and held to state cause of action in ejectment against tenant at will.

39 Cal. 593–597, DAY v. CALLOW.

Mandamus to Compel Payment of municipal debt. See note, 14 L. R. A. 778, 779.

39 Cal. 609–612, RICE v. HEATH.

Error by Court at Trial is Presumed to be injurious to party against whom it is made.

Approved in Taggart v. Bosch (Cal.), 48 Pac. 1094, following rule.

39 Cal. 612–613, FARIS v. PHELAN.

Position of Well-defined City Street may be definite and certain call in deed.

Approved in St. Louis v. Koch, 169 Mo. 591, 70 S. W. 144, upholding designation in ordinance of property subject to assessment for public improvement by numbers of city blocks.

39 Cal. 614–617, PEOPLE v. MELVANE.

To Justify Conviction on Accomplice Testimony, there must be some evidence which, of itself, tends to connect accused with crime.

Approved in People v. Spadoni, 11 Cal. App. 218, 219, 104 Pac. 589, following rule.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 170.

Proof That Part of Stolen Property was found on accused day after theft is sufficient corroboration of testimony of accomplice.

Approved in People v. Gibson, 16 Cal. App. 349, 116 Pac. 988, holding possession of part of stolen property three days after theft with defendant's assertion of ownership thereof sufficient to convict of theft.

Possession of Stolen Property as evidence of guilt. See notes, 101 Am. St. Rep. 507; 12 L. R. A. (n. s.) 214.

39 Cal. 625–638, PEOPLE v. DENNIS.

Improper Admission of Testimony which could not prejudice party is immaterial error.

Approved in Perrin v. Carbone, 1 Cal. App. 297, 82 Pac. 222, holding alleged error of court in admitting question not prejudicial where no answer to question appears on the record.

39 Cal. 639–646, RYAN v. TOMLINSON.

Effect of Order, "Judgment Reversed and Remanded," is only to set aside judgment that new trial may be had unless opinion shows order of supreme court was intended to be final.

Reaffirmed in Steinman v. United States, 185 Fed. 53, and Talcott v. Delta County Land etc. Co., 19 Colo. App. 16, 73 Pac. 257.

Persons to Whom Statute of Frauds is available. See note, 127 Am. St. Rep. 757.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 337, 345.

39 Cal. 646–655, YOUNG v. ROSENBAUM.

Stockholders are Liable as Principals on debts of corporation.

Reaffirmed in Anderson v. Schloesser, 153 Cal. 222, 94 Pac. 886.

Judgment Rendered Without Statement of Cause of Action in legal form is of no value beyond jurisdiction of court which rendered it.

Approved in Tin v. U. S. District Attorney, 148 Cal. 776, 113 Am. St. Rep. 354, 84 Pac. 153, holding void order vacating order admitting alien to citizenship made on motion only three years after entry of original order.

39 Cal. 655–658, TIRRELL v. JONES.

Party Advancing Money for Joint Venture is not entitled to interest in absence of agreement.

Approved in Lamb v. Rowan, 83 Miss. 93, 35 So. 444, denying interest in accounting between partners.

39 Cal. 658–659, PEOPLE ex rel. CHRYSTAL v. COOK.

Mandamus to Compel Payment of municipal debt. See note, 14 L. R. A. 778.

39 Cal. 660–661, WILBUR v. CHERRY.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 391.

39 Cal. 661, PEOPLE v. WARREN.

Accomplice Testimony must be Corroborated to warrant conviction.

Approved in Cooper v. Territory, 19 Okl. 501, 91 Pac. 1034, holding accomplice testimony not corroborated on substantial facts.

39 Cal. 662, GARNETT v. BOST.

First and Last Days in computation of time. See note, 49 L. R. A. 243.

39 Cal. 662–663, McFADDEN v. CRAWFORD.

In Action for Wages, Interest is recoverable only from time of filing complaint.

Approved in Courteney v. Standard Box Co., 16 Cal. App. 615, 117 Pac. 784, where contract for sale of goods was at agreed price less freight charges advanced by defendant, plaintiff in action for net balance may recover interest from commencement of suit.

39 Cal. 663–665, PEOPLE v. GELABERT.

Witness Who has Imperfect Knowledge of Language employed in conversation in which supposed confession was made to him is incompetent to testify thereof.

Approved in Cortez v. State, 43 Tex. Cr. 381, 66 S. W. 457, following rule; People v. Luis, 158 Cal. 193, 110 Pac. 583, holding interpreter could testify as to confession made by defendant through interpreter.

Distinguished in State v. Lu Sing, 34 Mont. 37, 38, 85 Pac. 523, admitting testimony of policeman in regard to statements of accused in nature of confession made in very poor English.

39 Cal. 683–685, PEOPLE v. MARIPOSA COUNTY.

Right of Attorney to Appear for party whom he assumes to represent. See note, 126 Am. St. Rep. 35.

Method of Attacking Attorney's Authority to appear for party whom he assumes to represent. See note, 126 Am. St. Rep. 45.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 851.

39 Cal. 688–690, BACHMAN v. SEPULVEDA.

Judgment must Accord With, and be warranted by, pleadings of party in whose favor rendered.

Approved in Satterlund v. Beal, 12 N. D. 129, 95 N. W. 521, reversing judgment not supported by pleadings; dissenting opinion in Gulling v. Washoe Co. Bank, 29 Nev. 279, 89 Pac. 33, majority holding conclusive decree against two parties joined as codefendants with owner of property in action to enforce trust deed, when answer of one of them was not served on the other.

39 Cal. 690–692, PEOPLE v. BEST.

Instruction Which has No Application to facts in evidence should be refused by court.

Approved in People v. Elster (Cal.), 3 Pac. 888, holding it improper to instruct that jury will be justified in finding verdict against defendant accused of larceny if no evidence in case to warrant that inference from his possession of property recently stolen.

Weakness of Mind as Affecting criminal responsibility. See note, 10 L. R. A. (n. s.) 1002.

39 Cal. 694–697, PEOPLE v. LONG.

To Constitute Murder in First Degree, there must not only be intention to kill but deliberate, premeditated killing.

Approved in Cook v. State, 46 Fla. 45, 35 So. 673, court dividing equally on question of error in instruction in regard to murder in first degree.

Homicide in Commission of unlawful act. See note, 63 L. R. A. 355.

39 Cal. 697–698, PEOPLE v. McDONALD.

Best Evidence is Essential to Discredit Witness by showing conviction of offense.

Approved in People v. Buckner (Cal.), 4 Pac. 489, following rule; People v. Elster (Cal.), 3 Pac. 889, refusing evidence of arrest of witness offered to impeach his credibility; Lewis v. Territory, 7 Ariz. 58, 60 Pac. 696, holding witness testifying in own behalf could not be compelled to testify in regard to previous conviction of felony.

Cross-examination as Proper Mode of proving conviction of crime for purposes of impeachment. See note, 30 L. R. A. (n. s.) 850.

39 Cal. 703–705, PEOPLE v. ANDERSON.

Reputation of Deceased as Dangerous Character is admissible in evidence in homicide case where circumstances make it doubtful whether homicide was committed in self-defense.

Approved in People v. Lamar, 148 Cal. 574, 575, 83 Pac. 996, 997, admitting evidence of reputation of deceased as dangerous character when intoxicated.

Admissibility of Evidence of Character or reputation of deceased in homicide cases. See notes, 124 Am. St. Rep. 1033; 3 L. R. A. (n. s.) 365.

Evidence of Antecedent Threats on trial for homicide. See note, 3 L. R. A. (n. s.) 525.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 40 CALIFORNIA.

40 Cal. 3–13, STEELE v. BRANCH.

Covenant for Forfeiture for Failure to discharge mortgage in contract of sale of land is waived by failure to promptly assert forfeiture.

Approved in Boone v. Templeman, 158 Cal. 297, 139 Am. St. Rep. 126, 110 Pac. 950, where purchaser was in actual use of land during whole period of default in monthly payments for over three years and vendor acquiesced in such default, waiver of forfeiture presumed.

Time as of Essence of Contract for sale of land. See note, 104 Am. St. Rep. 272.

Relief in Equity from forfeiture. See notes, 86 Am. St. Rep. 57; 69 L. R. A. 835, 836.

40 Cal. 14–19, 6 Am. Rep. 595, FLYNN v. SAN FRANCISCO ETC. R. R. CO.

One is not Required to Take Precautions against the negligence of others.

Approved in Indiana Clay Co. v. Baltimore etc. R. Co., 31 Ind. App. 261, 67 N. E. 706, holding owner of factory not required to provide waterworks for extinguishment of fire set from adjacent railroad.

No One is Required to Take Precautions against unavoidable or inevitable accidents.

Approved in Missouri etc. Ry. Co. v. Wilder, 3 Ind. Ter. 94, 53 S. W. 493, reaffirming rule.

Doctrine of "Last Clear Chance." See note, 55 L. R. A. 431, 432.

Duty of Abutter to Prevent Accumulation of combustibles near railway. See note, 12 L. R. A. (n. s.) 626.

40 Cal. 20–29, WRIGHT v. OROVILLE GOLD ETC. MINING CO.

Where Property of Corporation has Been Sold under execution and corporation takes no steps to redeem in statutory time, a stockholder may redeem for its benefit and hold it liable for money so advanced.

Approved in Duquesne Gold Mining Co. v. Glaser, 46 Colo. 191, 103 Pac. 301, following rule; Wailes v. Davies, 158 Fed. 674, holding work done by stockholder of mining corporation on its claims will apply on representation work to prevent forfeiture of claim.

Court of Equity will, at Instance of Stockholders, control corporation, even within limit of its powers, from doing acts which would amount to breach of trust.

Approved in Jones v. Missouri-Edison Electric Co., 144 Fed. 772, 75 C. C. A. 631, and Wheeler v. Abilene Nat. Bank Bldg. Co., 159 Fed. 394, 16 L. R. A. (n. s.) 892, 89 C. C. A. 477, both holding voidable sale by corporation to majority stockholders for less price than could have been obtained from others.

40 Cal. 29–33, PEOPLE v. HENDERSON.

Act Establishing Boundary of Merced County was operative upon passage and not dependent on surveys.

Approved in Crook County v. Sheridan County, 17 Wyo. 453, 100 Pac. 668, holding surveys of counties must follow statutory description of counties, being intended only for purpose of marking lines fixed by statute.

40 Cal. 33–58, FARRISH v. COON.

Essence of Adverse Possession is That Holder claims right of possession in opposition to, not under, title to which his possession is alleged to be adverse.

Approved in Fountain v. Lewiston Nat. Bk., 11 Idaho, 467, 83 Pac. 509, holding adverse possession established.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1192, 1195.

Criticised in Cassin v. Nicholson, 154 Cal. 507, 98 Pac. 194, holding vendee holding possession under contract of sale may assert his title after contract is executed on his part, and five years' limitation runs from such execution; Southern Cal. R. Co. v. Slauson (Cal.), 68 Pac. 108, holding where railway entered on land and built tracks on condition of erection of station, it could not hold such land adversely until condition was complied with.

Lands Covered and Uncovered by Ebb and Flow of tide, belong to state by virtue of its sovereignty.

Approved in People v. Kerber, 152 Cal. 733, 125 Am. St. Rep. 93, 93 Pac. 879, following rule.

Tide Lands are not Within Purview of third section of statute of limitations.

Approved in People v. Kerber, 152 Cal. 739, 125 Am. St. Rep. 93, 93 Pac. 881, approving rule but holding decision not essential.

When School Land Warrants are Located on state land not subject to such location, state is not estopped from asserting title by fact that it received and retained purchase money.

Approved in Terre Haute & Ind. R. R. Co. v. State, 159 Ind. 479, 65 N. E. 415, holding suit by state against railroad for recovery of surplus profits not barred by any laches on part of officers of state to collect same.

40 Cal. 58–63, ESPINOSA v. GREGORY.

When Debt Secured by Mortgage is barred by limitations, right to redeem is also barred.

Approved in Green v. Thornton, 8 Cal. App. 165, 166, 96 Pac. 385, and Allen v. Allen (Cal.), 27 Pac. 32, both following rule.

Effect of Debt Becoming Barred upon rights and remedies under conveyance absolute on face, intended as mortgage. See note, 11 L. R. A. (n. s.) 826.

Where Absolute Conveyance is Given as security, mortgagor retains right of redemption only.

Distinguished in Halloran v. Holmes, 13 N. D. 420, 101 N. W. 313, holding deed absolute in form but given as security does not convey legal title to mortgagee.

As to Whether Deed Absolute on Face, but intended as mortgage, conveys title. See note, 11 L. R. A. (n. s.) 212.

40 Cal. 63–69, HALL v. CENTER.

Equity will Decree Specific Performance of Covenant in lease, which provides lessee may purchase premises for fixed sum on or before expiration of term.

Approved in Smith v. Baughham, 156 Cal. 363, 104 Pac. 691, enforcing contract giving party option to purchase land within given time; Stanton v. Singleton (Cal.), 54 Pac. 589, holding not void for want of mutuality contract giving option to purchase mine for certain price on performance of certain conditions where other parties were notified of plaintiff's election to perform; Smith v. Phenix Ins. Co. (Cal.), 23 Pac. 384, holding lease providing lessee shall purchase at end of lease and have option to purchase at any time before, creates him an equitable owner; Couch v. McCoy, 138 Fed. 700, holding option to purchase land based on valuable consideration is converted into contract of sale by acceptance within time limited, and may be specifically enforced; Harper v. Runner, 85 Neb. 346, 123 N. W. 314, rule applies where lessor sells to third party during life of option; Olympia Bottling Wks. v. Olympia Brewing Co., 56 Or. 91, 107 Pac. 970, upholding contract making one sole agent of brewery for sale of its beer; Frank v. Stratford-Hancock, 13 Wyo. 55, 110 Am. St. Rep. 963, 77 Pac. 138, 67 L. R. A. 571, holding option to sell in lease could not be revoked in time limited.

Right to Specific Performance of Option as affected by lack of mutuality. See note, 6 L. R. A. (n. s.) 404.

Option to Purchase Included in Lease is founded on good consideration.

Approved in Monihon v. Wakelin, 6 Ariz. 232, 56 Pac. 736, holding right of renewal embodied in lease founded on good consideration.

Whether Destruction by Decay Rendering Premises untenantable is within landlord's covenant to repair, or statute relieving tenant in case of destruction by act of God or elements. See note, 21 L. R. A. (n. s.) 131.

40 Cal. 69–74, HODAPP v. SHARP.

Selection of Land by State Under Act of Congress of July 23, 1866, is not confirmed, nor does title pass until land is certified over

to state by commissioner of general land office as required in said act.

Overruled in McNee v. Donahue, 76 Cal. 505, 18 Pac. 441, holding legal title of lands set over to state by act of 1866 passed at once to state.

40 Cal. 74–77, BUTLER v. VASSAULT.

New Trial on Ground of Newly Discovered Evidence will not be granted unless strict proof is given of diligence in effort to find evidence before trial.

Approved in Nicholson v. Metcalf, 31 Mont. 278, 78 Pac. 484, holding affidavit of diligence insufficient.

40 Cal. 77–83, HARDING v. VANDEWATER.

Assessment on Corporate Stock can be Levied Only at regular meeting of directors or at special meeting regularly called.

Approved in Cheney v. Canfield, 158 Cal. 345, 111 Pac. 93, following rule; Raisch v. M. K. & T. Oil Co., 7 Cal. App. 669, 95 Pac. 663, bare majority of directors at special meeting adjourned from meeting at which no quorum present cannot levy assessment when all directors not notified of meeting.

40 Cal. 83–92, WANDALL v. SOUTH SAN FRANCISCO DOCK CO.

Corporations may be Organized for Purposes of speculating in real estate.

Approved in People v. Hagar, 52 Cal. 184, under act of March 5, 1864, corporations may be formed for purpose of purchasing and reclaiming swamp lands.

Corporation can Exercise No Other Powers than are specifically granted, or are necessary for carrying into effect the powers granted.

Approved in Boca etc. R. R. v. Sierra Valleys R. R., 2 Cal. App. 557, 84 Pac. 303, holding property could not be condemned for use of branch line of railroad not specified in charter, such not being incidental to charter powers; Derr v. Fisher, 22 Okl. 137, 139, 98 Pac. 982, 983, holding electric light and power company could contract for paving along line of railway with which it had twenty year contract to furnish power.

40 Cal. 93–97, SHARTZER v. LOVE.

Wife is not Personally Liable on Contract signed by herself and husband, as it is the contract of the husband alone.

Approved in Von Hasslocher v. Robinson, 3 Haw. 805, holding where money was bequeathed in trust, and interest to be paid thereon to a woman, such interest could not be applied by executors to payment of note signed by woman and her husband jointly.

Where One of Several Respondents Dies before notice of appeal is filed, motion to dismiss appeal as to him must be granted.

Approved in Deiter v. Kiser, 158 Cal. 262, 110 Pac. 922, and Ritchey v. Seeley, 68 Neb. 135, 97 N. W. 820, both following rule.

40 Cal. 97–101, SWEET v. BURDETT.

Accord and Satisfaction must be Pleaded to operate as defense.

Approved in Hogan v. Burns (Cal.), 33 Pac. 632, following rule.

40 Cal. 106–111, DOYLE v. FRANKLIN.

In Action of Ejectment Where Proper Matters of defense are pleaded as such, they should be regarded as matters of defense, although concluded with prayer for affirmative relief.

Approved in Martin v. Molera, 4 Cal. App. 300, 87 Pac. 1105, in ejectment cross-complaint is permissible under Code of Civil Procedure, section 442, where it seeks affirmative relief affecting property to which action relates.

40 Cal. 111–116, 6 Am. Rep. 600, HIMMELMANN v. HOTALLING.

Negotiable Instrument Payable on Demand may be presented for payment on next business day after given, when drawer and drawee reside in same town.

Approved in Herron v. Mawby, 5 Cal. App. 42, 89 Pac. 873, following rule; School Dist. No. 57 v. Eager, 19 Okl. 238, 91 Pac. 848, applying rule to bank check.

Negotiability of Check. See note, 26 L. R. A. 568.

40 Cal. 117–121, HUGHES v. DAVIS.

Where Property is Conveyed by Deed Intended as mortgage, grantor must show offer to redeem in order to demand aid of equity to deprive grantee of possession under the deed.

Approved in Green v. Thornton, 8 Cal. App. 165, 166, 96 Pac. 384, 385, holding when debt secured by deed intended as mortgage is barred, right to redeem is also barred, prior to enactment of section 430, Code of Civil Procedure; Rees v. Rhodes, 3 Ariz. 239, 73 Pac. 447, plaintiff, before suit to have deed declared mortgage, need not pay or tender debt secured; Ferguson v. Boyd, 169 Ind. 546, 81 N. E. 73, plaintiff, in action to redeem from mortgage cannot interpose limitations so as to cut off equitable defenses.

Absolute Deed, Though Shown to be Intended as mortgage, conveys legal title.

Reaffirmed in Ferguson v. Boyd, 169 Ind. 543, 81 N. E. 72.

As to Whether Deed Absolute on Face, but intended as mortgage, conveys title. See note, 11 L. R. A. (n. s.) 212.

Denied in Halloran v. Holmes, 13 N. D. 420, 101 N. W. 313, deed absolute on face intended as mortgage does not convey legal title.

Whenever Debt to Secure Which Deed is given is barred, right to redeem is also barred.

Approved in Allen v. Allen (Cal.), 27 Pac. 32, following rule.

40 Cal. 121–125, MAUMUS v. CHAMPION.

Where Negligence of Plaintiff has Proximately contributed to injury complained of, defendant cannot be held liable, unless injury is result of wanton or willful act on his part.

Approved in Williams v. Southern Pac. R. Co. (Cal.), 9 Pac. 155, 157; and Wardlaw v. California Ry. Co. (Cal.), 42 Pac. 1076, both holding where facts are undisputed and negligence necessarily inferred, question is one of law for court.

40 Cal. 125–126, HIMMELMANN v. SULLIVAN.

Party Procuring Judgment in His Favor by means of one part of verbal stipulation is not at liberty to repudiate the other part.

Approved in Continental Bldg. etc. Assn. v. Woolf, 12 Cal. App. 729, 108 Pac. 730, following rule.

40 Cal. 129–142, **PEOPLE v. CAMPBELL.**

Jury must Find Degree of Crime in Verdict when defendant is found guilty of crime having several degrees.

Approved in People v. Bannister (Cal.), 34 Pac. 710, and McLane v. Territory, 8 Ariz. 153, 155, 71 Pac. 938, 939, both following rule; State v. Noah, 20 N. D. 291, 124 N. W. 1125, under information for murder, plea of guilty "as charged in the information" is insufficient.

Accessory Before Fact must be Indicted and Charged as such, and cannot be convicted as accessory when charged as principal.

Approved in Harper v. State, 83 Miss. 422, 35 So. 576, applying rule to accessory after fact.

Denied in Rosencranz v. United States, 155 Fed. 42, 83 C. C. A. 634, holding accessories before fact may be indicted as principals.

40 Cal. 153–154, **HANCOCK v. PICO.**

Court has Discretion to Refuse to Open Default when defendant neglected to verify answer, and attorneys do not answer for him.

Approved in Scilley v. Babcock, 39 Mont. 539, 104 Pac. 677, absorption of defendant's attorney in political campaign not ground for opening default; Donlan v. Thompson Falls C. & M. Co., 42 Mont. 267, 112 Pac. 448, mistaken judgment of attorney as to necessity for answer not ground for opening default.

40 Cal. 154–159, **DAMRELL v. SAN JOAQUIN COUNTY.**

Authority to Take Private Property for Public Use must be strictly pursued.

Reaffirmed in Graham v. Bailard, 157 Cal. 103, 106 Pac. 218.

40 Cal. 159–164, **MOSS v. WILSON.**

Agreement Signed by Several Persons Which States that the undersigned will pay sums annexed to their names in order to make up aggregate sum to be paid to another is a several, and not a joint, obligation.

Approved in Los Angeles National Bank v. Vance, 9 Cal. App. 60, 98 Pac. 60, holding as several obligation subscription by several persons to sum opposite their names in consideration of location of federal building.

Distinguished in Roy v. Harrison Iron Min. Co., 113 Minn. 147, 129 N. W. 156, construing power of attorney.

As to Whether a Subscription Contract is joint or several. See note, 22 L. R. A. 81.

40 Cal. 165–166, **FROST v. HARFORD.**

Maker Who has Received Consideration of note cannot question right of payees to recover.

Approved in Berry v. Barton, 12 Okl. 244, 71 Pac. 1081, 66 L. R. A. 513, in suit on note denial of ownership of payee is frivolous and will not prevent judgment on pleadings; dissenting opinion in McGuffin v. Coyle, 16 Okl. 702, 86 Pac. 968, 6 L. R. A. (n. s.) 524, majority holding note payable to officer of railroad for personal benefit on consideration of particular location of road is void as against public policy.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 550.

40 Cal. 166–170, DAMRELL v. MEYER.

Agreement That if Either of Two Persons Succeed in establishing pre-emption claim to land he shall divide with other is void.

Approved in Armstrong v. Henderson, 16 Idaho, 577, 102 Pac. 365, holding void contract of trespassers on Indian lands to make homestead entry when land is open for entry, and then to adjust their respective titles; Roy v. Harney Peak Min. Co., 21 S. D. 143, 130 Am. St. Rep. 706, 110 S. W. 107, holding void agreement not to protest against another's application for land patent.

40 Cal. 183–185, BATES v. GAGE.

Jurisdiction cannot be Conferred upon a Court by stipulation when it could not under the law acquire jurisdiction.

Approved in Lay v. Superior Court, 11 Cal. App. 560, 105 Pac. 776, holding jurisdiction of superior court over special proceeding limited by statute under which such proceeding is authorized.

40 Cal. 185–188, McCORMICK v. LOS ANGELES CITY WATER CO.

Workman on Reservoir Who Devotes Part of Time to cooking on grounds for other men at work on same reservoir has no mechanic's lien, for such cooking, on the reservoir.

Approved in Clark v. Beyrle, 160 Cal. 315, 116 Pac. 742, reaffirming rule; Alpena v. Title Guaranty etc. Co., 159 Mich. 334, 123 N. W. 1127, holding "labor and materials furnished" on public work, payment for which was secured by bond, did not include labor and material used in repairing contractor's machinery; Lowe v. Casey, 18 N. D. 184, 119 N. W. 242, holding woman employed to do housework on farm not "farm laborer" within meaning of laborer's lien law; Tsutakawa v. Kumamoto, 53 Wash. 235, 102 Pac. 871, one who furnished groceries and camp equipment to subcontractor on railroad had no lien on company; Hall v. Cowen, 51 Wash. 297, 98 Pac. 671, no lien exists on abutting property for rental of scrapers furnished to street contractor.

Distinguished in Thompson v. Wise Boy Min. etc. Co., 9 Idaho, 365, 74 Pac. 959, workman attending to care of machinery in quartz-mill entitled to lien on mine for which mill was located; Cascaden v. Wimbish, 161 Fed. 245, 88 C. C. A. 277, sustaining lien for cooking where laborers were to be boarded as part of their wages.

As to Who are Laborers, Employees, or Servants within statutes giving them preferences. See note, 18 L. R. A. 306.

40 Cal. 188–194, KARR v. PARKS.

Person in Imminent Danger is not Negligent because he does not take every precaution that careful calculation will afterward show might have been taken.

Approved in Noyes v. Southern Pac. R. Co. (Cal.), 24 Pac. 928, holding not negligence to attempt to cross from between double tracks when trains were advancing in same direction on both tracks; Hainlin v. Budge, 56 Fla. 359, 47 So. 831, holding danger need only to be apparent imminent danger to one placed in perilous situation.

40 Cal. 194–198, GREER v. BLANCHAR.

The Word "Purchase" Includes Every Mode of acquiring an estate except by inheritance.

Approved in Marsh v. Lott, 8 Cal. App. 391, 97 Pac. 165, holding right to purchase given in contract gives right to acquire property by deed.

40 Cal. 198–221, 6 Am. Rep. 604, PEOPLE v. BRADY.

Constitutional Equality of Privileges, immunities and protection. See note, 14 L. R. A. 584.

40 Cal. 221–240, CARPENTIER v. BRENHAM.

Foreclosure of First Mortgage Does not Affect Rights of junior mortgagee who was not made party to foreclosure.

Approved in Wimple v. Yosemite Gold Min. Co., 4 Cal. App. 86, 87 Pac. 283, following rule; Dickinson v. Duckworth, 74 Ark. 143, 85 S. W. 84, holding subsequent lienholder entitled to redeem after foreclosure when not made party to suit; dissenting opinion in Austin v. Pulschen (Cal.), 42 Pac. 307, majority holding rights of mortgagor who advanced money to vendee for purpose of discharging superior lien are inferior to those of vendor in possession on his lien for purchase money notes.

40 Cal. 240–245, 6 Am. Rep. 617, DUFFY v. HOBSON.

Act of Congress Requiring Revenue Stamps on certain documents before they can be admitted in evidence does not apply to state courts, and legislature may determine whether such are competent evidence.

Approved in Watson v. Mirike, 25 Tex. Civ. App. 532, 61 S. W. 541, following rule; People v. Brady, 40 Cal. 211, holding legislature may declare Chinese incompetent as witnesses notwithstanding fourteenth amendment to federal constitution; Bennett v. Morris (Cal.), 37 Pac. 929, holding that fact that record of deed in 1872 does not show that revenue stamps were affixed does not render such record incompetent evidence; Magic Packing Co. v. Stone-Ordean etc. Co., 158 Ind. 542, 64 N. E. 12, refusing to suppress depositions taken in another state not having revenue stamps attached.

Failure to Comply With Statute requiring stamping of writings. See notes, 84 Am. St. Rep. 187, 190; 48 L. R. A. 305, 306.

Verbal Authority to Agent to Sell Real Estate is not sufficient to authorize agent to execute contract of sale in name of principal.

Approved in Stemler v. Bass, 153 Cal. 795, 96 Pac. 811, and White v. Bank of Hanford, 148 Cal. 553, 83 Pac. 698, under option to sell land, duties of vendor to make deed arise only upon acceptance and tender by payee within time limited; Bacon v. Davis, 9 Cal. App. 90, 92, 98 Pac. 74, both holding ordinary written authority to agent to sell real estate merely imparts authority to find purchaser ready and willing to contract, but does not give authority to bind owner by contract of sale; Stauffer v. Linenthal, 29 Ind. App. 306, 64 N. E. 643, holding broker's contract to sell real estate fully performed by finding purchaser ready and willing to buy on terms proposed, without actual completion of sale; Helling v. Darby, 71 Kan. 108, 79 Pac. 1074, holding letter to broker did not give him exclusive right to sell land; Sullivan v. Jahren, 71 Kan. 132, 79 Pac. 1073, and Brown v. Gilpin, 75 Kan. 781, 90 Pac. 270, both holding letters between principal and

broker did not give broker power to bind principal by agreement to sell land; Robertson v. Allen, 184 Fed. 380, Jones v. Howard, 234 Ill. 409, 84 N. E. 1042, Shillinglaw v. Sims, 86 S. C. 80, 67 S. E. 907, Lichty v. Daggett, 23 S. D. 390, 121 N. W. 866, Donnan v. Adams, 30 Tex. Civ. App. 619, 71 S. W. 582, and Larson v. O'Hara, 98 Minn. 74, 116 Am. St. Rep. 342, 107 N. W. 822, all holding broker employed to find purchaser for land has no implied power to execute contract of sale.

Brokers. See note, 116 Am. St. Rep. 345.

Power of Real Estate Broker to make contract of sale. See note, 17 L. R. A. (n. s.) 211.

Performance by Real Estate Broker of contract to find purchaser or effect exchange. See note, 44 L. R. A. 593, 594.

Performance of Conditions of Escrows. See note, 130 Am. St. Rep. 962.

40 Cal. 246-250, MASON v. WOLF.

Consequences of Entering into Contract of Lease can only be avoided by showing some fraud or mistake sufficient to have set aside contract itself.

Approved in Teich v. Arms, 5 Cal. App. 477, 90 Pac. 963, and Ogle v. Hubbel, 1 Cal. App. 361, 82 Pac. 218, both following rule.

In Unlawful Detainer It is not Error to find amount of rent due at time of trial.

Reaffirmed in Holland v. Eastern Outfitting Co., 16 Cal. App. 443, 117 Pac. 562.

40 Cal. 251-255, 6 Am. Rep. 621, MORE v. BONNET.

Contract is Severable Where Price is Expressly Apportioned by contract, or apportionment may be implied by law to each item to be performed.

Approved in Porter v. Fisher (Cal.), 34 Pac. 701, holding commission recoverable by agent on personalty, under parol contract to sell or exchange realty with personalty thereon, although in the exchange the two were not separately valued; Schiller v. Blyth & Fargo Co., 15 Wyo. 311, 88 Pac. 649, 8 L. R. A. (n. s.) 1167, holding contract for sale of lots distinct in description and price to be severable.

Distinguished in Los Angeles Gas etc. Co. v. Amalgamated Oil Co., 156 Cal. 779, 106 Pac. 57, and Sterling v. Gregory, 149 Cal. 120, 121, 85 Pac. 306, both holding contract under consideration not to be severable.

Divisibility in Respect of Time or territorial extent of contracts in restraint of trade. See note, 24 L. R. A. (n. s.) 943, 944.

Question of Construction of Contract must be Solved by considering its language and subject matter.

Reaffirmed in Mercia v. Burget, 36 Ind. App. 459, 75 N. E. 1086.

Contracts, Consideration for Which has Partly Failed or is partly illegal. See note, 117 Am. St. Rep. 525.

40 Cal. 255-264, HEWES v. REIS.

Three Days' Posting of Notice for Proposals for street improvement is insufficient under statute requiring five.

Approved in Comstock v. City of Eagle Grove, 133 Iowa, 597, 111 N. W. 54, holding failure to publish notice for bids for public improvements rendered subsequent proceedings void; Nelson v. Okl. City & W. Ry. Co., 24 Okl. 621, 104 Pac. 44, enjoining collection of

tax when legal prerequisites for its assessment had not been complied with; Tefft v. Lewis, 27 R. I. 17, 60 Atl. 246, holding void assessment of tax on school district without appraisal of property therein.

Distinguished in Sacramento Paving Co. v. Anderson, 1 Cal. App. 675, 82 Pac. 1070, holding statute requiring posting of notice of street improvement along line thereof does not require pasting on blocks of street which are not to be improved.

40 Cal. 264–267, HARTSON v. HARDIN.

Where Evidence Tending in Some Degree to Establish one of plaintiff's allegations was admitted after objection, the finding that there was no proof of such allegation is a surprise on the plaintiff and erroneous.

Approved in Smith v. Sinbad Development Co., 11 Cal. App. 257, 104 Pac. 708, holding surprise in making finding inconsistent with what plaintiff had been led to believe was accepted by court should have been presented as error on motion for new trial.

In Action for Value of Services, plea which does not aver that cause of action accrued more than two years before commencement of actions not good plea of limitations.

Approved in Osborn v. Hopkins, 160 Cal. 504, 117 Pac. 521, answer that "plaintiff's cause of action for compensation for said services did not accrue within two years next before commencement of this action" is sufficient plea of limitations.

40 Cal. 268–271, PEOPLE v. WEIL.

Refusal of Challenge of Juror for Bias will be reviewed by appellate court only when prejudice or injury is shown.

Approved in Melone v. Sierra Ry. Co., 151 Cal. 114, 91 Pac. 522 holding no prejudice caused by refusal to allow challenge for bias.

Where Challenge for Cause was Erroneously Disallowed and juror then peremptorily challenged, and defendant exhausted his peremptories before jury completed, error is prejudicial.

Approved in Burch v. Southern Pacific Co., 32 Nev. 106, 104 Pac 229, following rule; People v. Harrison, 13 Cal. App. 560, 110 Pac. 347, and People v. Helm, 152 Cal. 538, 93 Pac. 102, both holding defendant prejudiced by refusal of challenge for bias when peremptories were exhausted in removal of biased jurors before panel was complete.

Where Juror has Formed Unqualified Opinion in regard to defendant's guilt, he is not qualified to be juror although he declares he will try case according to evidence.

Approved in Dubiver v. City Ry. Co., 44 Or. 237, 73 Pac. 992, rejecting jurors who agreed to try to throw off opinion already formed.

40 Cal. 272–275, LARGAN v. CENTRAL RAILROAD CO.

Deduction of Conclusion from Facts Proved is in province of jury alone.

Approved in Martin v. Des Moines Edison Light Co., 131 Iowa, 739, 106 N. W. 364, holding improper question to expert witness calling for ultimate conclusion.

40 Cal. 278–281, FULTON v. HANNA.

On Appeal from Order Denying Motion for new trial, after money judgment, undertaking in double amount of judgment may be given

under section 942, Code of Civil Procedure, and execution on such judgment will be stayed pending such appeal.

Distinguished in Weldon v. Rogers, 154 Cal. 637, 98 Pac. 1072, holding undertaking on appeal from order denying motion to quash execution, given under section 949, Code of Civil Procedure, does not stay proceedings on judgment and execution.

Reversal of Judgments. See note, 96 Am. St. Rep. 130.

40 Cal. 281-284, MAYO v. FOLEY.

Decree of Court of Competent Jurisdiction for Sale of lands alleged to be delinquent in payment of taxes is conclusive as against collateral attack.

Approved in Baldwin v. Foster, 157 Cal. 646, 108 Pac. 716, holding judgment can only be collaterally attacked when court lacks jurisdiction of person or subject matter or power to render such judgment as was given.

40 Cal. 284-286, PEOPLE v. ATKINSON.

When Attorney Called as Witness was Unable to State whether communications were made to him by client before or after relation of client and attorney began, such testimony should be excluded.

Approved in dissenting opinion in People v. Patrick, 182 N. Y. 205, 74 N. E. 868, majority holding admissible statements of confessions made to attorney who was not certain whether made before or after his retention by party confessing.

40 Cal. 294-299, MONTGOMERY v. WHITING.

Pre-emptioner of Government Land has No Right that may not be abrogated by government at any time before final entry and payment.

Distinguished in Cooper v. Wilder (Cal.), 41 Pac. 27, holding person entering on timber culture claim and dying after two years leaves equity in claim to heirs.

40 Cal. 299-311, JACKSON v. MALLOY.

Separate Trials Should be Granted in Action to recover lands where there are several defendants claiming distinct parcels under different sources of title.

Approved in Boonville Nat. Bk. v. Blakey, 166 Ind. 449, 76 N. E. 535, where bill in equity is filed against several defendants, motion for separate trial may be granted for good cause.

Distinguished in County of San Luis Obispo v. Simas, 1 Cal. App. 182, 81 Pac. 975, holding no error in refusing separate trials in action to condemn different parcels of land for road.

To Constitute Abandonment of Land there must be concurrence of act of leaving premises vacant, so that they may be taken by next comer, and intention of not returning.

Approved in Powers v. Independent etc. Tel. Co., 19 Idaho, 584, 114 Pac. 667, where defendant attached wires to pole erected by another and thereafter removed them and another company attached wires thereto and thereafter pole taken down by person unknown to defendant, defendant not liable for injuries caused by running into pole as it lay on sidewalk; Barnett v. Dickinson, 93 Md. 267, 48 Atl. 840, holding house not abandoned when occupant's absence was temporary with intention to return; Farmers' Canal Co. v. Frank, 72 Neb. 155, 100 N. W. 292, nonuser of water right for less than statutory

time to support limitations is not abandonment; Wilmore Coal Co. v. Brown, 147 Fed. 943, holding facts show abandonment of rights, under grant of mineral rights, by nonuser for twenty-four years.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 891, 892, 903.

40 Cal. 344–346, PEOPLE ex rel. McDONALD v. BUSH.

Performance of Ministerial Act by Judicial Officer does not constitute act itself a judicial proceeding.

Approved in Havens v. Stiles, 8 Idaho, 253, 101 Am. St. Rep. 195, 67 Pac. 920, 56 L. R. A. 736, upholding complaint filed and summons issued on Sunday; State v. White Pine County, 31 Nev. 117, 101 Pac. 105, holding county commissioners in contracting for indexing records of county recorder did not exercise judicial functions, so as to be subject to certiorari.

40 Cal. 347–348, PROST v. MORE.

When Facts Showing Illegality of Contract sued on appear in answer, though not set up as defense, judgment for plaintiff cannot be had on pleadings.

Approved in Casci v. Ozalli, 158 Cal. 283, 110 Pac. 933, error to grant judgment on pleadings in quiet title suit where answer specifically denied material allegations of ownership and possession; Finley v. Tucson, 7 Ariz. 113, 60 Pac. 873, rendering judgment on pleadings when answer denied no material allegation of complaint, nor set up new matter in defense.

Contract Void in Part, Which Part cannot be separated, is unenforceable.

Approved in Cole v. Brown-Hurley Co., 139 Iowa, 498, 117 N. W. 750, 18 L. R. A. (n. s.) 1161, following rule.

40 Cal. 351–354, BARLOW v. BURNS.

Remedy of Forcible Entry and Detainer is available to actual possessor alone.

Approved in Chezum v. Campbell, 42 Wash. 567, 85 Pac. 51, holding landlord could not maintain action when tenant had been dispossessed.

40 Cal. 355–358, TODD v. MYRES.

Physician's Right to Determine Frequency of visits to patient. See note, 51 L. R. A. 299.

40 Cal. 378–383, PACKARD v. BIRD.

Effect of Preventing or Checking Bids upon validity of auction sales. See note, 20 L. R. A. 549.

40 Cal. 391–395, STOKES v. STEVENS.

Rights of Partners Inter Se in partnership realty. See note, 28 L. R. A. 102.

Rights and Position of Creditors, purchasers, and other third parties in partnership realty. See note, 28 L. R. A. 173.

Right to Purchase One Partner's Interest in partnership realty without consent of others. See note, 18 L. R. A. (n. s.) 1180.

40 Cal. 396–408, GRIGSBY v. CLEAR LAKE WATER CO.

Declarations of Agent are not Admissible in action against principal until agency is first proven.

Approved in Santa Cruz Butchers' Union v. I. X. L. Lime Co. (Cal.), 46 Pac. 382, following rule.

To Acquire Prescriptive Right to Overflow of Premises, there must have been such use to knowledge of owner as to occasion damage and raise presumption that owner would not have submitted unless other party had right to do so.

Approved in Galbreath v. Hopkins, 159 Cal. 304, 113 Pac. 177, enjoining land owner from accumulating surface water on his own land and discharging it on land of another; Anderson v. Bassman, 140 Fed. 26, holding user of water in river not adverse until it became injurious to plaintiff and amounted to actionable invasion of rights.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 724.

Party Who is not Original Creator of Nuisance is entitled to notice that it is a nuisance, and request to abate before action can be brought against him.

Approved in Castle v. Smith (Cal.), 36 Pac. 860, following rule; Coats v. Atchison etc. Ry. Co., 1 Cal. App. 446, 82 Pac. 643, discussing whether want of knowledge of existence or noxious character of nuisance is defense to action for its abatement; Martin v. Chicago R. I. & Pac. Ry. Co., 81 Kan. 349, 105 Pac. 452, railroad not entitled to notice that barbed-wire fence constructed on its right of way was nuisance; Watson v. Colusa-Parrot M. & S. Co., 31 Mont. 523, 79 Pac. 17, person continuing nuisance not liable for damages caused by operation of nuisance by predecessors in interest.

Liability of Property Owner for Nuisance which he did not create. See notes, 36 Am. St. Rep. 511, 512; 27 L. R. A. (n. s.) 166.

In Action to Abate Nuisance and Recover Damages county court has no jurisdiction of action for damages except as an incident to power to abate nuisance.

Approved in Bailey v. Chicago etc. Ry. Co., 25 S. D. 208, 126 N. W. 271, holding damages could be assessed as incidental to equity action by court in equity.

Plaintiff in Action to Abate Nuisance cannot recover damages which affect public generally, but only special damage suffered by himself.

Approved in Hatcher v. Range, 98 Tex. 90, 81 S. W. 292, reaffirming rule.

Expert Testimony is Admissible as to Effect of dam in relation to overflow of water complained of as nuisance.

Approved in Texas & Pacific Ry. Co. v. Cochrane, 29 Tex. Civ. App. 384, 69 S. W. 985, following rule.

Liability for Damming back stream. See note, 59 L. R. A. 840, 851, 859, 886.

40 Cal. 408–419, SEXEY v. ADKINSON.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 103.

40 Cal. 419–421, EX PARTE SMITH.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 275.

40 Cal. 426–428, EX PARTE AH CHA.

Judgment on Conviction of Misdemeanor which adjudges imprisonment in state prison is void.

Overruled in Ex parte Tani, 29 Nev. 391, 91 Pac. 138, 13 L. R. A. (n. s.) 518, holding sentence to state prison instead of county jail error that may be corrected on appeal.

Effect of Excessive Sentence. See note, 45 L. R. A. 139.

40 Cal. 428–432, STONE v. BUMPUS.

Actual Possession of Land is Prima Facie Evidence of ownership

Approved in Learned v. Castle (Cal.), 4 Pac. 194, holding one in actual possession may maintain action to abate nuisance which injuriously affects his possession.

Liability for Damming back stream. See note, 59 L. R. A. 900.

40 Cal. 434–439, MORGAN v. STEARNS.

Measure of Vendee's Damages on breach of contract to convey realty. See note, 106 Am. St. Rep. 971.

40 Cal. 439–447, FELCH v. BEAUDRY.

Defense by Maker of Note That Plaintiff is not lawful owner when on face it runs to him is frivolous.

Approved in Berry v. Barton, 12 Okl. 244, 71 Pac. 1081, 66 L. R. A. 513, following rule; dissenting opinion in Crew v. Hutcheson, 115 Ga. 531, 42 S. E. 25, majority approving court's action in striking out frivolous defenses; dissenting opinion in McGuffin v. Coyle, 16 Okl. 702, 86 Pac. 968, 6 L. R. A. (n. s.) 524, majority holding void note payable to officer of railroad for personal benefit given on consideration of location of road.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 550.

40 Cal. 447–456, SCHIERHOLD v. NORTH BEACH ETC. R. R. CO.

Negligence of Parents in Allowing Child to be alone on street does not release railroad from liability for injury to child through gross negligence of its employer.

Approved in Bygum v. Southern Pac. Co. (Cal.), 36 Pac. 415, following rule; Richmond, Fredricksburg etc R. R. v. Martin, 102 Va. 206, 45 S. E. 895, holding father could not recover for injury of child when his agent, the child's custodian, was guilty of contributory negligence.

Contributory Negligence of Parent or Custodian as bar to negligence action by child. See note, 21 L. R. A. 82.

Duty of Street-car Companies to Avoid Injuring Children on track. See note, 25 L. R. A. 663, 664.

What Acts of Child in Attempting to Cross Car Tracks are negligence per se. See note, 11 L. R. A. (n. s.) 170.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 552.

Right of Attorney General, or Other Representative of state, to maintain action to enforce statutory regulations affecting rates. See note, 18 L. R. A. (n. s.) 664.

40 Cal. 459–462, ROVEGNO v. DEFFERARI.

Contract Made on Mutual Misunderstanding between parties as to consideration is void.

Approved in Curry v. Greffett, 115 Mo. App. 369, 371, 90 S. W. 1167, 1168, holding void contract entered into by mutual mistake.

Rights and Liabilities on Sale of Personalty as affected by vendor's mistake in fixing price. See note, 23 L. R. A. (n. s.) 1110.

40 Cal. 463–466, BATES v. RYBERG.

Executor of Estate cannot Maintain Appeal from decree of final distribution on grounds that property was improperly distributed.

Reaffirmed in In re Coursen's Estate (Cal.), 65 Pac. 967.

Distinguished in Bruning v. Golden, 159 Ind. 208, 64 N. E. 660, holding administrator could sue one heir for accounting for benefit of another.

Any Heir or Devisee Aggrieved by Decree of Distribution may appeal therefrom.

Approved in Lamar v. Lamar, 118 Ga. 690, 45 S. E. 501, holding executor could appeal when improperly deprived of commissions.

40 Cal. 466–470, PAXSON v. HOLT.

Under San Francisco Consolidation Act, Section 90, demands on treasury must be presented for payment, properly audited within month after same are payable or be forever barred.

Approved in Geimann v. Board of Police Commrs., 158 Cal. 751, 112 Pac. 554, applying rule in construing San Francisco charter, article 8, chapter 4, section 1.

40 Cal. 471–474, TAYLOR v. UNDERHILL.

Riparian Owner has No Vested Right to future accretions.

Approved in Cohen v. United States, 162 Fed. 370, holding riparian owner cannot maintain action for damages against one who blocks stream which in the past has added accretions to his land.

Title to Land Between High and Low water mark. See note, 45 L. R. A. 240.

Right of State to Grant Tide Lands. See note, 22 L. R. A. (n. s.) 337.

40 Cal. 474–479, ROBINSON v. HAAS.

Sale of Personal Property Passes to Vendee only such title as vendor had.

Approved in First Nat. Bk. of Concordia v. McIntosh etc. Commission Co., 72 Kan. 612, 84 Pac. 538, holding void mortgage of cattle by bailee.

Distinguished in Runge v. Wilson, 7 Cal. App. 578, 95 Pac. 179, holding valid sale of personalty made by executor in ignorance of contract of sale made by decedent, but not consummated before his death.

Right of One Leaving Chattels in another's possession as against latter's vendees or creditors. See note, 25 L. R. A. (n. s.) 776.

What Constitutes a Transaction a Sale. See note, 94 Am. St. Rep. 216.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 439.

40 Cal. 484–488, TREAT v. FORSYTH.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 400.

40 Cal. 489-493, ROSENCRANTZ v. ROGERS.

Ignorance of Name must be Real to Allow Party to be sued by fictitious name.

Approved in Clark v. Oregon etc. R. R. Co., 29 Mont. 321, 74 Pac. 735, holding plaintiff bound to amend by substituting true name when it appeared from answer.

40 Cal. 493–497, BROAD v. BROAD.

Under Act of 1850, Section 11, Half of common property vests in surviving spouse.

Approved in Cook v. Norman, 50 Cal. 638, holding husband as community survivor has power to sell community property after death of wife.

40 Cal. 497–531, CHAMBERS v. SATTERLEE.

Where Contract for Street Work is not in Compliance with resolution of supervisors, remedy of aggrieved party is by appeal to board, and failing to so appeal he cannot set up such irregularity as defense in action on his assessment.

Approved in Bates v. Hadamson, 2 Cal. App. 577, 84 Pac. 52, holding error in placing excessive assessment on property for street improvement could only be corrected by appeal to city council.

Assessment for Street Work is not Taxation within meaning of constitution.

Approved in Wheatland v. Boston, 202 Mass. 261, 88 N. E. 770, holding such assessments recoverable in same manner as taxes.

Assessments for Improvements by front-foot rule. See note, 28 L. R. A. (n. s.) 1138, 1140.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 33.

40 Cal. 532–535, 6 Am. Rep. 623, McCOY v. CALIFORNIA PAC. R. R. CO.

Failure to Fence Railroad Track is prima facie negligence of company when stock of adjacent owner are killed while straying on track.

Approved in Pecos Valley etc. Ry. Co. v. Cazier, 13 N. M. 137, 79 Pac. 716, following rule; Johnson v. Southern Pacific Co., 11 Cal. App. 285, 104 Pac. 716, holding failure to keep in repair gate in railway fence along plaintiff's land is prima facie negligence, in action to recover for killing of stock straying on track; McCoy v. Southern Pac. Co. (Cal.), 26 Pac. 630, holding railroad liable for injury to stock escaping to track through defective fence.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 349.

40 Cal. 535–543, BARFIELD v. PRICE.

Reasonable Diligence must be Used in Pursuing the remedy to enable a party to maintain action to rescind or reform contract.

Approved in Horner v. Lowe, 159 Ind. 412, 64 N. E. 220, following rule; Wills v. Porter (Cal.), 61 Pac. 1111, holding action brought too late to compel repayment of sum paid before due on note of corporation to principal stockholder when two years had elapsed.

Where Plaintiff Supposes He is Selling Different Tract from that conveyed, and defendants think they are purchasing tract actually conveyed, there is such mutual mistake as avoids contract.

Approved in Fearon Lumber etc. Co. v. Wilson, 5 W. Va. 37, 41 S. E. 140, rescinding contract for mistake as to land conveyed.

When Party Sues as Executor, Complaint must contain proper allegations to show he is entitled to sue in that capacity.

Approved in Estate of Renton, 3 Cof. Prob. 533, allegation that contestant is adopted and only child and heir of decedent is insufficient.

40 Cal. 543–547, 6 Am. Rep. 624, EMERSON v. SANTA CLARA COUNTY.

Verdict of Jury in Disobedience of Instruction is "against law," although instruction was erroneous in point of law.

Approved in Miller v. Griffith, 4 Cal. App. 342, 88 Pac. 285, Lynch v. Snead Architectural Iron Wks., 132 Ky. 257, 116 S. W. 697, and Cotter v. Butte etc. Smelting Co., 31 Mont. 136, 77 Pac. 511, all reaffirming rule; Myers v. Fear, 21 Okl. 502, 129 Am. St. Rep. 795, 96 Pac. 643, holding verdict should be set aside when contrary to instructions; Stoner v. Mau, 11 Wyo. 406, 73 Pac. 550, refusing to reverse on theory jury had disregarded erroneous instruction, as evidence might have justified finding under conditions in instruction.

Distinguished in Cotter v. Butte & R. V. Smelting Co., 31 Mont. 137, 77 Pac. 511, holding court should not grant new trial when verdict was warranted by instructions, although instructions were contradictory.

Overruled in Compressed Air Co. v. West San Pablo Co., 9 Cal. App. 363, 99 Pac. 532, and O'Neill v. Thomas Day Co., 152 Cal. 361, 92 Pac. 858, both refusing to disregard verdict rendered contrary to erroneous instruction.

Right to Reversal or New Trial where jury disregarded erroneous instructions. See note, 21 L. R. A. (n. s.) 853.

40 Cal. 547–572, 6 Am. Rep. 624, LOVE v. WATKINS.

Vendee in Possession Under Executory Contract which he has performed may avail himself of his equitable title as defense in action of ejectment brought by holder of legal title.

Approved in Hooper v. Young, 10 Cal. App. 595, 102 Pac. 952, to point that plaintiffs in ejectment claiming to be successor of mortgagor whose debt is outlawed and whose debt they repudiate cannot claim any equities against legal title; Clint v. Eureka Crude Oil Co., 3 Cal. App. 469, 86 Pac. 819, holding that plaintiff in possession holding according to his rights cannot be compelled to pay defendant's costs where both parties failed to do equity; Barton v. Dunlap, 8 Idaho, 92, 66 Pac. 836, holding valuable improvements placed on realty by vendee under oral agreement to purchase removed bar of statute of frauds to enforcement of contract; Talley v. Kingfisher Imp. Co., 24 Okl. 475, 103 Pac. 592, holding vendor could not maintain ejectment against vendee in possession under contract of purchase who was not in default.

Limitations Do not Run in Favor of trustee against beneficiary while latter is in possession and there has been no adverse holding on part of trustee.

Reaffirmed in Levy v. Ryland, 32 Nev. 470, 109 Pac. 908.

Distinguished in Luco v. Toro (Cal.), 18 Pac. 869, holding limitations run where owner of interest in land agreed to convey part thereof to another if he should procure a patent to the land and such patent was obtained, but action not brought on contract for six years

thereafter; Edwards v. Beck, 57 Wash. 83, 106 Pac. 493, limitations run against action for specific performance of contract to convey lands.

Limitation of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 484.

Possession of Trustee is that of cestui que trust.

Reaffirmed in Levy v. Ryland, 32 Nev. 465, 109 Pac. 907.

Specific Performance of Contracts for conveyance where wife refuses to join. See note, 24 L. R. A. 764.

40 Cal. 572–578, HANCOCK v. PREUSS.

Court may Order Summons Delivered to plaintiff for further service after it has been served on some defendants and returned and filed.

Reaffirmed in Ridenbaugh v. Sandlin, 14 Idaho, 478, 94 Pac. 829.

40 Cal. 578–586, WADE v. THAYER.

Where Plaintiff in Rebuttal Introduces Evidence in contradiction of witnesses of defendants, the latter may, after plaintiff rests, support credibility of their witnesses by additional questions.

Approved in People v. Ye Foo, 4 Cal. App. 735, 89 Pac. 451, holding prosecution may introduce evidence to disprove defense of alibi after such defense has been offered; Maloney v. King, 30 Mont. 167, 76 Pac. 7, holding plaintiff entitled to rebuttal of defendant's proof of payment.

Employer, though not Present or Consenting, is liable for damages caused by assault inflicted by employee in performance of duty.

Approved in Cressey v. Republic Creosoting Co., 108 Minn. 356, 122 N. W. 486, following rule; Davis v. Hearst, 160 Cal. 165, 116 Pac. 540, discussing liability of newspaper proprietor who has given manager carte blanche for punitive damages for libel; De Wolf v. Ford, 193 N. Y. 408, 127 Am. St. Rep. 969, 86 N. E. 532, 21 L. R. A. (n. s.) 860, holding hotel-keeper liable for insult offered by servant to guest in discharge of duties.

Exemplary Damages for Act of employee. See note, 101 Am. St. Rep. 761.

Civil Responsibility for Wrongful or negligent act of servant or agent toward one not sustaining contractual relation. See note, 27 L. R. A. 196.

Liability for Malicious Act of Servant when master owes special duty to party injured. See note, 4 L. R. A. (n. s.) 486.

Liability of Innkeeper for Injury to guest by servant. See notes, 69 L. R. A. 643; 12 L. R. A. (n. s.) 1156.

40 Cal. 586–593, PEOPLE v. COYODO.

Bias of Officer Summoning Panel which would be good ground for challenge to juror is ground for challenge to panel.

Reaffirmed in State v. Jordan, 19 Idaho, 200, 112 Pac. 1051.

40 Cal. 593–599, 6 Am. Rep. 639, GRAHAM v. PLATE.

Measure of Damages for Violation of Trademark is profit realized on all goods sold under simulated mark.

Approved in Lynn Shoe Co. v. Auburn Lynn Shoe Co., 100 Me. 479, 62 Atl. 507, 4 L. R. A. (n. s.) 960, following rule.

One Who Wrongfully Mixes His Own Goods with another's loses the whole when they cannot be distinguished.

Approved in Huff v. Hardwick, 19 Colo. App. 420, 75 Pac. 594, where defendant agreed to pay plaintiff one-half proceeds of sale of two mining claims, but sold them with others and share of sale money of each could not be distinguished, plaintiff entitled to half of whole.

Confusion of Goods. See note, 101 Am. St. Rep. 913, 915.

40 Cal. 599-602, PEOPLE v. STAKEM.

Receiver of Stolen Goods With Knowledge of Theft who assists in their disposal is guilty of offense of receiving stolen property.

Approved in People v. Disperati, 11 Cal. App. 480, 105 Pac. 621, following rule; Ex parte Goldman (Cal. App.), 88 Pac. 821, holding indictment charging that accused concealed certain property and concealed the offense knowing such property was stolen states no offense; Dent v. State, 43 Tex. Cr. 150, 65 S. W. 633, and Street v. State, 39 Tex. Cr. 136, 45 S. W. 578, both holding mere receiver of stolen property not guilty as accessory to burglary.

40 Cal. 603-613, INGERSOLL v. TRUEBODY.

Grantee of Deed may Disprove Collateral Facts therein recited which are not essential to validity of estate granted.

Approved in Yule v. Fell, 123 Iowa, 664, 99 N. W. 560, grantor may show that grantee took deed with knowledge of existing lease, though not mentioned in deed.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 112.

Recital of Money Consideration in Deed as contractual. See note, 68 L. R. A. 925.

What is Community Property. See notes, 126 Am. St. Rep. 121; 4 Cof. Prob. 63.

40 Cal. 613-614, PEOPLE v. BANGENEAUR.

Right of State to Appeal in a criminal case. See note, 19 L. R. A. 343.

40 Cal. 614-627, PARROTT v. BYERS.

Transfer of Stock not Entered on Books is valid as against all except subsequent purchaser in good faith without notice.

Approved in National Bank v. Western Pac. Ry. Co., 157 Cal. 580, 108 Pac. 679, holding unregistered sale or pledge of stock valid as against later attachment on registered owner; Richardson v. Longmont Supply Ditch Co., 19 Colo. App. 495, 76 Pac. 549, holding transfer of stock by trustee's deed effectual to pass equitable title to grantee.

Denial in Answer of Relation of Trustee and beneficiary between parties dispenses with necessity of averring in complaint or proving prior demand and refusal.

Approved in Becker v. Feigenbaum (Cal.), 45 Pac. 838, applying rule to agency.

In Suit by Several Stockholders Against Trustees of corporation, one who holds shares not transferred on books is proper party plaintiff.

Approved in O'Connor v. International Silver Co., 68 N. J. Eq. 78, 59 Atl. 326, following rule.

40 Cal. 627–628, PEOPLE v. SCHUSTER.

Appeal Does not Lie from Order of Judge admitting party to bail under provisions of habeas corpus act.

Approved in Ex parte White, 2 Cal. App. 727, 84 Pac. 243, following rule; Matter of Hughes, 159 Cal. 363, 113 Pac. 686, holding determination in habeas corpus that information on which conviction based, not reviewable on certiorari in supreme court though decision was incorrect.

40 Cal. 642–647, PEOPLE v. ELKINS.

Where Court has Jurisdiction, Its Orders thereafter, though erroneous, are not void unless they contravene statute.

Approved in Matter of Hughes, 159 Cal. 364, 113 Pac. 686, certiorari does not lie to review erroneous determination in habeas corpus case where court had jurisdiction.

40 Cal. 648–656, PEOPLE v. MELLON.

Where Venue in Larceny has Been Laid in county to which stolen property was brought, facts showing commission in another county are matters of evidence.

Reaffirmed in State v. De Wolfe, 29 Mont. 421, 74 Pac. 1086.

Where Jurisdiction of Judge of Another County to try criminal cause is not questioned in lower court, it cannot be questioned on appeal.

Approved in Tillman v. State, 58 Fla. 117, 138 Am. St. Rep. 100, 50 So. 675, 676, following rule.

40 Cal. 657–662, MENDELSOHN v. ANAHEIM LIGHTER CO.

Verdict Which Finds Plaintiff Entitled to certain amount of money is not void for uncertainty, since it is equivalent to findings issues in his favor and assessing damages at that sum.

Approved in Cain v. Cody (Cal.), 29 Pac. 779, verdict in replevin considered and held to be equivalent to general finding that plaintiff was entitled to return of the property, and special finding as to value and damages.

40 Cal. 662–672, YATES v. SMITH.

Ruling of Appellate Court on Appeal becomes law of case for all subsequent proceedings.

Approved in Lorimer v. Fairchild, 68 Kan. 342, 75 Pac. 128, and Oklahoma City etc. Power Co. v. Baumhoff, 21 Okl. 508, 96 Pac. 760, both following rule.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

NOTES

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CALIFORNIA REPORTS.

CASES IN 41 CALIFORNIA.

41 Cal. 15–17, CARUTHERS v. McGARVEY.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 5, 15, 58.

41 Cal. 17–21, WATSON v. SAN FRANCISCO ETC. R. R. CO.

When Circumstances are Such as to Lead Court to hesitate upon motion to open default, it is better to decide in favor of the motion.

Approved in Vermont Marble Co. v. Black (Cal.), 38 Pac. 513, following rule; Barling v. Weeks, 4 Cal. App. 456, 88 Pac. 503, holding trial court did not abuse discretion in setting aside default obtained through mistake of attorney; Walsh v. Boyle, 94 Minn. 438, 103 N. W. 506, opening default where defendant, through ignorance of language, did not understand effect of summons; Sherman v. Southern Pac. Co., 31 Nev. 292, 102 Pac. 259, and Greene v. Montana Brewing Co., 32 Mont. 108, 79 Pac. 694, both opening default obtained through mistake of attorney; Riddle v. Quinn, 32 Utah, 352, 90 Pac. 896, opening default obtained by plaintiff's disregard of court rule.

In Opening Default, Terms and Conditions should be imposed.

Approved in McCarty v. Wilson, 2 Cal. App. 157, 83 Pac. 171, court may impose conditions upon granting permission to file bill of exceptions after expiration of statutory time.

41 Cal. 22–29, HENLEY v. HOTALLING.

Intention Appearing on Face of Deed absolute in form will prevail unless a different intention clearly appear to create a mortgage only.

Approved in Schultz v. McLean (Cal.), 25 Pac. 427, Peres v. Crocker (Cal.), 47 Pac. 930; Hays v. Emerson, 75 Ark. 555, 87 S. W. 1028, Smith v. Jensen, 16 N. D. 412, 114 N. W. 307, Jones v. Jones, 20 S. D. 639, 108 N. W. 25, and Baird v. Baird, 48 Colo. 516, 111 Pac. 82, all following rule; Sullivan v. Woods, 5 Ariz. 200, 50 Pac. 115, deed not clearly shown to be mortgage.

What Constitutes a Transaction and a Sale. See note, 94 Am. St. Rep. 237.

Parties may Buy Lands in Satisfaction of debt, or for consideration paid, and contract to reconvey for sum certain without any intention to create a mortgage.

Approved in Fletcher v. Northcross (Cal.), 32 Pac. 329, contract of sale and right of reconveyance considered and held not to be mortgage.

Existence of a Debt is Essential to existence of a mortgage.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, following rule; Couts v. Winston, 153 Cal. 691, 96 Pac. 359, holding implied promise to repay loan is such debt as to sustain mortgage.

41 Cal. 29–33, EX PARTE VOLL.

Constitution in Declaring Bail to be Matter of right contemplates only cases in which party has not been already convicted.

Approved in In re Schriber, 19 Idaho, 535, 114 Pac. 30, following rule; Ex parte Heath, 227 Mo. 403, 126 S. W. 1034, upholding statute denying bail pending appeal to one convicted of capital offense.

41 Cal. 34–37, RICH v. TUBBS.

When Homestead is Declared by Either Spouse, although spouses are denominated joint tenants, they are not such in common-law sense, but probate court may set aside such homestead for benefit of survivor and children.

Approved in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 354, 107 Pac. 337, holding "joint tenancy" in section 1265, Civil Code, merely describes nature of estate during life of spouses, and devolution on death of either is provided for by succeeding clause of descent.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 44, 48.

Purpose and Effect of Probate Order setting aside homestead for use of family is that the property be relieved from administration, and does not constitute assets of estate.

Approved in Hoppe v. Hoppe (Cal.), 36 Pac. 393, holding judgment setting aside homestead did not adjudicate interest of widow or minors in premises.

Inheritance of Homestead is Regulated by law in force at time of death.

Approved in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 359, 107 Pac. 339, following rule.

What is Community Property. See note, 126 Am. St. Rep. 106.

41 Cal. 37–40, PEOPLE v. RENFROW.

Challenge to Juror in Criminal Case must specify particular ground of challenge

Approved in People v. Quijada, 154 Cal. 245, 97 Pac. 690, refusing to consider on appeal challenge to grand juror on ground not specified in motion to set aside indictment.

41 Cal. 55–60, CURTIS v. SPRAGUE.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 789.

41 Cal. 61–63, WALSWORTH v. JOHNSON.

To Support Plea of Another Action Pending, plaintiff must be same in both suits and cause of action must be same.

Approved in Colburn v. Dortic, 49 Colo. 95, 111 Pac. 839, following rule; Rodney v. Gibbs, 184 Mo. 10, 82 S. W. 189, holding plea of prior

action pending not available when plaintiff had set up same cause of action as defense in prior suit.

41 Cal. 63–66, CRANE v. SALMON.

Quitclaim Deeds. See note, 105 Am. St. Rep. 858.

41 Cal. 66–67, PEOPLE v. MURRAY.

To Justify Inference of Legal Guilt from circumstantial evidence, facts must not only be consistent with guilt of accused but inconsistent with any other rational conclusion.

Approved in People v. Taggart, 1 Cal. App. 425, 82 Pac. 397, Union Pacific Coal Co. v. United States, 173 Fed. 740, 97 C. C. A. 578, The King v. Akana, 7 Haw. 554, and The King v. Ahop, 7 Haw. 561, all following rule.

Circumstantial Evidence. See note, 97 Am. St. Rep. 777, 778.

41 Cal. 68–78, TILDEN v. SACRAMENTO COUNTY.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 879.

41 Cal. 78–85, GAMBETTE v. BROCK.

Declaration of Homestead by Married Woman under act of 1860 is valid, although husband never resided there, or acknowledged such homestead, in absence of showing that he had fixed home elsewhere, or family other than his wife.

Approved in Harlan v. Schulze, 7 Cal. App. 292, 94 Pac. 381, holding temporary absence of husband, in absence of showing that he had residence elsewhere, did not prevent wife from declaring homestead.

Validity of Judgments against married women. See note, 134 Am. St. Rep. 929, 930.

41 Cal. 85–88, UPTON v. ARCHER.

Agent of Grantor cannot Insert Name of Grantee in deed, otherwise complete, without written authority.

Approved in Lund v. Thackery, 18 S. D. 117, 99 N. W. 857, following rule; Ormsby v. Johnson, 24 S. D. 498, 124 N. W. 437, holding grantor estopped to question such deed when he had accepted consideration.

41 Cal. 94–97, TOMLINSON v. MONROE.

Material Variance Between Allegation and Proof is ground for nonsuit unless plaintiff obtains leave to amend complaint to conform to proofs.

Approved in Bailey v. Brown, 4 Cal. App. 517, 88 Pac. 519, sustaining nonsuit granted because of material variance.

41 Cal. 97–100, SMITH v. CUSHING.

Court is Presumed to have Found Facts in favor of party in whose favor judgment is rendered, unless contrary appears from findings themselves.

Approved in Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, holding findings sustained judgment.

To Constitute Abandonment, Premises must be left vacant without intention to return, and open for occupation of next comer.

Approved in White's Guardian v. Martin, 2 Alaska, 502, holding insane person can have no intention to abandon.

41 Cal. 100–103, DAVENPORT v. TURPIN.

If Mortgagor Conveys Title to Another, whose deed is recorded before decree of foreclosure is entered, purchaser at sheriff's sale acquires no title when such grantee was not party to suit.

Approved in Noyes v. Crawford, 118 Iowa, 22, 96 Am. St. Rep. 363, 91 N. W. 801, applying rule as against one suing for specific performance of contract to convey.

Entry Other Than as Mortgagee to enable one to hold as mortgagee in possession. See note, 16 L. R. A. (n. s.) 151.

41 Cal. 103–109, EVANS v. EVANS.

Corroboration is Required by Statute to testimony of plaintiff in divorce, but it is impossible to lay down any general rule as to degree.

Approved in Avery v. Avery, 148 Cal. 243, 82 Pac. 969, and Blanchard v. Blanchard, 10 Cal. App. 204, 101 Pac. 536, both applying rule to cruelty.

Adultery may be Proved by Circumstantial Evidence.

Reaffirmed in Aston v. Aston, 14 Cal. App. 325, 111 Pac. 1036.

41 Cal. 109–111, SEIGEL v. EISEN.

Mere Fact That Part of Plaintiff's Body extended beyond side of moving car does not prove contributory negligence.

Approved in McCord v. Atlanta & Charlotte etc. Air Line R. R. Co., 134 N. C. 57, 45 S. E. 1033, following rule; Huber v. Cedar Rapids etc. St. Ry. Co., 124 Iowa, 558, 100 N. W. 479, holding passenger protruding head from car eighteen inches is negligent per se.

41 Cal. 111–116, GROSS v. KIERSKI.

There is No Breach of Express Warranty of title of chattels sold until vendee's possession is disturbed by true owner.

Approved in Dunn v. Mills, 70 Kan. 660, 79 Pac. 148, holding vendee of land in possession could not resist payment of purchase price on ground of defective title.

Distinguished in Bancroft v. San Francisco Tool Co. (Cal.), 47 Pac. 686, holding cause of action for breach of warranty that design of passenger elevator would be suitable for intended purpose accrues when elevator is completed; Burling v. Allvord, 77 Neb. 867, 110 N. W. 685, holding vendee's right of action for fraudulent representation as to title to realty accrues immediately upon perpetration of fraud.

Whether Limitations Commence to Run at time of breach of contract, or at time actual damages sustained. See note, 15 L. R. A. (n. s.) 163.

Operation of Statute of Limitations where cause of action for nominal damages subsequently ripens into right to actual damages. See note, 126 Am. St. Rep. 946.

41 Cal. 117–118, WEAVER v. HAYWARD.

Affidavit for Attachment Need not State Facts out of which indebtedness arose.

Distinguished in Gatward v. Wheeler, 10 Idaho, 72, 77 Pac. 24, affidavit for attachment need not allege that debt sued on was due at time of making and filing affidavit.

41 Cal. 138-143, 10 Am. Rep. 269, LAVERONE v. MANGIANTI.

Owner of Ferocious Dog, Knowing Its Vicious Propensities, keeps it at his own risk, and is responsible for any injury inflicted by it upon a person who is free from fault.

Approved in Gooding v. Chutes Co., 155 Cal. 625, 102 Pac. 821, 23 L. R. A. (n. s.) 1071, holding owner liable for injury due to bite of vicious camel whose propensities were known to keeper; Parsons v. Manser, 119 Iowa, 90, 97 Am. St. Rep. 283, 93 N. W. 87, 62 L. R. A. 132, holding owner of bees liable for loss of horses stung to death.

Liability for Injuries Inflicted by animal upon one coming upon owner's premises. See note, 14 L. R. A. 197.

Marriage of Infant as working emancipation. See note, 24 L. R. A. (n. s.) 160.

41 Cal. 147-202, STOCKTON-VISALIA R. R. CO. v. STOCKTON.

When Legislature has Determined that a particular railroad in fact concerns public interest, its determination is not open to review by courts.

Approved in Sisson v. Supervisors of Buena Vista County, 128 Iowa, 454, 104 N. W. 459, 70 L. R. A. 440, holding taking private property for drainage district to be for public use.

Distinguished in Shasta Power Co. v. Walker, 149 Fed. 570, and Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 674, 676, 87 Pac. 29, 30, both holding courts may inquire whether use is in fact public when condemnation is sought for railway purposes under general statute.

Existence of Public Use as question for courts. See note, 88 Am. St. Rep. 928.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 12, 34, 35, 39, 86, 88, 91, 100.

Power of Court to Declare Statute Unconstitutional should never be exerted except where conflict between it and constitution is palpable and incapable of reconciliation.

Approved in People v. Richards, 1 Cal. App. 574, 82 Pac. 694, upholding Code of Civil Procedure, section 204, in regard to provision for superior judges drawing jurors in counties of one hundred thousand inhabitants.

Public Purposes for Which Money may be appropriated or raised by taxation. See note, 14 L. R. A. 480.

41 Cal. 202-208, TREAT v. DE CELIS.

Power of Attorney for Sale of Land considered and held not to give attorney authority to bind principal by contract of sale.

Approved in White v. Bank of Hanford, 148 Cal. 553, 83 Pac. 698, holding agreement for sale of land only required deed to be given by vendor upon compliance with agreement by vendee within time specified in agreement; Quay v. Presidio etc. R. R. Co., 82 Cal. 6, 22 Pac. 927, holding power of attorney did not give express or implied power to sell or hypothecate stock; Robertson v. Allen, 184 Fed. 381, holding broker to purchase and sell land could not bind principal by contract to convey; Stauffer v. Linenthal, 29 Ind. App. 306, 64 N. E. 643, holding broker's contract merely to be undertaking to find purchaser; Helling v. Darby, 71 Kan. 108, 79 Pac. 1073, holding letters and telegram from owner did not give broker power to bind owner by contract of sale of land.

Implied Powers Under Power of Attorney to transact business. See note, 4 L. R. A. (n. s.) 844.

Performance by Real Estate Broker of contract to find purchaser or effect exchange. See note, 44 L. R. A. 594.

Performance of Conditions of Escrows. See note, 130 Am. St. Rep. 962.

41 Cal. 209–211, **EX PARTE JONES.**

Time Pending Appeal from Judgment of imprisonment does not apply on period of imprisonment under sentence.

Approved in Harmon v. Bowers, 78 Kan. 138, 96 Pac. 52, 17 L. R. A. (n. s.) 502, holding prisoner's civil rights not suspended pending appeal.

41 Cal. 211–220, **EX PARTE McLAUGHLIN.**

Discharge of Jury After Failure to Agree, over objection of defendant, is not acquittal.

Approved in Hovey v. Sheffner, 16 Wyo. 277, 125 Am. St. Rep. 1037, 93 Pac. 312, 15 L. R. A. (n. s.) 227, following rule.

41 Cal. 221–231, **THOMPSON v. McKAY.**

Judgment in Action Litigating Title to two lots is binding on parties thereto, if unreversed, although silent as to title of one of the lots.

Approved in Soule v. Soule, 4 Cal. App. 106, 87 Pac. 208, failure of court to find in accord with averments of plaintiff that transfers of property by her were made in consideration of agreement by defendant for payment of alimony was in legal effect finding they were not made upon such consideration; Smith v. Vandepeer, 3 Cal. App. 303, 85 Pac. 138, holding error of court in decree of distribution conclusive on all parties and not subject to collateral attack.

One on Whose Objection Competent Evidence to prove fact is excluded cannot afterward say fact was not proved.

Reaffirmed in Spaulding v. Mott, 167 Ind. 71, 76 N. E. 624.

41 Cal. 232–234, **LYNCH v. KELLY.**

Formal Entry of Judgment by Justice of Peace upon verdict of jury is mere clerical duty.

Approved in Hull v. Justice's Court, 5 Cal. App. 138, 89 Pac. 871, holding failure of justice to enter time of appearance of defendant, or nonappearance if default be made, at time they occur under sections 911 and 912, Code of Civil Procedure, does not devest justice of jurisdiction; Wilson v. Otis, 71 N. H. 486, 93 Am. St. Rep. 564, 53 Atl. 440, Haag v. Burns, 22 S. D. 54, 115 N. W. 106, Fowler v. Thomsen, 68 Neb. 586, 94 N. W. 813, and Montgomery v. Viers, 130 Ky. 701, 114 S. W. 253, all upholding informal entry of judgment; Tomlin v. Woods, 125 Iowa, 376, 101 N. W. 138, holding failure of justice of peace to enter judgment on return day on failure of defendant to appear is mere irregularity.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 640.

41 Cal. 234–237, **PEOPLE v. HUGHES.**

Allegation of Ownership of Stolen Property is essential to indictment for larceny, unless offense be otherwise sufficiently described.

Approved in State v. Rathbone, 8 Idaho, 173, 67 Pac. 189, upholding allegation as to ownership of stolen mares; State v. Ham, 21 S. D. 601, 602, 114 N. W. 714, 715, holding ownership insufficiently alleged.

Material Variance Between Indictment and Proof is no bar to further prosecution.

Approved in State v. Laechelt, 18 N. D. 91, 118 N. W. 241, holding variance is immaterial.

Identity of Offenses on Plea of former jeopardy. See note, 92 Am. St. Rep. 105.

41 Cal. 238, PEOPLE v. MOORE.

Effect of Separation of Jury. See note, 103 Am. St. Rep. 162.

41 Cal. 239–242, HUSSEY v. CASTLE.

There is No Legal Presumption That Conveyance of land by husband to wife is fraudulent as against judgment creditor of husband, whose judgment was recovered after the conveyance.

Approved in Lindley v. Blumberg, 7 Cal. App. 144, 93 Pac. 897, holding valid conveyance of land by husband to wife in consideration of one dollar and love and affection as against subsequent lessee from husband.

Burden of Proof of Husband's Debt to Wife on account of property received from her. See note, 56 L. R. A. 845.

Antenuptial Verbal Contract, executed after marriage cannot be avoided on ground it was not in writing.

Approved in Rowell v. Barber, 142 Wis. 316, 125 N. W. 941, 27 L. R. A. (n. s.) 1140, execution of deed by husband pursuant to oral antenuptial settlement, and deposit for delivery after his death, not such performance as to take same out of statute of frauds.

41 Cal. 242–247, RANDALL v. FALKNER.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 410.

41 Cal. 253–256, CHASE v. CHRISTIANSON.

Jurisdiction is Power to Hear and Determine a cause, and includes power to decide incorrectly, as well as correctly, so that an erroneous judgment is not void.

Approved in Dahlgren v. Superior Court, 8 Cal. App. 627, 97 Pac. 683, refusing certiorari to correct error of court within limits of its jurisdiction; Worth v. Emerson, 3 Cal. App. 161, 85 Pac. 665, holding judgment only voidable for error committed within jurisdiction of court; Cohen v. Cohen, 150 Cal. 102, 88 Pac. 269, holding judgment in divorce granting alimony when prayer was for divorce and general relief not void on face; Lockard v. Lockard, 21 S. D. 137, 110 N. W. 105, holding not void, but merely erroneous judgment rendered when court was not regularly in session to try contested cases.

Whether a Personal Liability may be created for an easement. See note, 133 Am. St. Rep. 932.

Default Judgments Beyond Scope of relief asked. See note, 11 L. R. A. (n. s.) 807.

41 Cal. 256–262, SOUTHERN PAC. R. R. CO. v. REED.

Grant by City Authorities to Railroad of Right to lay tracks on street does not preclude adjacent owners from recovering damages sustained by them.

Approved in Coats v. Atchison etc. Ry. Co., 1 Cal. App. 443, 82 Pac. 641, following rule.

What are Additional Servitudes in highways. See note, 106 Am. St. Rep. 242, 259.

41 Cal. 263–278, PEOPLE v. KLUMPKE.

Deed Considered and Held Void for uncertainty in description.

Approved in Aylett v. Keaweanahi, 8 Haw. 326, deed conveying "two inclosed lots" considered and held not to be patently ambiguous; dissenting opinion in Union Lumber Co. v. Simon, 150 Cal. 754, 89 Pac. 1081, majority holding description in mechanic's lien sufficient.

Establishment of Dock Lines. See note, 14 L. R. A. 499.

41 Cal. 278–290, GREGORY v. NELSON.

Where Judgment Decrees Existence of Facts not within issues and then pronounces judgment thereon, that part of the judgment founded on such facts is superfluous and void.

Reaffirmed in Cummings v. Cummings (Cal.), 17 Pac. 445.

Court of Equity has No Power to Allow Ground supporting ditch having prior right of way to be washed away for mining purposes, even on condition that flume should be built instead.

Approved in Wutchumna Water Co. v. Ragle, 148 Cal. 766, 84 Pac. 165, holding in action to enjoin diversion of water from plaintiff's ditch, where defendant has perfect right by prescription, and exercised it without notice, court cannot impose any condition as to notice in future; Kavanaugh v. St. Louis Traction Co., 127 Mo. App. 279, 105 S. W. 282, holding owner of dominant estate could not change character of servitude imposed on servient estate without consent of owner, although beneficial to such estate.

Right to Change Easement. See note, 15 L. R. A. 94.

41 Cal. 290–298, MONTGOMERY v. STURDIVANT.

Deed Which in Granting Clause Simply Grants, bargains and sells without words of inheritance, conveys fee simple, but title thus conveyed may be limited by habendum clause to life estate.

Approved in Beedy v. Finney, 118 Iowa, 279, 91 N. W. 1070, and Utter v. Sidman, 170 Mo. 301, 70 S. W. 707, both following rule; Burnett v. Piercy, 149 Cal. 190, 86 Pac. 607, holding terms and limitations in deed describe life estate, and are inconsistent with estate in fee.

Effect of Other Language in Deed to cut down estate conveyed by granting clause. See note, 12 L. R. A. (n. s.) 964.

41 Cal. 298–305, McCULLOUGH v. CLARK.

Supplementary Proceedings are but a Substitute for creditor's bill at common law.

Approved in Bryant v. Bank of California (Cal.), 7 Pac. 130, holding statutory requirement must be strictly pursued to give court jurisdiction of supplementary proceedings.

Order on Proceedings Supplementary to Execution estops parties from again litigating same matter in another form of action.

Approved in Societa di Mutuo Socorso v. Mantel, 1 Cal. App. 110, 81 Pac. 660, holding order on supplementary proceedings directing

garnishee to pay sum due to judgment debtor to judgment creditor is in effect a judgment and conclusive in any other action between garnishee and judgment creditor.

Where Party Goes to Trial on Merits Without Objection to verification of pleading, he cannot raise such objection on appeal.

Reaffirmed in Moore v. Hupp, 17 Idaho, 245, 105 Pac. 213.

41 Cal. 305–307, LOCKE v. PORTER ETC. MINING CO.

Receipt as Evidence of Payment as against third parties. See note, 29 L. R. A. 739.

41 Cal. 308–312, ANDERSON v. FISH.

Probate Court cannot Order Executor to reconvey land, conveyed to decedent as security for loan, upon payment of loan.

Approved in Caron v. Old Reliable Gold Min. Co., 12 N. M. 222, 78 Pac. 65, holding probate court could not determine title contested by stranger to estate.

41 Cal. 312–314, REILLY v. RUDDOCK.

Party Asking Default to be Set Aside must show excusable neglect or other reasonable excuse.

Approved in Victor Power and Mining Co. v. Cole, 11 Cal. App. 502, 105 Pac. 760, refusing to set aside default in absence of showing of excusable neglect; Andreen v. Andreen, 15 Cal. App. 730, 115 Pac. 762, holding valid decree in divorce rendered on publication of summons could not be set aside without notice and hearing.

41 Cal. 314–317, KING v. BLOOD.

Where Several Defendants Named in Summons are served in same county, presumption is that they are all residents of that county, and service of copy of complaint on one is sufficient.

Reaffirmed in Mantle v. Casey, 31 Mont. 411, 78 Pac. 592.

41 Cal. 318–322, ALLEN v. CURREY.

Judgment will not be Set Aside as Fraudulent on ground that opposing party testified as witness and knew of fact, which, if proved, would have given judgment to other party and failed to disclose it, and witnesses have since been discovered who will testify to such fact.

Approved in Estate of Welch, 3 Cof. Prob. 305, applying rule in proceedings for payment of widow's allowance.

41 Cal. 322–325, GUY v. BIBEND.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 460.

41 Cal. 325–330, KENYON v. QUINN.

Pre-emption on Public Lands on acquiring certificate of purchase acquires only equitable title.

Approved in Cooper v. Wilder (Cal.), 41 Pac. 27, under 20 Stat. 113, relating to timber culture claims, one who died within two years after entry had such equitable interest in land as was capable of devise.

41 Cal. 331–335, MORRIS v. DE CELIS.

Court Should not Decide Motion for new trial before statement, as settled, has been engrossed and certified as correct.

Approved in Estate of McKenna, 138 Cal. 440, 71 Pac. 502, holding as premature motion for new trial when court had not passed on certain issues not included in verdict.

41 Cal. 351-356, PEOPLE v. WHYLER.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 34.

41 Cal. 356-359, CALIFORNIA PACIFIC R. R. CO. v. FRISBIE.

Right to Set Off Benefits Against Damages on condemnation. See note, 9 L. R. A. (n. s.) 828.

41 Cal. 360-363, ROUSSELL v. KELLY.

Acts of Defendant as Defense in unlawful detainer. See note, 120 Am. St. Rep. 64.

41 Cal. 363-386, WILSON v. FITCH.

Belief in Truth of or Existence of Rumor of defamatory matter is not justification for its publication. The matter must be proven to justify publication or mitigate damages.

Approved in Davis v. Hearst, 160 Cal. 182, 116 Pac. 110, reaffirming rule; Tingley v. Times-Mirror, 151 Cal. 26, 89 Pac. 1107, holding pleading in defense of libel not amounting to allegation that printed statement was true was insufficient in justification or mitigation of damages; Morse v. Times etc. Printing Co., 124 Iowa, 718, 100 N. W. 871, holding good faith not available as defense of libel per se, but only in mitigation of damages; Wallace v. Homestead Co., 117 Iowa, 357, 90 N. W. 838, holding defendants could not show in mitigation of damages that libelous statements were mere publications of current rumors, when purported to be published on their own knowledge; Pfister v. Milwaukee Free Press Co., 139 Wis. 641, 121 N. W. 944, refusing to admit in mitigation of damages evidence that libelous article was copied from another newspaper and published under belief it was true.

In Libel Question of Amount of Damages is largely in discretion of jury.

Approved in Scally v. Garratt, 11 Cal. App. 147, 104 Pac. 329, upholding verdict in personal injury case; Maloney v. Winston Bros. Co., 18 Idaho, 766, 111 Pac. 1089, reducing excessive damages allowed by jury.

Law Implies That Libelous Publication causes damage to injured party.

Approved in Paxton v. Woodward, 31 Mont. 214, 107 Am. St. Rep. 416, 78 Pac. 219, following rule.

What Words are Libelous Per Se. See note, 116 Am. St. Rep. 804.

41 Cal. 387-393, HILDEBRAND v. STEWART.

Application to Purchase Public Lands Under Act of March 28, 1868, must describe lands desired and specifically state that purchase is desired under said act.

Approved in Moran v. Bonynge, 157 Cal. 299, 10 Pac. 314, holding complaint of interveners in action to determine respective rights to purchase state lands does not allege valid application to purchase; Gilson v. Robinson (Cal.), 7 Pac. 430, holding void certificate of

purchase of state lands filed before plat of survey of township has been approved or filed.

41 Cal. 393–408, HARRIS v. SAN FRANCISCO SUGAR ETC. CO.

Findings of Referee on Question of Fact can be reviewed only by making motion for new trial.

Approved in United States v. Ramsey, 158 Fed. 493, following rule; Raskin v. Robarts (Cal.), 35 Pac. 764, arguendo.

Confirmation of Referee's Report and Order for Entry of Judgment held not to be final judgment from which appeal could be taken.

Approved in Picken's Exrs. v. Daniels, 58 W. Va. 331, 52 S. E. 217, holding decree merely ascertaining personal debt but not decreeing payment or fixing lien not appealable.

41 Cal. 420–423, ENGLANDER v. ROGERS.

Obligations of Parties to Agreement for Sale of Land are mutual and dependent, and neither can put the other in default except by tendering performance on his part.

Approved in Kerr v. Moore, 6 Cal. App. 308, 92 Pac. 108, holding tender of purchase price sufficient on part of one party to option to purchase to obtain specific performance by other party; Naftzger v. Gregg (Cal.), 31 Pac. 613, holding defective complaint on notes in failing to set out contract entered into at same time by which deed was to be given in consideration for notes, and alleging performance of conditions; Michigan Home Colony Co. v. Tabor, 141 Fed. 336, 72 C. C. A. 480, holding in contract for sale of land agreement to pay purchase money and to give deed were mutual and dependent, and deed must be tendered before suit can be brought for purchase money.

To Constitute Valid Tender Party must have money at hand and must then and there not only be ready and willing, but produce and offer to pay on performance of requisite condition.

Approved in Sterling v. W. of World Lodge, 38 Utah, 524, 80 Pac. 381, holding tender insufficient.

41 Cal. 423–428, MAHONEY v. BERGIN.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 178, 184.

41 Cal. 429–431, PEOPLE v. McGUNGILL.

Appellate Court will not Review Refusal of challenge of juror for bias unless prejudice is shown.

Approved in Melone v. Sierra Ry. Co., 151 Cal. 114, 91 Pac. 522, following rule; Territory v. Shankland, 3 Ariz. 411, 77 Pac. 494, holding it not reversible error to refuse challenge for cause when peremptories were not exhausted on going to trial.

Cross-examination of Defendant cannot be extended beyond subject matter of testimony in chief.

Reaffirmed in People v. Schmitz, 7 Cal. App. 359, 94 Pac. 415.

It is Error for Counsel for Prosecution to comment on defendant's refusal to testify.

Approved in People v. Morris, 3 Cal. App. 6, 84 Pac. 464, and State v. Williams, 28 Nev. 416, 82 Pac. 357, both following rule.

Evidence and Instructions as to character of accused. See note, 20 L. R. A. 615.

41 Cal. 435–439, PEOPLE v. HUNT.

Effect of Repeal of Special Act suspending general act, on operation of general act, stated.

Cited in Tilden v. Esmerald Co., 32 Nev. 325, 107 Pac. 882, construing effect of acts relating to salary of district attorney.

41 Cal. 439–444, DOOLY v. NORTON.

Order Taxing Costs cannot be Reviewed on appeal from judgment without statement annexed to record.

Reaffirmed in Schomberg v. Long, 15 N. D. 507, 108 N. W. 332.

41 Cal. 444–448, PURDY v. BULLARD.

Party cannot have Contract Rescinded on ground of fraud unless he has been injured thereby.

Approved in Sonnesyn v. Akin, 14 N. D. 256, 257, 104 N. W. 1029, following rule; Wills v. Porter (Cal.), 61 Pac. 1111, where corporation pays debt to principal stockholder before due, repayment will not be enforced at suit of other stockholders without showing injury to themselves or to the corporation.

41 Cal. 449–452, ARAM v. SCHALLENBERGER.

Private Individual cannot Maintain Action to abate public nuisance unless he shows special damage to himself in addition to that received by public.

Approved in Brown v. Rea, 150 Cal. 174, 88 Pac. 714, following rule; City Store v. San Jose-Los Gatos etc. Ry. Co., 150 Cal. 279, 88 Pac. 978, unauthorized railroad in street may be abated at suit of individual on showing special damage to himself; Cushing-Wetmore Co. v. Gray, 152 Cal. 121, 125 Am. St. Rep. 47, 92 Pac. 71, holding obstruction of street blocking outlet from plaintiff's quarry shows grounds for private action for damages from nuisance; Reynolds v. Presidio etc. R. R. Co., 1 Cal. App. 232, 81 Pac. 1119, adjacent owner has no cause of action for failure of street railway company to lay tracks in center of street as required by franchise; Smart v. Aroostook Lumber Co., 103 Me. 49, 68 Atl. 532, 14 L. R. A. (n. s.) 1083, riparian owner using navigable stream as highway may maintain injunction suit against one obstructing stream with logs.

Right of One Prevented by Unlawful Obstruction from using highway to maintain action. See note, 28 L. R. A. (n. s.) 1054.

41 Cal. 452–455, PEOPLE v. JOHNSON.

Confession Made After Threats are Made to prisoner is presumed involuntary until shown that threats had ceased to operate upon his mind.

Approved in People v. Loper, 159 Cal. 15, 112 Pac. 723, holding confession was involuntary.

As to When Confession Voluntary. See note, 18 L. R. A. (n. s.) 811, 859.

41 Cal. 455–458, KOHLER v. HAYES.

Conditional Sales are Valid in this state.

Approved in Liver v. Mills, 155 Cal. 462, 101 Pac. 299, following rule; Houser etc. Mfg. Co. v. Hargrove (Cal.), 59 Pac. 949, holding

sale of harvester for which notes were given under contract that title was not to pass until notes were fully paid is valid as conditional sale.

Right of One Leaving Chattels in Another's Possession as against latter's vendees or creditors. See note, 25 L. R. A. (n. s.) 783.

What Constitutes a Transaction a Sale. See note, 94 Am. St. Rep. 252.

41 Cal. 458–462, PEOPLE v. McCRARY.

Continuance to Secure Absent Witnesses should be granted on proper showing of materiality and due diligence to procure them.

Approved in People v. Lee (Cal.), 8 Pac. 686, reversing for refusal of continuance to procure witnesses.

41 Cal. 462–466, CRANMER v. PORTER.

Effect of Destruction or Cancellation, or redelivery to grantor for that purpose, or delivered but unrecorded deed. See note, 18 L. R. A. (n. s.) 1169.

41 Cal. 472–481, CLARKE v. FITCH.

If It is Intended to Charge in Complaint that words not libelous per se were used in an offensive sense, and were so understood by readers thereof, there must be a colloquium in complaint to show how words were libelous.

Reaffirmed in Baxter v. Dorrington, 13 Ariz. 144, 108 Pac. 460.

What Words are Libelous Per Se. See note, 116 Am. St. Rep. 806.

41 Cal. 481–485, SALMON v. VALLEJO.

What Covenants Run With the Land. See note, 82 Am. St. Rep. 671, 676, 685, 686.

Covenants of Seisin. See note, 125 Am. St. Rep. 447, 456.

Necessity of Eviction to Maintenance of action on warranty of title or seisin. See note, 17 L. R. A. (n. s.) 1184.

41 Cal. 489–494, WESTERN PACIFIC R. R. CO. v. KERR.

Claimant of Public Land is One Who has some interest in land recognized by federal laws.

Approved in Union Pac. R. R. Co. v. Harris, 76 Kan. 263, 91 Pac. 71, settler on public land who has filed declaration under pre-emption law is claimant of public land, and government cannot grant railroad right of way over such land.

41 Cal. 501–504, SOUTH BEACH LAND ASSOCIATION v. CHRISTY.

Reception of Irrelevant Testimony is not Ground for reversal where no injury appears.

Approved in Vidger Co. v. Great Northern Ry. Co., 15 N. D. 505, 107 N. W. 1084, following rule.

41 Cal. 507–511, PEOPLE ex rel. JENKINS v. DUNCAN.

Franchise to Construct Turnpike is not assignable without consent of granting power and does not pass to assignee in bankruptcy.

Distinguished in Evans v. Kroutinger, 9 Idaho, 158, 72 Pac. 884, holding assignment of ferry franchise could only be questioned by original grantor.

41 Cal. 512–514, **MATHEWS v. KINSELL.**

Party is not Liable for Damages to Land of another caused by overflow of water from his own land due to heavy rain when momentum was given to water by flowing through ditches dug by third person.

Approved in Myers v. Nelson (Cal.), 44 Pac. 803, holding owner of lower land cannot dam culvert under highway to stop flow of abnormal quantity of water conveyed to culvert by upper owners by means of ditches.

Findings of Court Should be of Ultimate, not probative, facts.

Approved in Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, in action to determine adverse claims to real estate, findings that plaintiff is owner and entitled to possession, and that defendant has no claim, are of ultimate facts.

41 Cal. 515–519, **CAMPBELL v. JONES.**

Failure to File Statement on Motion for new trial, within time, is waiver of motion.

Distinguished in Sherman v. Southern Pac. Co., 31 Nev. 287, 102 Pac. 257, discussing sufficiency of affidavit of counsel for relief against default in failure to move for new trial within time.

41 Cal. 519–521, **CHILD v. HUGG.**

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 761.

41 Cal. 525–532, **SINTON v. ASHBURY.**

Legislature has Constitutional Power to control affairs of a municipality and by appropriate legislation to compel it to pay just demands upon it, although not legally bound to pay.

Approved in State v. Aberdeen, 34 Wash. 69, 74 Pac. 1024, reaffirming rule; Fleming v. Hance, 153 Cal. 168, 94 Pac. 622, holding legislature could establish police or other inferior courts in Los Angeles and provide for their salaries out of city revenues; City of Columbus v. Union Pac. R. Co., 137 Fed. 873, 70 C. C. A. 207, holding Nebraska organic act does not deprive legislature of control of city streets.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 468, 471, 475, 473.

Distinguished in Fitch v. Board of Auditors, 133 Mich 186, 94 N. W. 955, holding constitution does not give legislature power to determine what debts a municipality shall pay or to compel their payment.

Assessments for Improvements by front-foot rule. See note, 28 L. R. A. (n. s.) 1160.

Maxim Nullum Tempus Occurrit Regi. See note, 101 Am. St. Rep. 170.

41 Cal. 532–536, **BOHALL v. DILLER.**

Vendor may Maintain Ejectment Against Vendee in possession under contract of sale who has failed to perform, upon return of purchase money paid.

Approved in Brixon v. Jorgenson, 28 Utah, 297, 107 Am. St. Rep. 720, 78 Pac. 675, where contract did not stipulate for forfeiture on failure to pay balance of purchase price, action could not be maintained.

As to When Vendor may Recover possession from vendee. See note, 107 Am. St. Rep. 728.

Real Estate Broker's Commissions as affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 604.

Miscellaneous.—Cited in Herzog v. Atchison, Topeka etc. R. R. Co., 153 Cal. 499, 95 Pac. 989, 17 L. R. A. (n. s.) 428, holding action under agreement to establish station in consideration of right of way was one for specific performance and not for damages for breach of contract.

41 Cal. 536–544, CITY OF SAN JOSE v. TRIMBLE.

Actual Adverse Possession for Five Years subsequent to act of 1863 relative to Spanish grants will bar recovery under title derived from Spain or Mexico in certain cases, even though title was not confirmed until after expiration of the five years.

Approved in Ohm v. San Francisco (Cal.), 25 Pac. 157, holding where one claiming title under Spanish grant may commence action for its enforcement under statute of 1863, running of limitation against such action is not checked by want of confirmation by United States of the survey.

Overruled in Valentine v. Sloss (Cal.), 37 Pac. 329, holding statute of limitations did not begin to run until patent was obtained from United States to Mexican grant.

Adverse Possession, to Bar Recovery, must have continued without interruption for statutory period, and any interruption, even by force or fraud, breaks the running of the statute.

Approved in Anderson v. Bassman, 140 Fed. 25, following rule.

41 Cal. 562–565, LEWISTON TURNPIKE CO. v. SHASTA ETC. WAGON ROAD CO.

Private Person has No Cause of Action to abate public nuisance unless he suffer some special injury to himself.

Approved in City Store v. San Jose-Los Gatos etc. Ry. Co., 150 Cal. 279, 88 Pac. 978, holding private person may maintain action to prevent construction of unauthorized railway on public street upon showing of special damage to himself.

Obstruction of Public Highway is common nuisance.

Reaffirmed in People v. McCue, 150 Cal. 197, 88 Pac. 900.

41 Cal. 566–571, LAWRENCE v. NEFF.

Insolvent's Conveyance to Certain Creditors held not to be "assignment for benefit of creditors."

Approved in Wylly-Gabbett Co. v. Williams, 53 Fla. 933, 42 So. 928, upholding mortgage of whole property by insolvent to secure certain creditors.

Preference by Mortgage or Sale as assignment for creditors. See note, 37 L. R. A. 340.

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 335.

41 Cal. 571–582, WALSH v. HILL.

General Inclosure of Large Tract of land is not sufficient to constitute actual exclusive possession of specific parcel within it when much of the inclosed land is not claimed and much is held adversely.

Approved in Hamilton v. Flournoy, 44 Or. 102, 74 Pac. 485, general inclosure common to several persons does not establish adverse possession of one.

Distinguished in Cory v. Santa Ynez Land etc. Co., 151 Cal. 784, 91 Pac. 649, holding where owner of large inclosed tract conveyed a portion and put vendee in possession, such acts did not put an end to owner's possession of residue.

41 Cal. 583–588, **FUQUAY v. STICKNEY.**

Deed of Trust Conveys Such Interest as imposes upon trustee duty to give notice prescribed by section 1192, Code of Civil Procedure, to prevent subordination of his claim to lien of person furnishing labor and material.

Overruled in Hollywood Lumber Co. v. Love, 153 Cal. 271, 272, 100 Pac. 699, holding deed of trust to secure debt of owner does not impose on trustee duty to give notice under section 1192, Code of Civil Procedure.

Power of Lessee or Vendee to subject owner's interest to mechanics' liens. See note, 23 L. R. A. (n. s.) 618.

When Mechanics' Liens Superior to earlier mortgages. See note, 14 L. R. A. 307.

41 Cal. 588–594, **WILL v. SINKWITZ.**

Liability for Damming back stream. See note, 59 L. R. A. 881.

41 Cal. 595–610, **SALMON v. WILSON.**

Denial of Plaintiff's Title and Right of possession in ejectment is admission of ouster.

Approved in Dondero v. O'Hara, 3 Cal. App. 639, 640, 86 Pac. 987, 988, following rule.

Demurrer on Ground of Ambiguity should be overruled if enough appears to render the pleading demurred to easy of comprehension and free from reasonable doubt.

Approved in Loring v. Dutchess Ins. Co., 1 Cal. App. 189, 81 Pac. 1026, following rule.

Deed of Valuable Ranch to Children for slight money consideration held to be gift.

Approved in Lynch's Estate, 220 Pa. 18, 69 Atl. 291, holding deed of mother to daughter for one dollar consideration to be gift.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 112.

41 Cal. 611–616, **MARSHALL v. CALDWELL.**

Where Vendee in Contract for Sale of Land is entitled to specific performance, he may compel vendor to convey any less interest he may have, if he has not the interest he contracted to convey.

Reaffirmed in Farnum v. Clarke, 148 Cal. 618, 84 Pac. 170.

Distinguished in Garvey v. Lashells, 151 Cal. 532, 91 Pac. 501, holding where vendor under contract to convey perfect title to land did not possess perfect title, and vendee acquired outstanding title, vendee cannot compel vendor to convey what title he has.

Right of Vendee to Specific Performance with abatement from price where vendor unable to give clear title. See note, 10 L. R. A. (n. s.) 118.

41 Cal. 626–629, **THOMPSON v. THORNTON.**

Illness of Attorney Held Ground for continuance when party was unable to secure other counsel, and affidavit showed meritorious defense.

Approved in Rankin v. Caldwell, 15 Idaho, 631, 99 Pac. 110, refusing continuance on ground of attorney's illness when meritorious defense was not shown by affidavit.

41 Cal. 630–632, **WILSON v. SHACKELFORD.**

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 389.

41 Cal. 634–640, **LOW v. HUTCHINGS.**

Right of Pre-emptioner on Public Land is defeasible by government at any time before payment.

Approved in Messenger v. Kingsbury, 158 Cal. 618, 112 Pac. 68, applying rule to state lands; Graham v. Great Falls W. P. & T. Co., 30 Mont. 401, 76 Pac. 811, holding preferential right of successful contestant to purchase public lands not vested right, but mere privilege of being first entryman.

41 Cal. 640–644, **PEOPLE v. EDWARDS.**

Unqualified Expression of Opinion as to Guilt or innocence of prisoner is ground for challenge of juror for implied bias.

Reaffirmed in State v. Roberts, 27 Nev. 468, 77 Pac. 599.

Character and Reputation of Deceased as affecting homicide. See note, 3 L. R. A. (n. s.) 353.

41 Cal. 645–657, **PEOPLE v. AH SAM.**

A Motion is an Application for an Order or rule of court made viva voce, to court or judge, and making out and filing application for order is not sufficient.

Approved in Brownell v. Superior Court, 157 Cal. 710, 109 Pac. 94, holding motion of creditor to set aside order of partial distribution of estate properly presented when oral motion was made within six months after entry of decree; People v. Long, 7 Cal. App. 30, 93 Pac. 389, motion for new trial in criminal case cannot be awarded after judgment; City of Marengo v. Eichler, 245 Ill. 49, 91 N. E. 759, holding objections to confirmation of assessment under ordinance for public improvement filed with clerk not to be motion.

Distinguished in Gamble v. District Court, 27 Nev. 248, 74 Pac. 533, holding motion to change place of trial was properly made by forwarding application and authorities to judge who had formerly been counsel in the action and was then sitting in another county.

Incorporation may be Proven by Reputation in trial on indictment for possessing counterfeit bills purporting to be issued in name of corporation.

Approved in People v. Morley, 8 Cal. App. 374, 97 Pac. 85, holding in criminal action for burning of insured property it need only be shown that company intended to be defrauded was de facto corporation; State v. Rozeboom, 145 Iowa, 625, 124 N. W. 785, holding corporate character of prosecutor established by parol.

Presumption as to Incorporation. See note, 22 L. R. A. 278.

Forgery of Worthless Instruments. See note, 24 L. R. A. 40.

41 Cal. 663–679, MELEY v. COLLINS.

Five Years' Delay in Attacking Forged Deed does not estop party from saying deed is not his deed as against innocent purchaser deraigning title through forged deed.

Distinguished in Macomber v. Kinney, 114 Minn. 155, 128 N. W. 1004, one not in possession who has an interest in land which does not appear of record and fails to disclose it, and stands by and suffers estate to be sold and improved with knowledge that title had been mistaken, cannot assert claim against purchaser.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 42 CALIFORNIA.

42 Cal. 11–18, GOODYEAR v. WILLISTON.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 473.

42 Cal. 18–21, PEOPLE v. AH YING.

If a Doubt Arises During Trial as to Sanity of defendant, it is duty of court, on its own motion, to suspend proceedings until question of sanity has been determined.

Approved in Marshall v. Territory, 2 Okl. Cr. 145, 101 Pac. 142, and Steward v. State, 124 Wis. 631, 102 N. W. 1081, both following rule; Napa State Hospital v. County of Solano, 4 Cal. App. 512, 88 Pac. 502, holding county liable for expense of insane accused at state hospital only when adjudged insane after case is brought to trial.

Insanity After Commission of Criminal Act. See note, 38 L. R. A. 578.

District Court may Adjourn to Day beyond time for holding court in another county.

Approved in White v. Brown, 1 Ind. Ter. 106, 38 S. W. 337, and State v. Cotterel, 12 Idaho, 578, 86 Pac. 527, 528, both following rule.

42 Cal. 27–34, BORNHEIMER v. BALDWIN.

On Appeal for Exclusion of Testimony record should show what such testimony was.

Approved in San Francisco Commercial Agency v. Hogan Co., 6 Cal. App. 409, 92 Pac. 312, following rule.

42 Cal. 35–75, APPEAL OF S. O. HOUGHTON.

In Construing Statutes, Words are to be Taken in their usual and popular sense, unless they have a well-understood technical meaning.

Approved in In re McCoy, 10 Cal. App. 143, 101 Pac. 431, following rule; Edwards v. Sweigert, 15 Cal. App. 507, 115 Pac. 258, holding same effect, if possible, must be given to all parts of statute.

Words "Final and Conclusive," in Act of 1870, relating to San Francisco streets, means that no appeal lies from judgment.

Cited in Man v. Stoner, 14 Wyo. 199, 83 Pac. 221, holding "final" as applied to decree meant there should be no further appeal.

Proceeding Under Acts of 1868 and 1870 to modify street grades was not case at law of which supreme court has appellate jurisdiction.

Cited in Keech v. Joplin, 157 Cal. 5, 106 Pac. 224, upholding appellate jurisdiction of district court of appeal over mandamus to compel payment of warrant out of protection district general fund.

Act Making Conclusive Determination of Commissioners as to change of grade of streets is valid.

Approved in Gano v. Minneapolis & St. L. R. Co., 114 Iowa, 720, 89 Am. St. Rep. 393, 87 N. W. 717, 55 L. R. A. 263, upholding act requiring railroads exercising power of eminent domain to pay attorney's fees and costs of owner.

Constitutionality of Statute Denying Right of appeal in certain classes of cases. See note, 19 L. R. A. (n. s.) 382.

42 Cal. 75–86, PAGE v. VILHAC.

Contract for Sale of Land with Provision for resale considered and held not to be mortgage, but sale.

Approved in Farmer v. Grose, 42 Cal. 174, holding deed absolute with defeasance back not to be mortgage when no continuing debt from grantor to grantee; Fletcher v. Northcross (Cal.), 32 Pac. 329, deed and contract for resale between mortgagor and mortgagee made after dismissal of foreclosure proceedings considered and held not to be mortgage, but conditional sale.

42 Cal. 86–107, 10 Am. Rep. 282, ATKINS v. GAMBLE.

Where Shares of Stock of Corporation are pledged, the identity of particular certificates pledged is unimportant.

Approved in Bell v. Bank of California, 153 Cal. 239, 94 Pac. 892, complaint for redemption of pledged stock which shows on face that property has passed out of defendant's control is insufficient.

Conversion of Pledged Property by Invalid Sale. See note, 43 L. R. A. 740.

42 Cal. 110–121, CALDERWOOD v. PEYSER.

Appeal Lies from Order, Made After Judgment, striking from files statement on motion for new trial.

Approved in Magee v. Superior Court, 10 Cal. App. 161, 101 Pac. 535, order made after judgment directing payment of money sold on execution sale to purchaser is appealable; Freeman v. Brown, 4 Cal. App. 109, 87 Pac. 205, order denying motion to amend statement on motion for new trial is appealable; Descalso v. Duane (Cal.), 33 Pac. 328, considering appeal from order dismissing motion for new trial; Shumake v. Shumake, 17 Idaho, 658, 107 Pac. 45, appeal lies from order after final judgment vacating such judgment.

Motion for New Trial may be Dismissed for failure to prosecute.

Approved in Desmond v. Faus (Cal.), 33 Pac. 458, following rule.

A Case is a State of Facts Which Furnishes Occasion for exercise of jurisdiction of court or justice.

Approved in United States v. Dolla, 177 Fed. 104, 100 C. C. A. 521, and Barnett v. County Court, 111 Mo. App. 699, 86 S. W. 576, both approving definition.

42 Cal. 123–129, FAIRCHILD v. DOTEN.

Substantial Compliance With Statutory Terms of special proceeding is essential to validity of judgment therein.

Approved in In re Abrams, 2 Cal. App. 239, 83 Pac. 364, holding void award on arbitration made after time stipulated by parties.

Distinguished in Matter of Silliman, 159 Cal. 157, 113 Pac. 136, judgment entered on award not void because agreement to arbitrate does not expressly require submission to be made rule of court.

42 Cal. 129–134, BANK OF STOCKTON v. HOWLAND.

Objection to Recovery of Claim Against Estate of decedent on ground it was not presented to executor cannot be first made in appellate court, nor on motion for new trial.

Reaffirmed in Clayton v. Dinwoodey, 33 Utah, 263, 93 Pac. 727.

Distinguished in Burke v. Maguire, 154 Cal. 464, 98 Pac. 24, objection by general demurrer of failure to present claim to administrator is available on appeal.

42 Cal. 139–148, BREWSTER v. LIME.

Person Holding Stock on Books of Company as trustee may bind concealed owner by hypothecating it to those who have no notice of true owner.

Approved in Tafft v. Presidio & Ferries R. Co. (Cal.), 22 Pac. 487, holding corporation not guilty of conversion for issuing to attorney in fact of a stockholder, who presents certificates and power of attorney, another certificate in his own name, when they are ignorant of the fraud.

Effect of Putting Transferable Paper or Securities into another's possession, to estop owner as against purchaser in good faith. See note, 29 L. R. A. (n. s.) 254.

Duty of Corporation as to Transfer of stock held in trust. See note, 15 L. R. A. 644.

What Circumstances Sufficient to Put Purchaser of negotiable paper on inquiry. See note, 29 L. R. A. (n. s.) 367.

42 Cal. 148–149, SANGEL v. DELLINGER.

Effect of Judgment Obtained upon Unauthorized Appearance by attorney. See note, 21 L. R. A. 856.

42 Cal. 152–158, GRAY v. COLLINS.

Inclosure of Land by Substantial Fences or barriers constitutes actual possession without any other act.

Approved in Knowles v. Crocker Estate Co., 149 Cal. 284, 286, 86 Pac. 717, 718, following rule.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 387.

42 Cal. 159–165, HILL v. HASKIN.

Where Right of Action Depends on Condition Precedent, it must be fulfilled before limitations commence to run.

Reaffirmed in Ott v. Boring, 131 Wis. 483, 110 N. W. 828.

42 Cal. 165–169, 10 Am. Rep. 296, PEOPLE v. HARRINGTON.

Prisoner has Right to be Free of shackles at trial.

Approved in State v. Temple, 194 Mo. 245, 247, 92 S. W. 871, 872, following rule; Parker v. Territory of Arizona, 5 Ariz. 287, 52 Pac.

363, holding it not undue restraint when prisoner was shackled only during arraignment.

Right of Prisoner to Appear Unmanacled at trial. See note, 39 L. R. A. 821, 825.

42 Cal. 169–174, FARMER v. GROSE.

When Absolute Deed is Accompanied by Defeasance, test as to whether it is a mortgage is whether or not there was, notwithstanding the conveyance, a subsisting, continuing debt from grantor to grantee.

Approved in Keifer v. Myers, 5 Cal. App. 673, 91 Pac. 164, holding sale of stock with defeasance a pledge when there was no consideration for sale and none of vendor's stockholder's liability was assumed by vendee; Schultz v. McLean (Cal.), 25 Pac. 429, holding no mortgage existed in absence of continuing obligations of debtor to creditor between the parties; Fletcher v. Northcross (Cal.), 32 Pac. 329, deed to land and contract for resale between mortgagor and mortgagee made after dismissal of foreclosure proceedings considered and held not to be mortgage, but conditional sale.

42 Cal. 174–179, CHRISTY v. DANA.

Allegation That Debt is Barred by Discharge in insolvency is allegation of conclusion of law.

Approved in Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 306, 90 Pac. 205, holding allegation of ownership of note by means of assignment made "pursuant to order of court" merely avers legal conclusion.

Title Acquired by Mortgagor Feeds his prior mortgage.

Approved in Jones v. Chalfant (Cal.), 31 Pac. 258, following rule; Hafemann v. Gross, 199 U. S. 346, 26 Sup. Ct. 80, 50 L. Ed. 220, and Stewart v. Powers (Cal.), 33 Pac. 490, both holding title acquired by pre-emptioner through patent inures to benefit of prior mortgagee; Tilton v. Flormann, 22 S. D. 338, 117 N. W. 383, holding title under federal patent passed under patentee's warranty deed.

Conveyance Recorded Before Grantor obtained title, as notice. See note, 23 L. R. A. 563.

42 Cal. 180–196, JONES v. CLARK.

Where, on Question of Ratification of Note, findings embraced several facts tending to establish it, and then conclusion therefrom that there had been full ratification, the conclusion was the ultimate fact, and was itself a finding of fact.

Approved in In re Bullard's Estate (Cal.), 31 Pac. 1120, refusing to set aside finding of fact because intermixed with statements of evidence, argument, and conclusions of law; Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, holding in action to determine adverse claims to realty findings that plaintiff is owner and entitled to possession and defendant has no claim are of ultimate facts; Dodson v. Crocker, 20 S. D. 313, 105 N. W. 929, upholding finding as being of fact, though stated as conclusion of law.

Mining Partnerships are Governed by law of ordinary partnerships, except where general usage has established different rules, the only differences being such as flow from fact that there is no delectus personae.

Approved in Kelley v. McNamee, 164 Fed. 375, 22 L. R. A. (n. s.) 851, 90 C. C. A. 357, holding retiring partner liable for wages of employees who continue in employ of mining partnership after his retirement without knowledge.

Note Given by Superintendent of Mining Corporation for its use, interest on which was paid by corporation, held to be note of corporation.

Approved in Nunnemacher v. Poss, 116 Wis. 449, 92 N. W. 377, holding note reciting that corporation and undersigned agreed to pay, and signed in corporation name and by officers, to be binding on both corporation and officers.

Personal Liability of Officers on Note made for corporation. See note, 19 L. R. A. 677.

Partnership After Death. See note, 79 Am. St. Rep. 716.

42 Cal. 196–201, EX PARTE BULL.

Prisoner's Right to Discharge on Habeas Corpus after commitment and before trial. See note, 100 Am. St. Rep. 34, 35.

Delay of Prosecution as Ground for Discharge. See note, 56 L. R. A. 515, 540.

42 Cal. 210–215, ESTATE OF SILVEY.

It is to be Presumed That Husband does not intend to dispose by will of that part of the community property which he cannot so dispose of.

Approved in Estate of Vogt, 154 Cal. 510, 98 Pac. 266, following rule; In re Smith's Estate (Cal.), 38 Pac. 951, holding will, by its terms, purported to dispose of all testator's property, including his wife's interest.

Widow's Election Between Will and Dower or community property. See note, 92 Am. St. Rep. 705.

42 Cal. 215–218, MYERS v. SAN FRANCISCO.

Discretion of Jury in Fixing Damages for wrongful death should not be interfered with, except in clear cases of abuse.

Approved in Gulf, Colorado etc. Ry. Co. v. Brown, 33 Tex. Civ. App. 272, 76 S. W. 796, refusing to disturb damages fixed by jury.

42 Cal. 218–227, HALL v. POLACK.

Evidence Contrary to Admissions in pleadings should be disregarded.

Reaffirmed in Horn v. Martinho, 7 Cal. App. 205, 94 Pac. 80.

Court may of Own Motion Set Aside Order inadvertently made.

Approved in Raine v. Lawler, 1 Cal. App. 486, 82 Pac. 689, and Frost v. Idaho Irr. Co., 19 Idaho, 381, 382, 114 Pac. 41, both following rule.

42 Cal. 233–235, HIGGINS v. BARKER.

Change of Use or Channel of Water appropriated. See note, 30 L. R. A. 385.

42 Cal. 245–252, REEDY v. SMITH.

Contract to Complete Work by Given Time or "as soon as practicable" allows reasonable time for completion.

Approved in Salinas Lumber Co. v. Magne-Silica Co., 159 Cal. 185, 112 Pac. 1090, where time was not of essence of contract to deliver lumber reasonable time allowed.

42 Cal. 252–257, **KEYS v. MARIN COUNTY.**

Exceptions to Rule That Certiorari will not lie where there is an appeal. See note, 50 L. R. A. 788.

42 Cal. 257–269, **BROWN v. CENTRAL LAND CO.**

Authority to Agent to Sell Land on Credit allows agent to give only reasonable credit.

Approved in Morton v. Morris, 27 Tex. Civ. 267, 66 S. W. 97, holding power to sell land on such terms as agent shall deem meet did not authorize him to defer payment of purchase price until determination of validity of attachment on land.

42 Cal. 279–285, **WHITE v. LYONS.**

Legal and Equitable Remedies may be had in one and the same action.

Reaffirmed in Becker v. Superior Court, 151 Cal. 317, 90 Pac. 690.

42 Cal. 288–290, **ESTATE OF GASQ.**

Miscellaneous.—Cited in Estate of Blythe, (No. 2), 1 Cof. Prob. 116, as to power of court to appoint attorney for absent heirs.

42 Cal. 290–293, **DE LA MONTAGNIE v. UNION INSURANCE CO.**

Guardian cannot Sell Property of Ward without order of court.

Reaffirmed in Gentry v. Bearss, 82 Neb. 791, 118 N. W. 1079.

42 Cal. 303–313, 10 Am. Rep. 299, **HANSON v. McCUE.**

Use of Water by Lower Owner for Fifteen Years, who conducts it through artificial channel from land of upper owner, does not create presumption of grant of easement by upper owner.

Approved in Van Rossum v. Grand Rapids Brewing Co., 129 Mich. 535, 89 N. W. 372, holding easement not presumed in right to conduct water from reservoir on one lot to tank on another when such use had been abandoned before severance of ownership of lots.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 718.

Rights Acquired in an Artificial Condition of a body of water. See note, 50 L. R. A. 843.

Percolating Waters Belong to Owner of Freehold.

Approved in Cohen v. La Canada Land etc. Co., 157 Cal. 692, 91 Pac. 590, 11 L. R. A. (n. s.) 752, percolating waters developed may be taken from land in which they are found and used elsewhere, provided no injury results to adjacent property holders.

Rights in Subterranean Waters. See note, 19 L. R. A. 92, 94, 98.

Springs are Presumed to be Supplied by Percolation, in absence of showing they are supplied by well-defined stream.

Approved in Western Md. R. R. Co. v. Martin, 110 Md. 567, 73 Atl. 272, and Barclay v. Abraham, 121 Iowa, 622, 100 Am. St. Rep. 365, 96 N. W. 1081, 64 L. R. A. 255, both following rule; Haffner v. Dobrinski, 17 Okl. 443, 88 Pac. 1044, and Porter v. Anderson, 14 Cal. App. 721, 113 Pac. 347, both complaints in specific performance held insufficient.

Effect of Bad Motive to Make Actionable what would otherwise not be. See note, 62 L. R. A. 691.

42 Cal. 313–315, **THOMPSON v. CONNOLLY.**

Description of Land in Judgment is presumed definite in absence of showing to contrary.

Reaffirmed in Merryman v. Kirby, 13 Cal. App. 347, 109 Pac. 637.

42 Cal. 316–326, STOPPELKAMP v. MANGEOT.

Notice is Unnecessary to Terminate Tenancy and entitle landlord to re-enter when tenant refuses to surrender premises at end of lease for specific terms.

Reaffirmed in Craig v. Gray, 1 Cal. App. 599, 82 Pac. 700.

Unlawful Detainer. See note, 120 Am. St. Rep. 41.

Lease from Month to Month does not terminate by mere lapse of time.

Approved in Owen v. Herzihoff, 2 Cal. App. 623, 84 Pac. 275, holding notice to quit must be for one month when tenancy is from month to month.

Tenant for Period of One Month who holds over by consent thereby becomes tenant from month to month.

Reaffirmed in Baker v. Kenny, 69 N. J. L. 181, 54 Atl. 526, and Byxbee v. Blake, 74 Conn. 610, 51 Atl. 536, 57 L. R. A. 222.

42 Cal. 339–345, CORREA v. FRIETAS.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 266.

42 Cal. 346–357, BRUCK v. TUCKER.

In Suit for Specific Performance of contract for sale of land, plaintiff should aver that price to be paid is just and fair.

Approved in Kaiser v. Barron, 153 Cal. 790, 96 Pac. 807, Herzog v. Atchison etc. R. R., 153 Cal. 501, 95 Pac. 900, 17 L. R. A. (n. s.) 428, White v. Sage, 149 Cal. 615, 616, 87 Pac. 193, 194, Flood v. Templeton, 148 Cal. 378, 83 Pac. 150, Martin v. Condrey, 13 Cal. App. 620, 110 Pac. 485, and Kerr v. Moore, 6 Cal. App. 306, 92 Pac. 107, all following rule; Swanston v. Clark, 153 Cal. 303, 95 Pac. 1119, holding plea of rescission insufficient for failing to aver offer to compensate for improvements; Sunrise Land Co. v. Root, 160 Cal. 98, 116 Pac. 73, mere allegation that contract was in writing and that sale was "legally and fairly" made is insufficient.

Necessity in Complaint for Specific Performance of showing adequacy of consideration. See note, 19 L. R. A. (n. s.) 179.

42 Cal. 358–362, WOODS v. WHITNEY.

Where Issue was Whether Deed Directed by husband to be made to wife inured as gift to her, it is for court to decide upon husband's intentions from his acts and conduct at the time.

Approved in Killian v. Killian, 10 Cal. App. 319, 101 Pac. 808, holding husband's intention to deed community property to wife can only be shown by acts and declarations at the time.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 112.

Where Husband Purchases Property With Community Funds and deeds it to wife, with intent to make it her separate property, such deed operates to vest property in her as separate estate.

Approved in Wright v. Wright (Cal.), 41 Pac. 696, following rule.

Distinguished in Nilson v. Sarment, 153 Cal. 530, 126 Am. St. Rep. 91, 96 Pac. 317, holding deed to land intended as home for family taken in wife's name remains community property.

What is Community Property. See notes, 126 Am. St. Rep. 107; 4 Cof. Prob. 49.

Right of One to Testify as to his intent. See note, 23 L. R. A. (n. s.) 387.

42 Cal. 367–372, TAYLOR v. CASTLE.

Cause of Action is Same as That in Former Suit when same evidence will support both actions.

Approved in Page v. Graver, 5 Cal. App. 387, 90 Pac. 483, following rule; Water, Light etc. Co. v. City of Hutchinson, 160 Fed. 46, 90 C. C. A. 547, 19 L. R. A. (n. s.) 219, holding judgment in former suit will not operate as estoppel in action on different claim unless matters actually litigated are the same. .

Established Usage of Mining Company in transacting business held to be part of contract of partnership.

Approved in Penn. R. R. Co. v. Naive, 112 Tenn. 254, 79 S. W. 127, 64 L. R. A. 443, holding contract with carrier to be made with reference to custom of not giving notice of arrival of freight on holiday.

Mining Partnership is not Dissolved by sale of an interest by a partner to a stranger.

Reaffirmed in Loy v. Alston, 172 Fed. 92, 96 C. C. A. 578.

Partnership After Death. See note, 79 Am. St. Rep. 716.

42 Cal. 372–375, LITTLEFIELD v. NICHOLS.

Title Under Later Sale on Earlier Lien is superior to title under earlier sale on junior lien.

Approved in Woods v. Kellerman, 3 Cal. App. 425, 89 Pac. 359, holding senior lien not impaired by sale under junior lien.

Superiority of Lien of Local Assessment over prior lien. See note, 35 L. R. A. 378.

42 Cal. 387–390, McCOURTNEY v. FORTUNE.

Upon Appeal from Final Judgment, order which is itself made by statute subject to distinct appeal cannot be reviewed.

Criticised in White v. Atchison etc. Co., 74 Kan. 781, 88 Pac. 56, holding court could review appealable order made within one year of filing appeal from final judgment.

Entry or Record Necessary to Complete Judgment or order. See note, 28 L. R. A. 627.

42 Cal. 390–397, TALBERT v. SINGLETON.

Actual Possession of Land With Exercise of usual acts of ownership and dominion is constructive notice of possessor's claim.

Approved in Pioneer Investment etc. Co. v. Board of Education, 35 Utah, 9, 136 Am. St. Rep. 1016, 99 Pac. 152, where corporation erects permanent structures on land and uses them as its own, and its officers tell land owner they will defend corporation's claims acquired by such use and ask compensation for removing structures from land, possession may ripen into title by prescription.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 51, 73, 90, 104.

42 Cal. 397–402, TALBERT v. HOPPER.

Presumption is in Favor of Legality of sessions of district court.

Approved in State v. Cotterel, 12 Idaho, 578, 86 Pac. 528, holding illegality of session of district court not shown; Stockslager v. United

States, 116 Fed. 595, 54 C. C. A. 46, holding presumption is in favor of legality of convening of special term of court and that notice was duly given of time and place.

42 Cal. 402–408, SWEENEY v. REILLY.

Abandonment is Question of Intention, and delay in asserting rights with knowledge of occupancy by others may be taken into consideration in connection with other circumstances to throw light on owner's intentions.

Approved in Lindblom v. Rocks, 146 Fed. 665, 77 C. C. A. 86, holding neglect to sue for possession for four years after entry of stranger did not show abandonment.

42 Cal. 412–415, BATCHELDER v. MOORE.

Power of Court to Punish for Contempt is arbitrary in its nature, and not to be upheld except under circumstances and in manner prescribed by law.

Approved in In re Gitkin, 164 Fed. 74, holding court of bankruptcy must strictly comply with law in committing bankrupt for contempt before referee; Boyd v. Glucklich, 116 Fed. 137, 53 C. C. A. 451, holding court of bankruptcy cannot imprison bankrupt for failure to obey order to deliver money which is not in his possession to his trustee; Cline v. Langan, 31 Nev. 244, 245, 101 Pac. 555, violation of void order of referees is not contempt; Lutz v. District Court, 29 Nev. 154, 86 Pac. 445, holding inadequate to sustain contempt finding that defendant in divorce had been earning a competence for self and family, as not being binding on present ability to pay alimony; State v. Harvey, 16 N. D. 154, 112 N. W. 53, and State v. McGahey, 12 N. D. 547, 97 N. W. 869, both holding affidavit of facts upon information and belief cannot be ground for proceeding in contempt; dissenting opinion in Chicago etc. Ry. Co. v. Gildersleeve, 219 Mo. 198, 118 S. W. 95, majority holding court's power to punish for contempt could not be restricted by legislature.

Mere Presumptions and Intendments are not to be indulged in favor of validity of contempt proceedings, but they must clearly show the case within provisions of the law.

Approved in In re Shortridge, 4 Cal. App. 375, 379, 90 Pac. 479, 481, following rule; Crites v. State, 74 Neb. 692, 105 N. W. 471, and In re Shull, 221 Mo. 628, 133 Am. St. Rep. 476, 121 S. W. 11, both holding defective commitment for contempt; dissenting opinion in People v. News-Times Pub. Co., 35 Colo. 401, 84 Pac. 958, majority holding lack of verification of information in contempt did not deprive court of jurisdiction.

Remedies of Plaintiff Dispossessed after being put in possession under judgment in ejectment. See note, 135 Am. St. Rep. 649.

42 Cal. 416–418, THOMASSON v. WOOD.

Omission of Revenue Stamp cannot be set up as defense to action on contract in state court.

Approved in Bennett v. Morris (Cal.), 37 Pac. 929, following rule; Beer v. State, 42 Tex. Cr. 505, 96 Am. St. Rep. 610, 60 S. W. 963, revenue stamp no part of check.

Failure to Comply With Statute requiring stamping of writings. See notes, 84 Am. St. Rep. 190; 48 L. R. A. 306.

42 Cal. 418–434, PALACHE v. PACIFIC INSURANCE CO.

In Construction of Statutes to Ascertain Legislative Intent, exact phraseology is to be less regarded than general tenor of entire legislative scheme embodied in statute.

Approved in In re Sing, 14 Cal. App. 513, 112 Pac. 582, applying rule to juvenile court law.

42 Cal. 435–438, SHAW v. CROCKER.

Persons Authorized by Contract to Make or Improve public streets are not answerable for consequential damages if they act within jurisdiction and with care and skill.

Approved in Fitzgibbon v. Western Dredging Co., 141 Iowa, 335, 117 N. W. 881, holding drainage ditch contractor not liable for injury caused by excavation according to plans.

Overruled in De Long v. Warren (Cal.), 36 Pac. 1009, holding one who fills in earth to make street conform to new grade is liable to adjoining property owner for consequential damages.

42 Cal. 439–444, FOOTE v. RICHMOND.

Court may in Its Sound Discretion admit evidence offered by plaintiff after close of evidence in chief.

Approved in Maloney v. King, 30 Mont. 167, 76 Pac. 7, holding evidence offered in rebuttal improperly excluded.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 859.

42 Cal. 444–446, RYCRAFT v. RYCRAFT.

Wife has No Ground for Divorce for nonsupport when her own earnings are sufficient therefor.

Reaffirmed in Locke v. Locke, 153 Cal. 59, 94 Pac. 245.

42 Cal. 446–452, CREIGHTON v. SAN FRANCISCO.

Legislature may Appropriate Moneys of Municipal Corporations to pay claims found equitably due individuals.

Approved in McSurely v. McGrew, 140 Iowa, 169, 132 Am. St. Rep. 248, 118 N. W. 418, legislature may permit deposit of county funds in banks and absolve officers of liability; Horton v. City of Newport, 27 R. I. 288, 61 Atl. 761, 1 L. R. A. (n. s.) 512, General Assembly can control police though duties are confined to city; State v. Aberdeen, 34 Wash. 69, 74 Pac. 1024, municipal corporation mere agent of state subject to its control.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 468, 473, 475.

42 Cal. 452–457, GUEDICI v. BOOTS.

Mistake in Running Partition Line carried into deeds may be relieved in equity.

Approved in Benz v. City of St. Paul, 89 Minn. 39, 93 N. W. 1040, holding conveyance to adjacent owner of part of his own land through mistake as to boundary did not estop such owner from asserting title to true line.

42 Cal. 457–462, McCREERY v. BROWN.

Discretion of Lower Court as to Dissolving Injunction will not be interfered with unless abused.

Approved in Humphrey v. Buena Vista Water Co., 2 Cal. App. 543, 84 Pac. 297, holding lower court acted within its discretion in dissolving injunction against sale of corporate stock for nonpayment of assessment.

42 Cal. 462–464, CHAPMAN v. HOLLISTER.

Action by Heirs for Possession of Property of estate cannot be maintained until administration has been closed or property distributed by decree of probate court.

Approved in Thorpe v. Sampson, 84 Fed. 66, following rule.

42 Cal. 465–469, BARSTOW v. CITY R. R. CO.

In Action Against Corporation on Quantum Meruit for services, situation of parties at time and business relation may be shown as relevant and material circumstances.

Approved in Perry v. J. Noonan Furniture Co., 8 Cal. App. 40, 95 Pac. 1130, following rule; Bassett v. Fairchild (Cal.), 61 Pac. 795, holding directors of corporation could ratify payment made to director for services outside his duties as director.

42 Cal. 469–474, CRAWFORD v. BARK "CAROLINE REED."

Admiralty Jurisdiction of Contracts. See note, 66 L. R. A. 215.

42 Cal. 475–479, RUSSELL v. MIXER.

Allegation of Essential Matter by inference is good in absence of demurrer.

Reaffirmed in Dillon v. Cross, 5 Cal. App. 768, 91 Pac. 440.

Equity will Relieve Mistake by Which Parties, through ignorance or inattention, fail to prepare proper kind of instrument to effectuate their intention.

Approved in Smith v. Owens, 65 W. Va. 69, 59 S. E. 766, reforming deed failing of purpose through scrivener's mistake; Taylor v. Godfrey, 62 W. Va. 683, 59 S. E. 634, granting relief from instrument which through mistake failed to effectuate intention of parties.

Reinstatement of Mortgage Released or discharged by mistake. See note, 58 L. R. A. 788.

42 Cal. 479–484, SPENCER v. HINSELMAN.

Subject Matter of Action to Recover Mining Claim on public land is a question of title to real property in fee.

Reaffirmed in Buchner v. Malloy, 155 Cal. 255, 100 Pac. 688.

42 Cal. 484–492, SMITH v. McDONALD.

Court has Jurisdiction of Persons of minors when general guardian appears and defends for them, although they are not personally served.

Approved in Kapiolani's Estate v. Atcherly, 14 Haw. 665, upholding decree affecting property of minors who were not personally served but appeared by guardian.

Admissions and Waivers by Fiduciaries in Actions. See note, 32 L. R. A. 685.

When a Rule for Determining Title to real property has become established by judicial decision, its inherent justice or injustice are of less importance than that it should be invariable.

Approved in Green v. Tenold, 14 N. D. 50, 116 Am. St. Rep. 638, 103 N. W. 399, following rule; Hollywood Lumber Co. v. Love, 155 Cal. 274, 100 Pac. 700, holder of trust deed is not required to give notice of interest to avoid liability imposed by mechanic's lien; Schoonover v. Birnbaum, 148 Cal. 551, 83 Pac. 1000, homestead cannot be selected from lands held as tenant in common.

42 Cal. 493–509, **SICHEL v. CARRILLO.**

Expiration of Time Fixed in Statute of Limitations for recovery of money does not discharge the debt, but only removes the remedy.

Approved in Towle v. Sweeney, 2 Cal. App. 34, 83 Pac. 76, holding when primary obligation of contractors to materialmen for material furnished, or verbal contract, is barred, the right of action of materialmen on bond against sureties is also barred; Morrow v. Barker, 119 Cal. 66, 51 Pac. 13, Code of Civil Procedure, section 1493, bars claims on contract against estates not presented within time limited, although claimant had no notice by reason of being out of state; Newhall v. Hatch (Cal.), 64 Pac. 252, when suit was brought on obligation in mortgage and dismissed as barred by limitations, and property was sold on execution on judgment had prior to main promise to pay mortgage debt, suit cannot be maintained on the new promise when execution purchaser took in reliance upon the mortgage debt being barred.

Counsel Fees on Foreclosure of Mortgage can only be allowed when provided for therein.

Distinguished in Hildreth v. Williams (Cal.), 33 Pac. 1113, holding statutory fees could not be allowed in action to enforce pledge; Armijo v. Henry, 14 N. M. 193, 89 Pac. 309, allowing attorney's fees on foreclosure of deed of trust where note, but not deed, provided for attorney's fees.

42 Cal. 513–522, **SAN FRANCISCO v. CERTAIN REAL ESTATE.**

Legislature can Cure Defects in Proceedings of board of supervisors relative to street improvement in San Francisco under act of February 1, 1870.

Approved in McSurely v. McGrew, 140 Iowa, 172, 132 Am. St. Rep. 248, 118 N. W. 419, upholding act to validate settlement between supervisors and treasurer releasing him from liability on loss of county funds.

Statutes Legalizing Invalid Municipal Contracts. See note, 27 L. R. A. 703.

42 Cal. 535–541, **PEOPLE v. PADILLIA.**

Charge on Circumstantial Evidence considered and held erroneous.

Approved in People v. Kaiser, 119 Cal. 459, 51 Pac. 703, holding correct instruction given as to reasonable doubt; The King v. Ahop, 7 Haw. 562, holding instruction that circumstantial evidence must produce absolute conviction in minds of jury properly refused.

Circumstantial Evidence. See note, 97 Am. St. Rep. 776.

Court will not Review Evidence in absence of bill of exceptions.

Approved in Territory v. Kay, 3 Ariz. 13, 21 Pac. 152, following rule.

Alleged Errors in Instruction may be considered on appeal in absence of testimony, if instructions are incorrect in every conceivable state of the evidence.

Approved in People v. Johnson (Cal.), 8 Pac. 690, holding when evidence is not before appellate court, instructions granted by court at instance of prosecution are presumed proper where such state of evidence is conceivable as may have rendered them correct.

42 Cal. 541–559, SAN FRANCISCO v. CANAVAN.

Intention to Dedicate to Public Use, clearly indicated by words or acts of owner, is essential to validity of dedication.

Approved in City of Los Angeles v. McCollum, 156 Cal. 151, 103 Pac. 916, 23 L. R. A. (n. s.) 378, holding recording of map by owner showing land divided into lots and blocks shows intention to dedicate streets shown therein to public use.

Pueblo Lands of San Francisco are Held in trust for municipal purposes.

Approved in Tulare Irrigation Dist. v. Collins, 154 Cal. 443, 97 Pac. 1125, holding unused lands in irrigation district are held in trust for uses specified in act creating district and not subject to execution sale.

Legislature may Enlarge or Restrict Powers of municipal corporation at will, but cannot impair obligation of contract.

Approved in Mannie v. Hatfield, 22 S. D. 478, 118 N. W. 818, holding right of appeal granted by city charter no obstacle to act of legislature denying such right.

42 Cal. 559–570, PUJOL v. McKINLAY.

A Trust must be Enforced, if at all, according to its terms.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, holding complaint to enforce resulting trust shows no cause of action when it fails to allege conditions to contract creating trust were satisfied.

Right of Tenant to Acquire Title not inconsistent with landlord's at commencement of tenancy. See note, 53 L. R. A. 938.

42 Cal. 570–578, McKINLAY v. TUTTLE.

Mode of Offering Judgment as Estoppel in bar to action is by offering the judgment-roll in evidence.

Reaffirmed in Page v. Graver, 5 Cal. App. 385, 90 Pac. 482.

To Maintain Judgment When Directly Attacked, record must show jurisdiction of person against whom judgment was rendered.

Approved in Linott v. Rowland, 119 Cal. 453, 51 Pac. 687, holding void judgment rendered by default when service on defendant did not appear by affidavits or otherwise.

Distinguished in Haynes v. Backman (Cal.), 31 Pac. 746, holding valid judgment against corporation not named where it appeared and filed answer showing its identity with corporation named as defendant.

Where Persons are Sued by Fictitious Names, judgment against them will not be binding unless complaint is amended by inserting true names.

Approved in San Francisco v. Burr (Cal.), 36 Pac. 771, reversing judgment for failure to insert true instead of fictitious name in complaint; Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 654, 655, 95 Pac. 670, holding appellate court may order true name inserted by court below as of date before judgment; Coal & Coke Ry. Co. v. Taylor, 63 W. Va. 106, 59 S. E. 942, upholding designation of de-

fendant in action in justice's court as "Italian No. 37, whose name is unknown."

Rules Announced on Former Appeal are law of case on subsequent appeal if same questions are again presented on same state of facts.

Approved in Estate of Jessup, 2 Cof. Prob. 478, Westfall v. Wait, 165 Ind. 359, 73 N. E. 1091, Oklahoma City Elec. Gas etc. Co. v. Baumhoff, 21 Okl. 507, 96 Pac. 760, and Hunter v. Porter, 10 Idaho, 87, 77 Pac. 439, all following rule; Lorimer v. Fairchild, 68 Kan. 342, 75 Pac. 128, decision of one court of appeal held not binding on another.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 345.

42 Cal. 619–622, **SEMPLE v. WARE.**

Judgment as Estoppel in Equity must be pleaded, or it will be deemed waived.

Approved in Ortz v. First Bk. of Las Vegas, 12 N. M. 528, 78 Pac. 531, following rule.

42 Cal. 622–626, **PEOPLE v. CLARKE.**

Intermediate Orders in Criminal Cases can be reviewed only on appeal from final judgment.

Approved in People v. Walker (Cal.), 61 Pac. 800, following rule; People v. Majors (Cal.), 2 Pac. 745, holding appeal did not lie from judgment upon plea of former conviction.

Order of Court Directing Criminal Charge, ignored by one grand jury, to be heard by another is not appealable under section 231, Criminal Practice Act.

Approved in People v. Quijada, 154 Cal. 245, 97 Pac. 690, holding order discharging prisoner on habeas corpus from first indictment before second has been returned is not dismissed, and does not bar second indictment for same offense.

42 Cal. 626–628, **HARVEY v. RYAN.**

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 769.

42 Cal. 629–630, **BENNETT v. BENNETT.**

Where Undertaking on Appeal is not in Conformity with notice of appeal, appeal may be dismissed.

Reaffirmed in Walker v. McGinness, 9 Idaho, 164, 72 Pac. 885.

42 Cal. 636–643, **DECKER v. HOWELL.**

Members of Mining Partnership are tenants in common of mine and in its working.

Approved in dissenting opinion in Candelaria v. Vallejos, 13 N. M. 172, 81 Pac. 599, majority holding majority of owners of community ditch could not, without consent of owner injuriously affected, change ancient course of ditch.

42 Cal. 643–645, **WOOD v. RAMOND.**

Judgment of Nonsuit on Motion of Defendant is equivalent to dismissal.

Approved in San Francisco v. Brown, 153 Cal. 647, 96 Pac. 283, following rule; Guthiel v. Gilmer, 27 Utah, 507, 76 Pac. 631, holding judgment of nonsuit on motion of defendant no bar to further action.

42 Cal. 645–650, LOGAN v. HALE.

Person to Whom Property is Transferred by judgment debtor is necessary party to action brought by creditors to subject property to their claim.

Approved in First National Bank of Plattsmouth v. Gibson, 69 Neb. 26, 94 N. W. 967, following rule.

42 Cal. 657–663, BARBOUR v. PIERCE.

Use of Way Over Another's Land by Parol at its inception may, by prescription, ripen into perfect title.

Approved in Alper v. Tormey, 7 Cal. App. 10, 93 Pac. 403, holding parol gift of right of way for easement followed by possession and use with grantor's knowledge for five years invests grantee with perfect title; Ann Arbor Fruit etc. Co. v. Ann Arbor R. R. Co., 136 Mich. 607, 99 N. W. 871, 66 L. R. A. 481, holding use of right of way of necessity cannot become easement by prescription by use after public way is opened, unless land owner had notice that the use had become adverse.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 43 CALIFORNIA.

43 Cal. 11-22, POWELL v. MAGUIRE.

Where Two Persons Agreed to form partnership but one of them proceeded to conduct enterprise by himself, remedy of the other is for breach of contract and not for accounting.

Reaffirmed in Thomason v. De Greayer (Cal.), 31 Pac. 567.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 409.

43 Cal. 23-24, IRWIN v. TOWNE.

When Supreme Court Reverses Order denying new trial the situation is the same as though the lower court had granted a new trial.

Approved in Riley v. Loma Vista Ranch Co., 5 Cal. App. 27, 89 Pac. 850, reaffirming rule.

43 Cal. 25-27, BENNETT v. WALLACE.

Certiorari will Lie Only where there is no appeal.

Approved in Hall v. Justice's Court, 5 Cal. App. 139, 89 Pac. 872, certiorari will not lie where opportunity to appeal lost by neglect or laches; Chapman v. Justice Court, 29 Nev. 161, 86 Pac. 554, refusing to review conviction in justice court on ground that statute defining offense was unconstitutional.

Exceptions to Rule That Certiorari will not Lie where there is an appeal. See note, 50 L. R. A. 788.

43 Cal. 29-37, PEOPLE v. SANFORD.

Witness may Testify as to State of mind of declarant, as to whether it was clear or confused.

Approved in Nelson v. Thompson, 16 N. D. 301, 112 N. W. 1060, admitting opinion of witness as to sanity and clearness of mind of another.

Distinguished in Sneed v. Marysville Gas etc. Co., 149 Cal. 708, 87 Pac. 378, evidence of decedent's mother that he had no knowledge of electricity, inadmissible.

Allegation That Defendant Killed Deceased is sufficient averment that latter died.

Approved in State v. Sly, 11 Idaho, 113, 114, 80 Pac. 1126, and State v. Phillips, 59 Wash. 253, 109 Pac. 1048, both holding indictment need not further state that deceased died within a year and a day.

Giving of Oral Instruction in Criminal Case is error which is not waived by defendant's failure to object.

Approved in dissenting opinion in Boggs v. United States, 11 Okl. 145, 65 Pac. 929, majority refusing to reverse because of oral statement of court in response to question of juror.

Disapproved in Williams v. United States, 158 Fed. 35, right to written instructions waived by inviting court to give oral instructions.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 721, 738.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 641; 56 L. R. A. 417, 420.

Religious Belief as Qualification of Witness. See note, 42 L. R. A. 554, 555.

New Trial for Disqualification of Juror. See note, 18 L. R. A. 474.

Charge of Time and Place in indictment for homicide. See note, 3 L. R. A. (n. s.) 1022.

43 Cal. 43–53, 13 Am. Rep. 136, **VAN VALKENBURG v. BROWN.**

"Privileges and Immunities" Defined and Discussed.

Cited in Loeb v. Jennings, 133 Ga. 802, 67 S. E. 104, sentence on conviction of violation of city ordinance requiring defendant to pay fine and work on public places does not violate fourteenth amendment.

"Privilege" and "Immunity" are synonymous terms.

Approved in Hammer v. State, 173 Ind. 203, 89 N. E. 851, upholding law which forbade wearing of badge of secret society by one not a member.

The Elective Franchise is not a Privilege or immunity of citizenship within the fourteenth amendment.

Approved in Shaw v. Marshalltown, 131 Iowa, 132, 134, 104 N. W. 1121, 10 L. R. A. (n. s.) 825, upholding statute giving preference to veteran soldiers in making appointments to minor offices; State v. Weber, 96 Minn. 430, 113 Am. St. Rep. 630, 105 N. W. 493, legislature may limit suffrage, as regards naturalized citizens, to such as were admitted to citizenship three months prior to election.

Federal Control of Elections. See note, 53 L. R. A. 660, 669.

Right of Women to Vote. See note, 21 L. R. A. 662.

43 Cal. 55–56, **PEOPLE v. McAUSLAN.**

Error must Affirmatively Appear in record on appeal.

Approved in People v. Hatch, 13 Cal. App. 527, 109 Pac. 1100, reaffirming rule.

Where Verdict was Set Aside because contrary to evidence, record on appeal must show what evidence was.

Approved in Austin v. Gagan (Cal.), 30 Pac. 790, where motion for new trial was made on several grounds, presumption is, when evidence conflicting, that it was granted on ground of insufficiency of evidence.

43 Cal. 56–65, HINCKLEY v. FOWLER.

The Ordinary Rules of Pleading and evidence apply to contest over state lands.

Approved in Bieber v. Lambert, 152 Cal. 565, 93 Pac. 98, defendant may rely on plaintiff's proof and facts admitted by pleadings.

Right of Applicant to Purchase Land from state is not lost by mistake of officer.

Distinguished in Ewbank v. Mikel, 6 Cal. App. 143, 91 Pac. 673, right of contestant lost by failure to commence action within sixty days.

43 Cal. 65–74, WILLIAMS v. SUTTON.

A Tenant in Common is Entitled to the enjoyment of the entire estate as against everyone except his cotenant.

Disapproved in Williams v. Coal Creek Min. etc. Co., 115 Tenn. 580, 112 Am. St. Rep. 878, 93 S. W. 573, 6 L. R. A. (n. s.) 710, part of tenants in common can recover in ejectment only portion to which they show title; dissenting opinion in Godfrey v. Rowland, 17 Haw. 590, 7 Ann. Cas. 993, majority upholding rule.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 712.

Disability of One Tenant in Common does not save the rights of the others against whom the statute of limitations has fully run.

Cited in Iona v. Uu, 16 Haw. 434, arguendo.

Adverse Possession for the Statutory period creates a new title.

Approved in Robinson v. Thornton (Cal.), 31 Pac. 937, statute of limitatione does not begin to run against purchaser at sheriff's sale until delivery of sheriff's deed.

43 Cal. 83–90, LICK v. RAY.

If Title be Void on Its Face, it does not constitute a cloud.

Approved in Beardsley v. Hill, 85 Ark. 8, 106 S. W. 1170, tax deed void on its face for want of proper description is not cloud on title; McArthur v. Griffith, 147 N. C. 549, 61 S. E. 521, cancellation may be decreed as to note and mortgage which have been paid; Cummings v. Dolan, 52 Wash. 501, 132 Am. St. Rep. 986, 100 Pac. 991, recorded conveyance by stranger to chain of title is not cloud.

That is a Cloud upon Title which, if asserted by action, would drive the other party to the production of his own title.

Approved in Gilman v. Gilman, 171 Mass. 47, 50 N. E. 452, purchaser at sheriff's sale cannot quiet title against former owner who has made no conveyance or assertion of claim.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 127.

43 Cal. 110–119, ROSEMAN v. CANOVAN.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 614.

43 Cal. 119–135, McKENZIE v. DICKINSON.

One Partner may Purchase, with his own funds and outside of partnership business, judgment against copartner.

Approved in Miller v. Ferguson, 110 Va. 231, 135 Am. St. Rep. 934, 65 S. E. 564, reaffirming rule.

Right to Acquire Claim Against Copartner. See note, 28 L. R. A. (n. s.) 619.

43 Cal. 137–158, PEOPLE v. FAIR.

Opinion of Juror as to Guilt of Accused not ground for new trial when objection is raised for first time after trial.

Approved in People v. Emmons, 7 Cal. App. 701, 95 Pac. 1039, and People v. Duncan, 8 Cal. App. 197, 96 Pac. 419, both reaffirming rule; State v. Coleman, 17 S. D. 618, 619, 98 N. W. 181, disqualification of juror not ground for new trial where no challenge interposed.

Disapproved in State v. Mott, 29 Mont. 299, 300, 303, 304, 74 Pac. 730, 731, 732, disqualification of juror in criminal case on ground that he was prejudiced against defendant, which fact he had concealed on his voir dire, is ground for new trial.

The Grounds for a New Trial are those only which are set forth in section 440, Criminal Practice Act.

Approved in People v. Amer, 151 Cal. 305, 90 Pac. 699, misconduct of district attorney not ground for new trial.

The Accused is Presumed to have a fair character.

Distinguished in People v. Davis, 1 Cal. App. 13, 81 Pac. 718, presumption applies only to traits of character necessarily involved in case.

Evidence of Good Character to create doubt of guilt. See notes, 103 Am. St. Rep. 897, 898; 20 L. R. A. 612.

43 Cal. 173–178, PEOPLE v. WOODS.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 359.

43 Cal. 185–190, WOOD v. GOODFELLOW.

Mortgagor cannot Waive Statute of Limitations so as to affect third persons.

Approved in California Title Ins. etc. Co. v. Miller, 3 Cal. App. 56, 84 Pac. 454, mortgagor's death will not affect right of grantee of mortgaged premises to plead statute; Newhall v. Hatch (Cal.), 64 Pac. 252, mortgagee estopped by failure to allege renewal of mortgage as against subsequent judgment creditor; Boucofski v. Jacobsen, 36 Utah, 181, 104 Pac. 123, junior mortgagee may interpose statute of limitations to bar prior mortgagee's claim to full extent of his own interest in mortgaged property.

Distinguished in Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 583, 126 Am. St. Rep. 129, 96 Pac. 12, statute cannot begin to run in favor of grantee under prior unrecorded deed from mortgagor until deed is recorded; Perkins v. Bailey, 38 Wash. 53, 54, 107 Am. St. Rep. 831, 80 Pac. 179, mortgagor's absence from state arrested statute both as to mortgagee and attaching creditor.

Disapproved in Du Bois v. First Nat. Bank, 43 Colo. 405, 96 Pac. 171, grantor in trust deed may suspend running of statute by making payment, so as to bind subsequent purchaser.

Who may Plead Statute of Limitations. See note, 104 Am. St. Rep. 745, 748, 763.

Foreclosure of Mortgage may be Barred though recovery on note which it secures is not.

Approved in Colonial & United States Mortgage Co. v. Northwest Thresher Co., 14 N. D. 160, 116 Am. St. Rep. 642, 103 N. W. 920, 70 L. R. A. 814, absence of mortgagor from state after he has parted with title does not prevent statute from running in favor of his grantee.

Disapproved in Clark v. Grant, 26 Okl. 402, 109 Pac. 235, where note and mortgage are barred, payment of interest on note revives not only note but mortgage.

Effect of Mortgagor's Absence from State to toll limitations as against foreclosure against his grantee. See note, 26 L. R. A. (n. s.) 899, 902.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 555.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 677, 686.

43 Cal. 196-200, PEOPLE v. AVILA.

Indictment Charging That Defendant knowingly received stolen property is sufficient, without alleging that he did so to deprive owner of property.

Reaffirmed in State v. Richmond, 186 Mo. 88, 84 S. W. 885.

43 Cal. 200-205, IN RE ESTATE OF UTZ.

Rule in Shelley's Case Does not Apply to devise to mother and to her "children."

Approved in Brown v. Brown, 125 Iowa, 221, 101 N. W. 82, 67 L. R. A. 629, reaffirming rule.

Rule in Shelley's Case. See note, 29 L. R. A. (n. s.) 1010, 1160.

"Children" as Word of Purchase or Limitation. See note, 12 L. R. A. (n. s.) 289.

Conveyance of Fee by Devise to One and his or her child or children. See note, 4 L. R. A. (n. s.) 952.

43 Cal. 206-210, MAIN v. TAPPENER.

Both Service and Filing are Essential to attachment of real property.

Approved in Menager v. Farrell, 6 Ariz. 318, 57 Pac. 608, range levy created no lien as against subsequent mortgagee until requirements of statute were complied with.

43 Cal. 219-224, PLATT v. JONES.

Parol Evidence Inadmissible to Vary the terms of a deed.

Approved in Bullock v. Consumers' Lumber Co. (Cal.), 31 Pac. 369, rejecting evidence of manner in which terms of contract were understood by parties; Alaska Gold Min. Co. v. Barbridge, 1 Alaska, 321, rejecting surveyor's field-notes and evidence of his intention in making survey.

43 Cal. 225-228, PEOPLE ex rel. GREEN v. DE LA GUERRA.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 34, 110.

43 Cal. 229-238, MINOR v. KIDDER.

An Election Contest is not an Ordinary, adversary proceeding, but an investigation in which the public at large is deeply concerned.

Approved in O'Dowd v. Superior Court, 158 Cal. 541, 111 Pac. 753, service of citation within five days of hearing is not essential to jurisdiction of court over election contest; Hill v. Superior Court, 15 Cal. App. 310, 114 Pac. 806, statutes should be construed to end that election contests be determined as speedily as possible; dissenting opinion in Kulike v. Fern, 19 Haw. 298, majority holding that election contest cannot be instituted by thirty voters unless they all have direct knowledge of irregularities which would invalidate election.

Statement of Cause of Election Contest need not possess highest degree of certainty known to pleading.

Approved in Bass v. Leavitt, 11 Cal. App. 588, 105 Pac. 774, no statement required of votes invalidated by distinguishing marks on ballots.

Statement of Cause of Election Contest may be amended.

Approved in State v. Hough, 193 Mo. 651, 91 S. W. 915, supreme court will not prohibit circuit court from hearing election contest because notice of contest appears insufficient.

43 Cal. 242–250, JOHNSON v. SIMONTON.

A City Ordinance Imposing a Penalty for feeding still swill to cows makes such act unlawful.

Approved in Levinson v. Boas, 150 Cal. 193, 88 Pac. 828, 12 L. R. A. (n. s.) 575, where pawnbroker has violated city ordinance regulating his business, pledgor may recover property; Musback v. Schaefer, 115 Wis. 359, 91 N. W. 967, statute imposing penalty on school district officer for failure to furnish certified copy of records by implication imposes duty to furnish such copies; Missouri etc. Ry. Co. v. City of Olathe, 156 Fed. 632, refusing to enjoin passage of ordinance.

Police Regulations as to Food for milch cows. See note, 1 L. R. A. (n. s.) 932.

Municipal Power Over Nuisances affecting safety, health, and personal comfort. See note, 38 L. R. A. 313.

One Carrying on Illegal Business cannot maintain action for libel in respect thereto.

Approved in Weltmer v. Bishop, 171 Mo. 118, 71 S. W. 169, 65 L. R. A. 485, burden was upon plaintiffs in libel suit to show that their business of magnetic healing was legitimate.

What Words are Libelous Per Se. See note, 116 Am. St. Rep. 817.

43 Cal. 250–253, GRIMM v. CURLEY.

Possession of Land Under Mistake is adverse possession within statute of limitations.

Reaffirmed in Steckter v. Ewing, 6 Cal. App. 767, 93 Pac. 289.

Adverse Possession Due to Ignorance or Mistake as to boundary. See note, 21 L. R. A. 830.

43 Cal. 253–263, CORWIN v. BENSLEY.

Purchasers With Notice from Party to suit, during its pendency, must apply for leave to protect their interest in suit.

Approved in Walker v. Sanders, 103 Minn. 127, 123 Am. St. Rep. 276, 114 N. W. 650, where seller retains any interest, intervention and not substitution is proper remedy.

Discretion of Court to Permit Intervention. See note, 123 Am. St. Rep. 288.

Who may Proceed to Set Aside Judgments against other parties. See note, 54 L. R. A. 768.

43 Cal. 264–270, BUHNE v. CORBETT.

Each Defense must be Consistent in itself, but need not be consistent with the others.

Approved in Eaton v. Metz (Cal.), 40 Pac. 948, admission of title only goes to defense in which it is set forth; Shepherd-Teague Co. v. Hermann, 12 Cal. App. 402, 107 Pac. 625, denials in one defense not affected by inconsistent affirmative matter in another; Rudd v. Dewey, 121 Iowa, 459, 96 N. W. 975, where defendant in action for alienation of affections pleaded general denial and acquiescence of plaintiff, latter defense is not admission for purpose of trial.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 177, 191, 208.

43 Cal. 270–274, ALDEN v. ALAMEDA COUNTY.

Action cannot be Maintained on money judgment against county without first presenting it to board of supervisors for allowance.

Approved in Farmers' etc. Bank v. Los Angeles, 151 Cal. 658, 91 Pac. 796, applying rule to action for recovery of taxes paid under protest; Estate of Renton, 3 Cof. Prob. 531, allegation that contestants are adopted children and heirs of decedent is insufficient in absence of allegation of facts upon which claim of adoption rests; Gunning v. Wyandotte County, 81 Kan. 712, 106 Pac. 1000, judgment against county having auditor must be submitted to that officer for examination.

43 Cal. 299–306, JOHNSON v. CHELY.

In Action of Unlawful Detainer, relation of landlord and tenant must be shown to exist.

Approved in Richmond v. Superior Court, 9 Cal. App. 65, 98 Pac. 58, justice court has jurisdiction to determine whether such relation exists.

Defendant in Unlawful Detainer may show that, being already in possession, he was induced to accept lease by fraudulent representations.

Approved in Ogle v. Hubbel, 1 Cal. App. 361, 82 Pac. 218, lessee with preferred right to purchase may show sale of property to be collusive and fraudulent.

Distinguished in dissenting opinion in Illinois Steel Co. v. Budzisz, 139 Wis. 310, 119 N. W. 942, majority holding that purchaser from tenant without notice that he was such, acquired title by ten years' possession.

43 Cal. 306–312, PHELAN v. GARDNER.

Broker is Entitled to Commission when he finds purchaser willing to take land at price fixed.

Approved in Hill v. McCoy, 1 Cal. App. 163, 81 Pac. 1016, broker entitled to commission though owner completed sale on terms fixed by him; Reams v. Wilson, 147 N. C. 306, 60 S. E. 1125, broker entitled to compensation though owner sold property himself without broker's knowledge; Little & Little v. Fleishman, 35 Utah, 569, 101 Pac. 985, broker entitled to commission where sale not consummated because owner was unable to furnish sufficient abstract of title.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 593, 605, 614, 619, 620, 623.

As to When Real Estate Broker is Considered as procuring cause of sale or exchange. See note, 44 L. R. A. 350, 351.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 594, 595, 596, 599, 603, 604, 606, 607, 609.

One may Show, in Order to Defeat Settlement, that he was intoxicated at time.

Approved in Swan v. Talbot, 152 Cal. 145, 146, 94 Pac. 239, 17 L. R. A. (n. s.) 1066, action to set aside bill of sale, because of vendor's intoxication, is equitable.

Contracts of Intoxicated Persons. See notes, 107 Am. St. Rep. 540; 54 L. R. A. 440.

43 Cal. 314-319, JARVIS v. HOFFMAN.

Upon Death of Homesteader, his widow is entitled to patent in her own name.

Approved in McCracken v. Sisk, 91 Ark. 457, 121 S. W. 727, applying rule to donee of land under donation laws of state.

Effect of Contracting or Dissolution of Marriage before consummation of right under homestead entry. See note, 7 L. R. A. (n. s.) 968.

43 Cal. 320-323, COTTLE v. LEITCH.

Notice of Motion for New Trial renders notice of filing findings unnecessary.

Approved in Girdner v. Beswick (Cal.), 8 Pac. 11, notice of decision waived by notice of intention to move for new trial.

43 Cal. 323-325, POORMAN v. MILLS.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 332.

Duties of Savings Banks toward depositors. See note, 105 Am. St. Rep. 744.

43 Cal. 331-340, 13 Am. Rep. 143, PEOPLE v. EDDY.

Legislature cannot, Under Pretense of regulating duties of assessors, exempt property from taxation which the Constitution requires to be taxed.

Approved in State National Bank v. City of Memphis, 116 Tenn. 654, 94 S. W. 610, 7 L. R. A. (n. s.) 663, holding void statute which provided that, in assessing shares of corporate stock, value of registered Tennessee state bonds should be deducted.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

Double Taxation of Credits. See note, 132 Am. St. Rep. 527.

Taxation of Mortgage and Real Estate at full value as double taxation. See note, 23 L. R. A. (n. s.) 154.

Power to Tax Mortgages. See note, 16 L. R. A. 60.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 366.

43 Cal. 341-344, GRAFF v. MIDDLETON.

Quitclaim Deeds are as Effectual as deeds of bargain and sale.

Reaffirmed in Myers v. Oceanside, 7 Cal. App. 93, 93 Pac. 688.

Effect of Quitclaim Deeds under registration laws. See note, 105 Am. St. Rep. 860.

Effect of Quitclaim in Otherwise Perfect record title. See note, 29 L. R. A. 42.

43 Cal. 344–352, PEOPLE v. WILLIAMS.

To Constitute Deliberation There Need be no appreciable time between intention to kill and act of killing.

Reaffirmed in People v. Ye Foo, 4 Cal. App. 739, 89 Pac. 453.

Drunkenness may be Considered solely on question of premeditation.

Approved in State v. Williams, 122 Iowa, 123, 97 N. W. 995, and State v. Johnny, 29 Nev. 223, 87 Pac. 9, both reaffirming rule.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 465.

43 Cal. 359–364, GREY v. TUBBS.

When Parties have Made Time of the essence of a contract, party in default in payments cannot enforce contract.

Approved in Machold v. Farnan, 14 Idaho, 267, 94 Pac. 174, where purchaser in default in payments, without excuse, court will not decree specific performance; Raymond v. San Gabriel Val. Land etc. Co., 53 Fed. 887, 4 C. C. A. 89, such stipulation in contract for sale of realty is for benefit of vendor alone.

Courts of Equity have No Power to make contracts for parties.

Approved in Miller v. Jones, 68 W. Va. 529, 71 S. E. 250, court cannot compel vendor to receive purchase money until it is due.

43 Cal. 365–369, CENTRAL PACIFIC R. R. CO. v. PLACER CO.

Error as to Reasons and Evidence cannot be reviewed on certiorari.

Approved in Matter of Hughes, 159 Cal. 364, 113 Pac. 686, refusing to review judgment in habeas corpus proceeding holding complaint insufficient; City Council v. Hanley, 19 Colo. App. 394, 75 Pac. 602, on certiorari to review action of city council in election contest, sufficiency of evidence before council cannot be considered; McConnell v. State Board, 11 Idaho, 662, 83 Pac. 497, refusing to inquire into validity of state revenue act on certiorari.

43 Cal. 371–377, SMITH v. O'HARA.

Person Who First Appropriates, for mining or other purposes, waters of stream upon public lands is entitled to same.

Approved in dissenting opinion in Lux v. Haggin (Cal.), 4 Pac. 933, majority upholding rights of riparian proprietor.

Appropriations of Water may be Measured by time of use.

Cited in McPhee v. Kelsey, 44 Or. 202, 74 Pac. 404, arguendo.

Periodical Appropriation of Water. See note, 46 L. R. A. 175.

Sale of Ditch for Appropriating Water must be evidenced by deed.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 727, 93 Pac. 863, 15 L. R. A. (n. s.) 359, right of land owner to have water flow through canal for irrigation is servitude upon canal; Bashore v. Mooney, 4 Cal. App. 283, 87 Pac. 556, holding title by prescription established.

Distinguished in Watts v. Spencer, 51 Or. 268, 94 Pac. 41, rule inapplicable to oral sale of possessory right to land and appurtenant water right.

43 Cal. 380–383, ROBERTS v. EVANS.

Where Goods are Converted, owner may waive the tort and sue in assumpsit for their value.

Distinguished in Lehmann v. Schmidt (Cal.), 22 Pac. 974, no conversion where factor retained wine as security for advances; Fountain v. City of Sacramento, 1 Cal. App. 462, 82 Pac. 637, city not liable in assumpsit for materials furnished under illegal contract; Bechtel v. Chase, 156 Cal. 711, 106 Pac. 83, rule does not apply where exchange of property was induced by fraud.

43 Cal. 393–397, PIERATT v. KENNEDY.

Clerk of Court must be Authorized by Parties to arbitration to enter note of the submission in his register of actions.

Distinguished in Matter of Silliman, 159 Cal. 157, 113 Pac. 136, where parties to pending suit agree to arbitrate, it will be presumed that they intended submission to be entered as rule of court.

43 Cal. 398–437, PEOPLE v. CENTRAL PAC. ETC. R. R. CO.

The Constitution Does not Prohibit a special act, because subject with which it deals might have been subject of general law.

Approved in In re Cole, 12 Cal. App. 292, 107 Pac. 582, validity of prior legislation not affected by constitutional amendment; Russell v. Esmeralda Co., 32 Nev. 314, 107 Pac. 892, upholding fee act of 1883; Picton v. Cass County, 13 N. D. 254, 100 N. W. 715, upholding law which gave county commissioners option to institute proceedings to enforce payment of taxes on real property.

Disapproved in State v. Spellmire, 67 Ohio St. 85, 65 N. E. 621, holding void act establishing special school district.

Exemption from Taxation or Assessment of Lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 330.

43 Cal. 437–439, CLELAND v. THORNTON.

Evidence as to Character of Timber for milling purposes in immediate neighborhood is admissible to determine value of timber burned.

Approved in State v. Clark, 124 La. 969, 50 So. 813, admitting evidence of intoxicating character of particular beverage when sold at places other than that of illegal sale charged.

Liability for Setting Fires Which Spread to property of others. See note, 21 L. R. A. 258.

43 Cal. 439–444, 13 Am. Rep. 148, PEOPLE v. BOWEN.

An Offender may be Pardoned after he has suffered punishment adjudged for his crime.

Approved in Miller v. State, 46 Tex. Cr. 61, 79 S. W. 568, holding where party was convicted of two felonies, pardon was only in one case.

An Executive Act Restoring a convicted criminal to rights of citizenship does not remove disability to testify.

Approved in Blanc v. Rodgers, 49 Cal. 18, reaffirming rule; In re Conditional Discharge of Convicts, 73 Vt. 429, 51 Atl. 14, 56 L. R. A. 658, governor may grant conditional pardon to convict.

43 Cal. 444–445, PEOPLE v. LONG.

Where Testimony is Given Without Objection, motion to strike out is too late.

Approved in Marks v. Bodie Bank (Cal.), 8 Pac. 809, and Poindexter & Orr Co. v. Or. Short Line R. R. Co., 33 Mont. 341, 83 Pac. 888, both reaffirming rule; People v. Walker, 15 Cal. App. 406, 114 Pac. 1011, objection is waived by failure to specify grounds thereof.

43 Cal. 452–454, COOMBS v. HIBBERD.

Where Motion for New Trial in Due Form has been acted upon, court cannot vacate order and decide again on motion.

Approved in Estate of Byrne, 3 Cof. Prob. 70, order settling annual account is conclusive as to all parties in interest, and after time for appeal cannot be set aside on motion.

43 Cal. 455–458, EX PARTE MURRAY.

The Judgment in a Criminal Case need contain no recital of the particular offense.

Approved in In re Fernandez, 12 Haw. 123, reaffirming rule; Ex parte Mogensen, 5 Cal. App. 598, 90 Pac. 1064, judgment reciting conviction for violating specified ordinance sufficient; Ex parte Monckros Von Vetsera, 7 Cal. App. 137, 93 Pac. 1036, judgment reciting that defendant was convicted of a "felony" sufficient upon habeas corpus; People v. Gregory, 8 Cal. App. 746, 97 Pac. 916, judgment showing nature of offense sufficient.

Miscellaneous.—Cited in Ex parte Simpson, 47 Cal. 129, upholding judgment and warrant of commitment for misdemeanor issued out of San Francisco police court.

43 Cal. 458–467, VASSAULT v. EDWARDS.

A Proposal to Sell Real Estate signed by vendor alone is valid.

Approved in Harper v. Goldschmidt, 156 Cal. 250, 134 Am. St. Rep. 124, 104 Pac. 453, requirement of mutuality satisfied by bringing suit; Smith v. Baugham, 156 Cal. 363, 104 Pac. 691, acceptance of option makes binding contract.

Distinguished in Leuschner v. Duff, 7 Cal. App. 723, 95 Pac. 915, refusing to enforce unilateral contract to sell land because of inadequacy of consideration.

As to Who must Sign Memorandum of executory sale contract within statute of frauds. See note, 28 L. R. A. (n. s.) 698.

Averment of Agreement to Sell Land is sufficient without alleging that it was in writing and signed.

Approved in Marshall v. Livermore Spring Water Co. (Cal.), 5 Pac. 101, reaffirming rule; Levy v. Ryland, 32 Nev. 469, 109 Pac. 908, statute of frauds must be set up by answer and not by demurrer.

Rights Conferred by a "Refusal" or "Option." See note, 21 L. R. A. 129.

43 Cal. 467–477, McLERAN v. BENTON.

Attempted Sale of Land which fails because of defect in deed is not abandonment.

Approved in Watts v. Spencer, 51 Or. 271, 94 Pac. 42, parol sale of land and surrender of possession are not abandonment.

Sale of Real Property as an Abandonment. See note, 10 L. R. A. (n. s.) 635.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 35 Am. St. Rep. 909.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 939.

When Defects in Certificates of Acknowledgment are Fatal. See note, 108 Am. St. Rep. 561.

43 Cal. 477–478, DAVERKOSEN v. KELLEY.

When Case has Been Referred, by stipulation of parties, upon report of referee and entry of judgment, stipulation ceases to have further effect.

Approved in Cline v. Langan, 31 Nev. 244, 101 Pac. 554, referees appointed to try all issues and report had no further authority after reporting.

43 Cal. 478–481, EX PARTE DELANEY.

Blasphemy and Profanity as Crimes. See notes, 22 L. R. A. 353, 354.

Municipal Power as to Nuisances affecting public morals, decency, peace, and good order. See note, 39 L. R. A. 524.

43 Cal. 485–492, HOBBS v. DUFF.

A Notice of Motion for New Trial must be signed by the attorney of record.

Reaffirmed in McMahon v. Thomas, 114 Cal. 591, 46 Pac. 733.

Settlement of Statement is Waiver of notice of motion for new trial.

Approved in Mendocino County v. Peters, 2 Cal. App. 27, 82 Pac. 1123, reaffirming rule; Gibson v. Berryman, 14 Cal. App. 333, 111 Pac. 927, notice of intention to move for new trial waived by stipulation.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

43 Cal. 492–494, PEOPLE v. OLVERA.

Taxes Assessed Against Estate pending administration are not claims which must be presented to administrator.

Approved in Miller & Lux v. Katz, 10 Cal. App. 578, 102 Pac. 947, presentation of claim based on stockholder's liability unnecessary; Estate of Finch, 3 Cof. Prob. 297, funeral expenses are not debt required to be presented for allowance.

Jurisdiction of District Courts Over Actions for collection of delinquent taxes is not taken away by probate act.

Approved in Miller & Lux v. Katz, 10 Cal. App. 580, 102 Pac. 947, reaffirming rule.

43 Cal. 495–497, GRAEBER v. DERWIN.

One Suing for Personal Injuries is not entitled to include in damages sum paid for board while he was disabled.

Reaffirmed in Irrgang v. Ott, 9 Cal. App. 444, 99 Pac. 530.

43 Cal. 506–509, RAIMOND v. ELDRIDGE.

Defendant Moving for Nonsuit on plaintiff's opening statement, upon specified ground, cannot urge for first time in supreme court that statement was otherwise insufficient.

Approved in Schroeder v. Mauzy, 16 Cal. App. 450, 118 Pac. 462, reaffirming rule; Mackel v. Bartlett, 33 Mont. 132, 82 Pac. 798, suffi-

ciency of complaint will not be considered where not made ground of motion for nonsuit.

43 Cal. 509–511, **PATTEN v. HICKS.**

Recovery may be Had on Quantum Meruit for services performed under contract void under statute of frauds.

Approved in Cozad v. Elam, 115 Mo. App. 139, 91 S. W. 435, reaffirming rule; Brown v. Crown Gold Milling Co., 150 Cal. 364, 89 Pac. 90, allowing such recovery where contract void for uncertainty.

Agreements not to be Performed within a year as within statute of frauds. See note, 138 Am. St. Rep. 607.

43 Cal. 515–526, **HICKS v. MURRAY.**

The Mechanic's Lien Law of 1868 is valid.

Approved in Hightower v. Bailey etc., 108 Ky. 205, 94 Am. St. Rep. 350, 56 S. W. 148, 49 L. R. A. 255, upholding mechanic's lien law; Pyramid Land etc. Co. v. Pierce, 30 Nev. 246, 95 Pac. 213, upholding law allowing attorney's fee to one recovering damages for unlawfully herding or grazing stock.

Evidence or Stipulations as to Facts do not entitle party to relief beyond averments of pleadings.

Approved in dissenting opinion in Gulling v. Washoe County Bank, 29 Nev. 273, 89 Pac. 31, majority admitting extrinsic evidence to show what issues were tried and determined.

43 Cal. 526–530, **MARQUART v. BRADFORD.**

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 890.

43 Cal. 530–533, **PEOPLE v. BROTHERTON.**

An Unqualified Expression of an Opinion is ground of challenge for implied bias.

Reaffirmed in State v. Roberts, 27 Nev. 468, 77 Pac. 599.

43 Cal. 534, **PEOPLE v. MORSE.**

City Block Owned by One Man may be assessed as a whole without placing separate valuation upon the several lots.

Approved in Houghton v. Kern Valley Bank, 157 Cal. 294, 107 Pac. 115, lots, when so assessed, may be sold in bulk.

43 Cal. 542–543, **JOHNSON v. MUIR.**

Affidavits Used on Motion for New Trial must be identified, by indorsement of judge or clerk, as having been so used.

Approved in Wilkes v. Tibbets (Cal.), 31 Pac. 609, applying rule to affidavits intended to show that jury trial was erroneously denied.

43 Cal. 543–552, **ESTATE OF SIMMONS.**

Probate Court may Appoint Attorney for absent heirs on proceedings to sell realty.

Cited in Estate of Fisher, 1 Cof. Prob. 99, arguendo.

The Estate is not Chargeable with fee of attorney for procuring letters of administration.

Approved in Bowman v. Bowman, 27 Nev. 419, 76 Pac. 636, reaffirming rule. See note, 1 Cof. Prob. 4, 155.

Distinguished in Estate of Chittenden, 1 Cof. Prob. 2, allowing counsel fees incurred by executor in applying for letters though he renounced trust before letters issued.

An Administrator is Entitled to Commissions on the value of the estate taken into his possession and accounted for.

Approved in Estate of Pease, 149 Cal. 171, 85 Pac. 151, where mortgage is presented as claim against estate and sale is made to third party, executor is entitled to commission on entire value of property; Estate of Davis, 8 Cal. App. 360, 97 Pac. 88, where interest of decedent in estate of deceased brother was paid over in money, commission can be allowed only on latter; In re Coursen's Estate, (Cal.), 65 Pac. 968, commission properly disallowed on money received by coexecutor and expended by him for benefit of estate.

Conclusiveness of Inventory. See note, 1 Cof. Prob. 212.

Miscellaneous.—Cited in Estate of Blythe (No. 2), 1 Cof. Prob. 116, to point that application for compensation by attorney for absent heirs before final settlement of estate is not premature.

43 Cal. 552–556, PEOPLE v. VALENCIA.

Contradictory Instructions are Ground for reversal.

Approved in People v. Bartnett, 15 Cal. App. 95, 113 Pac. 882, reaffirming rule; United States v. Romero, 4 Ariz. 194, 35 Pac. 1060, instruction omitting malice aforethought as element of murder not cured by reading territorial statutes defining murder.

Distinguished in People v. McRoberts, 1 Cal. App. 30, 81 Pac. 736, where court had defined two degrees of murder, following instruction beginning, "From these instructions jury will see," does not confuse jury.

43 Cal. 557–560, PEOPLE v. GIBBONS.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 872.

43 Cal. 560–564, PEOPLE v. BURT.

If Act is Properly Enrolled and Authenticated, and is deposited with Secretary of State, it is conclusive of its passage and courts will not look to journals.

Approved in Parkinson v. Johnson, 160 Cal. 761, 117 Pac. 1059, recital in assembly journal of date of return of bill vetoed by governor is not conclusive as to date of return.

Implied Repeal of Statutes. See note, 89 Am. St. Rep. 278.

Conclusiveness of Enrolled Bill. See note, 23 L. R. A. 341.

43 Cal. 564–569, GORDON v. SWAN.

Contract Held to Constitute mere option to purchase.

Distinguished in Reed v. Hickey, 13 Cal. App. 150, 109 Pac. 44, where part of purchase money paid under option, vendor might recover residue.

43 Cal. 569–573, BORLAND v. LEWIS.

Failure to Pay Interest and Principal on swamp and overflowed land purchase works a forfeiture.

Approved in Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 245, 125 Am. St. Rep. 54, 92 Pac. 491, 15 L. R. A. (n. s.) 1269, Civil Code, section 502, providing for forfeiture of street railroad franchises, is

self-executing; Kaiser Land and Fruit Co. v. Curry, 155 Cal. 650, 103 Pac. 345, failure of domestic corporation to pay license tax works forfeiture ipso facto; Standard Inv. Co. v. Kingsbury, 16 Cal. App. 83, 116 Pac. 316, applying rule to payments for school lands under Political Code; McConathy v. Deck, 34 Colo. 471, 83 Pac. 138, 4 L. R. A. (n. s.) 368, concealed weapon forfeited upon taking without conviction for carrying concealed weapon; Miller v. Wattier, 44 Or. 354, 75 Pac. 211, swamp land reverted to state where no proof of payment and reclamation within ten years.

Distinguished in Santa Rosa etc. R. Co. v. Central St. Ry. Co. (Cal.), 38 Pac. 990, where street railroad is not completed within prescribed time, franchise continues to exist until forfeited by court or legislative authority.

State may Waive Forfeiture.

Approved in Northern Assurance Co. v. Stout, 16 Cal. App. 558, 117 Pac. 621, applying rule to acts of vendor after joint contract of purchase by cotenants has been forfeited; Miller v. Wattier, 44 Or. 355, 75 Pac. 211, land commissioners waived forfeiture by accepting payment for swamp lands after limit of time fixed by law.

43 Cal. 573–576, DONAHUE v. GALLAVAN.

One Entering, Under Color of Title, into actual possession of part of tract, has constructive possession of the whole.

Approved in Webber v. Clarke, 74 Cal. 16, 15 Pac. 434, one who enters upon grazing land, under color of title, and pastures sheep thereon during pasturing season of each year, has sufficient possession.

Possession of Part as Possession of Whole. See note, 125 Am. St. Rep. 304.

A Motion for Nonsuit Presents a question of law.

Approved in Archibald Estate v. Matteson, 5 Cal. App. 445, 90 Pac. 725, and Non-Refillable Bottle Co. v. Robertson, 8 Cal. App. 105, 96 Pac. 325, both holding if evidence tends to establish averments of complaint, motion must be denied; Smith v. Superior Court, 2 Cal. App. 531, 84 Pac. 55, appeal from judgment of justice's court granting nonsuit, though taken on questions of law and fact, presents questions of law alone; Nord v. Boston etc. Min. Co., 30 Mont. 57, 75 Pac. 683, plaintiff held not guilty of contributory negligence as matter of law.

43 Cal. 577–580, SHARP v. BAIRD.

Sheriff's Deed, Executed in Pursuance of judgment in attachment suit, relates back to date of attachment.

Approved in Purser v. Cady (Cal.), 49 Pac. 181, deeds executed in pursuance of judgments foreclosing labor liens relate to time when liens attached.

When Sheriff Indorses, on Attachment, acts performed in serving writ, it will be presumed that he states all that he did toward making service.

Approved in Ireland v. Adair, 12 N. D. 32, 102 Am. St. Rep. 561, 94 N. W. 767, reaffirming rule.

Distinguished in Griffin v. American Gold Min. Co., 136 Fed. 73, 68 C. C. A. 637, where marshal's return simply states that he attached property, it will be presumed that he complied with statute.

Attachment of Realty is Invalid when no copy of attachment is posted on premises.

Approved in Steinfeld v. Menager, 6 Ariz. 145, 53 Pac. 497, range levy creates no lien where no copy of notice filed with recorder; Menager v. Farrell, 6 Ariz. 318, 57 Pac. 608, range levy not valid until notice to owner and filing of copy of notice with recorder.

43 Cal. 581–586, **LORD v. HOUGH.**

Deed of Gift Made With Intent of depriving wife of right in community property is fraudulent.

Distinguished in Duncan v. Duncan, 6 Cal. App. 407, 92 Pac. 311, amendment of 1901 to Civil Code, section 172, has no application to property acquired before its enactment.

Deed of Gift by Husband of portion of community property is not void per se.

Approved in Reade v. de Lea, 14 N. M. 450, 95 Pac. 133, statute requiring signature of wife to deed of community property does not apply to property acquired before its passage.

43 Cal. 586–590, **CARDINELL v. O'DOWD.**

Payer Ratifies Application of Payments by acquiescing therein and taking note upon which application was made.

Approved in Harrison v. Woodward, 11 Cal. App. 21, 103 Pac. 936, rule for application of payments established in contract controls.

Application of Payments. See note, 96 Am. St. Rep. 76.

43 Cal. 590–596, **LICK v. AUSTIN.**

Mortgagor is not Subject to double taxation though both land and mortgage thereon are taxed.

Approved in Hackfeld v. Luce, 4 Haw. 186, reaffirming rule; Globe Lumber Co. v. Lockett, 106 La. 420, 30 So. 904, standing timber and land on which it grows are separately assessable.

Taxation of Mortgage and Real Estate at full value as double taxation. See note, 23 L. R. A. (n. s.) 154.

43 Cal. 597–605, **DAVENPORT v. TURPIN.**

Action Dismissed Without Trial determines nothing.

Cited in Hubbard v. Superior Court, 9 Cal. App. 171, 98 Pac. 396, arguendo.

Entry of Party Holding Sheriff's Deed, executed under foreclosure sale, does not affect title of vendee of mortgagor.

Approved in dissenting opinion in Burns v. Hiatt, 149 Cal. 626, 117 Am. St. Rep. 157, 87 Pac. 199, majority holding grantee of mortgagor cannot recover possession without paying mortgage debt.

Overruled in Burns v. Hiatt, 149 Cal. 626, 117 Am. St. Rep. 157, 87 Pac. 199, grantee of mortgagor cannot recover possession without paying mortgage debt.

Party Holding Legal Title to Land cannot devest himself of title by abandonment.

Cited in Northern Assurance Co. v. Stout, 16 Cal. App. 557, 117 Pac. 621, arguendo.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 895.

43 Cal. 605–614, COWELL v. MARTIN.

Right of Owner of Upland to access to navigable water. See note, 40 L. R. A. 605.

43 Cal. 615–617, HILL v. KIDD.

Election Bets are Illegal and no action can be maintained thereon.

Approved in Union Collection Co. v. Buckman, 150 Cal. 161, 164, 119 Am. St. Rep. 164, 88 Pac. 709, 710, 9 L. R. A. (n. s.) 568, denying recovery on notes given for money lost in gambling game.

Legality of Wagers. See note, 18 L. R. A. 861.

43 Cal. 628–635, KING v. WISE.

Where One Purchases Land for the benefit of himself and others and misrepresents price paid, his associates can recover difference.

Approved in Kroll v. Coach, 45 Or. 470, 78 Pac. 399, reaffirming rule; Humburg v. Lotz, 4 Cal. App. 442, 88 Pac. 511, applying rule where one business associate misrepresented to the other price paid for patent rights acquired for joint benefit; Great Western Gold Co. v. Chambers, 153 Cal. 312, 95 Pac. 153, purchaser may recover from agent difference between price paid by him and amount at which property was actually acquired by agent; Lomita Land etc. Co. v. Robinson, 154 Cal. 51, 97 Pac. 16, 18 L. R. A. (n. s.) 1106, one joint purchaser is not entitled to secret profit at the expense of the others; Llewellyn v. Levi, 157 Cal. 38, 106 Pac. 222, partner liable for failure to sell land for best price obtainable in accordance with agreement; Walker v. Pike County Land Co., 139 Fed. 611, 71 C. C. A. 593, agent who joined with others in purchasing land for speculative purposes must account for secret profits; Paddock v. Bray, 40 Tex. Civ. App. 230, 88 S. W. 421, where defendant proposed to plaintiff that they purchase land at certain price, when he had contract to sell it for much less.

43 Cal. 640–643, ESTATE OF BOLAND.

Widow Acquires No Right to Probate Homestead until order has been made setting it apart.

Approved in Estate of Green, 1 Cof. Prob. 454, following rule; Estate of Heywood, 149 Cal. 130, 84 Pac. 834, child, who was minor at father's death, loses right to probate homestead by not applying during her minority; Estate of Hayes, 1 Cof. Prob. 554, where widow and children, during minority, fail to apply for probate homestead all rights thereto are waived.

If Widow Marries Prior to Order of Probate Court setting apart homestead, she loses right to homestead.

Approved in Estate of Goodale, 5 Cof. Prob. 290, following rule; Estate of Hayes, 1 Cof. Prob. 553, where widow and children, during minority, fail to apply for probate homestead, all rights thereto are waived; Estate of Pickett, 1 Cof. Prob. 95, widow, on remarriage, loses right to administer on estate of first husband, and cannot nominate an administrator. See note, 5 Cof. Prob. 291.

43 Cal. 643–655, REEVE v. KENNEDY.

The Lien of a Tax Relates back to the assessment.

Distinguished in Territory v. Perrin, 9 Ariz. 320, 83 Pac. 362, land within forest reserve, relinquished to United States after tax became

lien but before rate fixed, not subject to taxation; Gillmore v. Dale, 27 Utah, 377, 75 Pac. 934, city tax did not become lien on real property severed from city after assessment but before tax rate was fixed.

As to When Taxes on Land Become a Lien or encumbrance thereon. See note, 15 L. R. A. 238.

Superiority of Lien of Local Assessment over prior lien. See note, 35 L. R. A. 374.

Judgments for or Against insane persons. See note, 130 Am. St. Rep. 855.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 43.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 856.

NOTES

ON THE

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44 Cal. 3–17, MOSS v. ATKINSON.

Letter Addressed to a Third Person is sufficient memorandum in writing within statute of frauds.

Approved in Doran v. Doran, 145 Iowa, 128, 123 N. W. 998, cause of action for barred mortgage debt was revived by execution of deed reciting conveyance was made subject to such mortgage; Charlton v. Columbia Real Estate Co., 67 N. J. Eq. 633, 110 Am. St. Rep. 495, 60 Atl. 194, 69 L. R. A. 394, in suit for specific performance of agreement to make a lease, a signed but undelivered lease is admissible to prove agreement upon details pursuant to previously signed memorandum in writing of agreement to make a lease.

Distinguished in Winders v. Hill, 144 N. C. 618, 57 S. E. 457, in action for specific performance of contract to convey, postscript to letter showing receipt of price of land did not admit existence of memorandum of contract of sale.

Possession of Land Under an Unrecorded Contract of Sale is notice sufficient to put purchaser on inquiry.

Distinguished in Womble v. Wilbur, 3 Cal. App. 542, 86 Pac. 919, holding bona fide purchaser from purchaser in possession of land, between whom and his grantor an escrow agreement had been made calling for specified installments and delivery of deed which was silent as to interest, was not charged with notice of a prior agreement charging original purchaser with interest.

Effect of Possession of Real Property as notice. See notes, 104 Am. St. Rep. 345; 13 L. R. A. (n. s.) 1033.

44 Cal. 18–29, COX v. WESTERN PACIFIC R. R. CO.

Contract to Grade Section of Railroad for fixed sum is entire, notwithstanding provision for payment of installments as the work progresses.

Approved in Alderson v. Houston, 154 Cal. 9, 96 Pac. 887, contract authorizing real estate agent to sell forty-three lots and certain price for each for an aggregate commission is entire contract and commission cannot be apportioned; McConnell v. Corona City Water Co.,

149 Cal. 62, 85 Pac. 929, 8 L. R. A. (n. s.) 1171, holding contract for construction of tunnel with partial payments as work progressed was not divisible, but deciding case on other grounds; Atlantic & Danville Ry. Co. v. Delaware Const. Co., 98 Va. 508, 37 S. E. 15, applying rule to contract whereby it is agreed to construct certain docks, piers and a warehouse, and the warehouse and a pier, after completion, are destroyed by fire before completion of entire work; dissenting opinion in Wagner v. Edison Electric Ill. Co., 177 Mo. 67, 69, 75 S. W. 972, 973, majority holding under contract to place electric wires underground, benefits accrued with progress of work and engineer was entitled to recover for services during progress of work.

Failure to Make Installment Payments when due authorizes rescission of contract.

Approved in Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 273, 110 Pac. 955, discussing whether rule applies to sale of goods to be delivered in installments and paid for at fixed times.

44 Cal. 32–35, EX PARTE HARTMAN.

Habeas Corpus cannot Operate to Review errors of law not affecting jurisdiction.

Approved in State v. Pratt, 20 S. D. 444, 107 N. W. 540, where there was no want of jurisdiction, question of whether information was properly based on preliminary examination could not be reviewed; Hovey v. Sheffner, 16 Wyo. 277, 125 Am. St. Rep. 1037, 93 Pac. 312, 15 L. R. A. (n. s.) 227, discharge of jury on Sunday which failed to agree did not deprive court of further jurisdiction of case and was no ground for discharge on habeas corpus.

44 Cal. 36–43, 13 Am. Rep. 151, POLACK v. MANSFIELD.

When Public Officers Assuming to Act for government are subject to suit. See note, 108 Am. St. Rep. 839.

44 Cal. 43–46, GALE v. TUOLUMNE COUNTY WATER CO.

Grounds of Special Demurrer not presented in court below will not be considered on appeal.

Approved in Conde v. Dreisam Gold Min. Co., 3 Cal. App. 590, 86 Pac. 828, applying rule to objection of misjoinder of two living mortgagees with administrator of dead mortgagee in suit to foreclose mortage.

44 Cal. 53–65, SMITH v. MOYNIHAN.

Rule That Parol Evidence is not Admissible to vary written contract is confined to controversy between parties to contract or those claiming under them.

Approved in Smith v. Goethe, 159 Cal. 632, 115 Pac. 225, reaffirming rule; Greve v. Echo Oil Co., 8 Cal. App. 279, 96 Pac. 906, in action by assignee of claim plaintiff may show by parol that name of assignee in assignment was intended for him though initials had been transposed.

44 Cal. 65–70, PEOPLE v. ANDERSON.

Erroneous Instruction is not Cured by correct one afterward given on same point.

Approved in People v. Maughs, 149 Cal. 261, 86 Pac. 190, error in instruction on right of self-defense not cured by another correct

instruction given; People v. Bartnett, 15 Cal. App. 95, 113 Pac. 882, subsequent instruction was merely in conflict with former erroneous instruction; dissenting opinion in People v. Bruggy (Cal.), 26 Pac. 758, majority holding instruction in question on law of self-defense not erroneous.

Practice of Allowing Counsel to Read Law to Jury is, as general rule, objectionable.

Distinguished in People v. Denomme (Cal.), 56 Pac. 99, use of instructions by counsel in argument to jury is within discretion of court and refusal to allow counsel to read instruction not error.

Scientific Books and Treatises as Evidence. See note, 40 L. R. A. 573, 574.

44 Cal. 71–84, YEOMANS v. CONTRA COSTA STEAM NAVIGATION CO.

Express Messenger Occupies Same Position toward railroad as passenger, with respect to latter's liability for personal injuries.

Approved in Holmes v. Birmingham Southern R. R. Co., 140 Ala. 214, 37 So. 339, where railroad ran its cars to a stockhouse for purpose of unloading, under agreement that cars were to be cleaned by employee of stockhouse after unloading, such employee while carried on cars of railroad company was a passenger; Barker v. Chicago, Peoria etc. Co., 243 Ill. 491, 134 Am. St. Rep. 382, 90 N. E. 1059, 26 L. R. A. (n. s.) 1058, applying rule in action by postal clerk in United States railway mail service for personal injuries resulting from collision of train he was on with coal-cars on track; Davis v. Chesapeake & Ohio Ry. Co., 122 Ky. 537, 121 Am. St. Rep. 481, 92 S. W. 340, 5 L. R. A. (n. s.) 458, upholding rule in action by injured express messenger who was carried in special car under a contract of carrier with express company.

Distinguished in Yarrington v. Delaware etc. Co., 143 Fed. 568, holding under local statute mail clerk not in position of passenger and railroad only liable to him for personal injuries to extent it would be to employee.

Rights of Person Riding on Pass or Contract for free passage. See note, 22 L. R. A. 796.

Presumption of Negligence from Happening of accident causing personal injuries. See notes, 113 Am. St. Rep. 1020; 15 L. R. A. 38.

44 Cal. 84–88, EX PARTE BENNETT.

Jurisdiction is Power to Hear and Determine, or to hear without determining, or to determine without hearing.

Approved in Dahlgren v. Superior Court, 8 Cal. App. 627, 97 Pac. 683, appointment of stranger as special administrator of estate of deceased person in preference to daughter of deceased who petitioned for appointment is error within exercise of jurisdiction which cannot be annulled upon certiorari; Beaulieu Vineyard v. Superior Court, 6 Cal. App. 248, 91 Pac. 1017, condemnation proceeding within jurisdiction of court, though court reserved question of necessity for taking particular piece; County of San Luis Obispo v. Simas, 1 Cal. App, 181, 81 Pac. 975, holding final decree in condemnation proceeding not void though made without opportunity or notice of hearing; Lawrence v. Cannavan, 76 Conn. 306, 56 Atl. 557, holding under General Statutes of 1902, section 510, providing that a trial shall be

ended and judgment entered before close of next term after it was commenced, a judgment rendered thereafter, though erroneous, is not void for want of jurisdiction; Wabaska Electric Co. v. City of Blue Springs, 84 Neb. 579, 122 N. W. 22, where action was duly brought by appeal from court obtaining jurisdiction, judgment entered by consent, though erroneous, is not void; George v. Dill, 83 Neb. 831, 120 N. W. 449, judgment based on evidence taken under stipulation in another judicial district, if erroneous, was not void and subject to collateral attack; Lockard v. Lockard, 21 S. D. 136, 110 N. W. 105, judgment rendered when court was not regularly in session for trial of contested cases was merely erroneous.

44 Cal. 89–92, TRUCKEE ETC. ROAD CO. v. CAMPBELL.

The Right to Construct and Operate a public utility is a franchise derived from the state.

Approved in State v. Des Moines City Ry. Co., 135 Iowa, 705, 109 N. W. 872, upholding proceedings in name of the state involving the unlawful exercise of right to use city streets for maintenance of street railway.

One Using Road will not be Permitted to refuse payment for use on account of its condition.

Reaffirmed in State v. Schenkel, 129 Mo. App. 234, 108 S. W. 638.

Right to Take Tolls Without Franchise. See note, 37 L. R. A. 716.

44 Cal. 92–96, PEOPLE v. CONGLETON.

An Indictment Charging Assault "with a deadly weapon" with intent to do bodily harm is good, without stating character of weapon.

Approved in Matter of Hughes, 159 Cal. 362, 113 Pac. 685, reaffirming rule; People v. Weir, 10 Cal. App. 462, 102 Pac. 539, upholding information charging "an assault with a deadly weapon, to wit, a large shovel."

44 Cal. 105, PEOPLE v. PARKS.

Venue must be Proved as Laid.

Approved in People v. Meseros, 16 Cal. App. 278, 116 Pac. 679, in prosecution for embezzlement of money by cashing of checks in San Francisco which were intrusted to defendant in Alameda county, venue is in Alameda.

44 Cal. 106–117, SAN DIEGO v. SAN DIEGO ETC. R. R. CO.

Courts will not Permit Trustees of business corporations to secure advantages to themselves at its expense.

Approved in Lainhart v. Burr, 49 Fla. 331, 38 So. 715, where county commissioners procured county supplies from firms in which some of them were interested, recovery should be confined to actual cost of supplies provided that does not exceed reasonable value; Young v. City of Mankato, 97 Minn. 6, 105 N. W. 970, 3 L. R. A. (n. s.) 849, board of freeholders appointed to draft charter for municipality cannot employ, at cost of public, one or more of its members to prepare such charter; Wann v. Scullin, 210 Mo. 481, 109 S. W. 702, in action for fraud and deceit by holder of stock in ferry company against its president, who was also stockholder in railroad company, which was planning to secure control of ferry stock, fraudulent intent was not established; Antigo Water Co. v. Antigo, 144 Wis. 166, 128 N. W. 890,

applying rule where a councilman was president of water company with which city had a contract.

Validity of Contract Between Director and his corporation. See note, 139 Am. St. Rep. 607.

Validity of Vote of Common Council or similar body as affected by personal interest of members. See note, 18 L. R. A. 368.

44 Cal. 117-120, BLETHEN v. BLAKE.

Condition in Contract may be Waived by party for whose benefit alone it was intended.

Approved in Kuballus v. Ewert, 40 Wash. 43, 82 Pac. 149, where one agreed to purchase meat business provided he could obtain lease from owner of market, the condition was one for his benefit which he could waive.

44 Cal. 121-127, BUSH v. LINDSEY.

Probate Court has No Authority to Cite the administrator of an administrator to settle the account of his intestate with the estate of which he was administrator.

Approved in Burke v. Maguire, 154 Cal. 469, 98 Pac. 26, holding complaint did not show personal liability of administrator of an executrix to legatees of first estate for their share of such estate.

Distinguished in King v. Chase, 159 Cal. 422, 115 Pac. 208, 209, upon enactment of Code of Civil Procedure, section 1639, in 1905, superior court sitting in probate has power to compel accounting in such cases; Elizalde v. Murphy, 4 Cal. App. 119, 87 Pac. 247, holding the superior court sitting in probate under the present constitution has such jurisdiction.

Miscellaneous.—Cited in McFadden v. Mason (Cal.), 3 Pac. 893.

44 Cal. 127-131, WHITCHER v. WEBB.

Provision in Note That if Any Installment of interest be not paid the whole note shall become due at option of holder is operative immediately without any notice from holder to payer.

Approved in Hewett v. Dean (Cal.), 25 Pac. 755, reaffirming rule.

Relief in Equity from Forfeitures. See note, 86 Am. St. Rep. 62.

44 Cal. 132-138, HALEY v. AMESTOY.

Where Deed Contains General Description of Property by name, followed by particular description by metes and bounds, which is erroneous, latter description will be rejected.

Approved in Schmidt v. Olympia Light etc. Co., 40 Wash. 136, 82 Pac. 186, where deed and mortgage described water right in two ways, one of which descriptions was erroneous, intention of parties must control.

Distinguished in Wood v. Dillingham, 5 Haw. 641, holding agreement for sale of realty, describing it as the "Nuuanu Dairy property, containing an area of 650 acres more or less," where property in fact contained only two hundred and fifty-eight acres, was made under mutual and gross mistake.

44 Cal. 139-144, SIMPSON v. PACIFIC MUT. LIFE INS. CO.

Presentment for Payment of Bank Check the following day after it is received is sufficient to fix liability of drawer.

Approved in Haggerty v. Baldwin, 131 Mich. 191, 91 N. W. 151, reaffirming rule; Gordon v. Levine, 194 Mass. 421, 120 Am. St. Rep. 565, 80 N. E. 506, 10 L. R. A. (n. s.) 1153, circulation of check from hand to hand will not extend time of presentment to detriment of drawer; School Dist. No. 57 v. Eager, 19 Okl. 238, 91 Pac. 848, where check which had been improperly signed was corrected on Saturday, holder was entitled to present it on the following Monday; Lewis, Hubbard & Co. v. Montgomery etc. Co., 59 W. Va. 81, 52 S. E. 1019, 4 L. R. A. (n. s.) 132, where person receiving check and bank on which it is drawn were in different places, it was not necessary to transmit check by only mail of day next after its receipt.

If Holder Declines to Accept Payment when tendered on proper demand, liability of drawer ceases.

Approved in Noble v. Doughten, 72 Kan. 350, 351, 354, 83 Pac. 1053, 1054, 3 L. R. A. (n. s.) 1167, holder of check who, instead of taking cash, accepted substituted check of drawee on another bank, did so at his own risk.

Accepting Something Besides Money from Bank as discharge of drawer of check. See note, 25 L. R. A. 200.

44 Cal. 144–153, HARKRADER v. MOORE.

In Malicious Prosecution It is not Sufficient that defendant was informed of facts sufficient to make a reasonable person believe the person prosecuted was guilty; he must have believed he was guilty.

Approved in Carpenter v. Sibley, 15 Cal. App. 593, applying rule in action for malicious prosecution upon charge of subornation of perjury, where plaintiff had been convicted of charge, but judgment was reversed on appeal; Fleischhauer v. Fabens, 8 Cal. App. 33, 96 Pac. 19, in action for malicious prosecution a proposed instruction which leaves out of consideration the question whether defendant did in fact believe plaintiff guilty of the crime charged properly refused.

In Malicious Prosecution, Question Whether Facts amount to probable cause is for court and not for jury.

Approved in Hynes v. Nelson (Cal.), 2 Pac. 37, 38, where uncontradicted evidence in action for malicious prosecution tends to show probable cause and verdict is against instructions, not error to set it aside.

Malice must be Shown to Support Action for malicious prosecution.

Cited in Davis v. Hearst, 160 Cal. 163, 180, 116 Pac. 539, 546, applying rule in libel suit; Stone v. Hutchinson, 4 Haw. 122, arguendo.

Acquittal or Discharge on Criminal Charge as evidence of want of probable cause. See notes, 64 L. R. A. 485; 3 L. R. A. (n. s.) 929.

44 Cal. 168–173, FRANKEL v. STERN.

Damages for Wrongful Attachment are measured by depreciation in value of goods.

Approved in McCarthy Co. v. Boothe, 2 Cal. App. 172, 83 Pac. 176, rule that measure of damages for wrongful attachment is difference in value when seized and when restored with loss of its use meanwhile is applicable to stock attached.

44 Cal. 173–177, 13 Am. Rep. 157, KIMBALL v. UNION WATER CO.

Mandamus will Lie Only where there is no sufficient remedy at law.

Approved in Williams v. Bagnelle (Cal.), 70 Pac. 1058, mandamus does not lie to compel school superintendent to issue requisition for teacher's salary.

Mandamus will not Lie to Compel Transfer of shares of stock on books of a corporation.

Approved in London, Paris & American Bank v. Aronstein, 117 Fed. 606, 54 C. C. A. 663, refusal of corporation without lawful excuse to transfer shares of stock on its books to one entitled to such transfer may be treated as a conversion and its value recovered in an action at law; State v. Jumbo Extension Mining Co., 30 Nev. 205, 133 Am. St. Rep. 715, 94 Pac. 77, mandamus does not lie against a corporation to compel it to issue and deliver shares of stock to relator.

Compelling Issue of Stock. See note, 133 Am. St. Rep. 725.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 860, 861.

44 Cal. 182–185, DELGER v. JOHNSON.

Injunction will not be Retained where the acts sought to be enjoined have already been performed.

Approved in Flood v. Goldstein Co., 158 Cal. 250, 110 Pac. 917, ousted lessee is not entitled to preliminary injunction against wrecking of a building which has been so far destroyed it cannot be used; Hatch v. Raney, 9 Cal. App. 717, 100 Pac. 887, holding injunction to restrain defendant from interfering with plaintiff's water ditch improperly issued where complaint showed the ditch had been destroyed.

44 Cal. 187–193, 13 Am. Rep. 160, BAXTER v. ROBERTS.

Employer is Bound to Inform Employee of dangers of the employment from external causes beyond what would fairly be understood by employee as resulting from the employment.

Approved in Boin v. Spreckels Sugar Co., 155 Cal. 618, 102 Pac. 940, where servant was ordered to work in tank containing dangerous chemical compound, failure to warn him of dangerous character of the mixture rendered employer liable for resulting injuries; Bone v. Ophir Silver Min. Co., 149 Cal. 294, 86 Pac. 685, employer liable where employee, a miner, was put to work in mine without being informed of existence of unexploded blasts in the mine; Hokhouser v. Denver Gas etc. Co., 18 Colo. App. 433, 434, 72 Pac. 290, master's failure to give employee warning that he was liable to be shot by striking employees was actionable negligence; Stephens v. Elliott, 36 Mont. 101, 92 Pac. 46, applying rule in action for personal injuries by one employed as a teamster who was put to work "running a whim"; Cetofonte v. Camden Coke Co., 78 N. J. L. 666, 75 Atl. 915, applying rule where laborer employed in loading coke on cars was killed by passing over an unguarded rail charged with electricity in his place of work; Bradburn v. Wabash R. Co., 134 Mich. 583, 96 N. W. 932, railroad knowing of existence of lumber piles placed, contrary to custom, close to switch track, is negligent in sending switching crew there without apprising them of danger.

Duty of Master to Instruct and Warn Servants as to perils of employment. See note, 44 L. R. A. 38, 56.

44 Cal. 200–203, CROSETT v. WHELAN.

A Party may Introduce His Evidence in any order he prefers, subject to control of the court in the exercise of a sound discretion.

Approved in Brady v. Ranch Mining Co., 7 Cal. App. 183, 94 Pac. 85, fact that account was proved without first proving agency of one who assumed to represent defendant not erroneous where proof of the agency was immediately afterwards supplied.

Where Verdict is General and There is Sufficient Evidence to sustain it on one of the issues, it will not be set aside.

Approved in California Wine Assn. v. Commercial etc. Co., 159 Cal. 52, 112 Pac. 860, permitting judgment-roll containing general verdict to be amended so as to show it was sustained by special verdicts, notwithstanding one of the issues was erroneous; Big Three Min. and Mill Co. v. Hamilton, 157 Cal. 141, 137 Am. St. Rep. 118, 107 Pac. 307, applying rule where there were two defenses under a general verdict for defendant.

44 Cal. 204–209, PORTER v. PACKHAM.

Errors Which Do No Injury are not grounds for new trial.

Approved in Lowry v. Southern Ry. Co., 117 Tenn. 516, 101 S. W. 1159, applying rule to erroneous instructions on measure of damages given in action for death of a boy.

Effect of Notice of Subagent. See note, 21 L. R. A. 341.

44 Cal. 213–228, HIMMELMANN v. HOADLEY.

Courts will Take Judicial Notice of the signatures of deputy clerks.

Approved in Jordan v. McDonnell, 151 Ala. 286, 44 So. 103, upholding introduction in evidence of certified copy of writ of error from United States circuit court, where certificate with seal attached was signed "Charles J. Allison, Clerk of the U. S. Circuit Court, per Ina Allison, Deputy Clerk"; Clements v. Utley, 91 Minn. 358, 98 N. W. 190, upholding writ of attachment signed, "L. H. Prosser, Clerk, by D. W. Bacon," with seal of court attached.

44 Cal. 230–236, HEARST v. PUJOL.

Statute of Limitations Does not Begin to Run against beneficiary of trust until trustee repudiates the trust and such repudiation is brought to his knowledge.

Cited in Miller v. Ash, 156 Cal. 566, 105 Pac. 609, holding in action against estate of guardian to recover property of wards converted by guardian forty-five years prior to action, no such facts appeared as would put wards on inquiry so as to bar their right by delay; Levy v. Ryland, 32 Nev. 466, 470, 109 Pac. 907, 908, where two persons purchase land and title is taken in name of one, there is resulting trust in favor of other.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 844.

44 Cal. 236–239, KING v. CONNOLLY.

Defenses of Tenant to Unlawful Detainer. See note, 120 Am. St. Rep. 49.

44 Cal. 239–245, BRADY v. WILCOXSON.

Where a Claim is Uncertain and Unliquidated, interest will not be allowed.

Approved in Erickson v. Stockton etc. R. R. Co., 148 Cal. 207, 82 Pac. 961, in action on account for services rendered and goods sold,

where plaintiff recovers less than the amount sued for, he is entitled, under Civil Code, section 1917, only to interest from day on which balance is ascertained; Krasilnikoff v. Dundon, 8 Cal. App. 412, 97 Pac. 174, applying rule to measure of damages for breach of warranty in manufacture and sale of boilers; Parkins v. Missouri etc. R. R. Co., 76 Neb. 257, 107 N. W. 266, in action for breach of contract of sale where vendee refused to accept goods which vendor was to procure from third parties, measure of damages should include interest from date of accrual of action.

Distinguished in Courteney v. Standard Box Co., 16 Cal. App. 613, 117 Pac. 784, where contract for sale of goods was for agreed price less freight advanced by defendant, in suit for net balance, plaintiff could recover interest from commencement of action.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 27.

44 Cal. 246-252, McCREERY v. EVERDING.

Actual Possession of Land may be had without fence or inclosure.

Approved in Daubenbiss v. White (Cal.), 31 Pac. 362, holding in ejectment prior possession was proved though there was no inclosure.

Miscellaneous.—Cited in Lowell v. Lowell, 55 Cal. 319, holding an appeal from a judgment is well taken if notice is filed within the year and thereafter the undertaking is filed within the period prescribed by the code.

44 Cal. 253-264, CASTRO v. TENNENT.

The Word "Heir" Includes Heirs Ad Infinitum.

Approved in Howell v. Garton, 82 Kan. 498, 108 Pac. 845, applying rule to term "unknown heirs," as used in sections of code providing for service by publication in cases relating to real property.

44 Cal. 264-269, DOYLE v. PHOENIX INS. CO.

In Action on Fire Insurance Policy providing for payment within sixty days after proof of loss, complaint must show that such period has elapsed before suit.

Approved in Lew v. Commercial etc. Ins. Co., 15 N. D. 364, 107 N. W. 61, where policy contained stipulation providing for the determination by agreement of parties or appraisers to be appointed of amount of loss in case of fire, complaint must show such stipulation was complied with or waived.

Disapproved in Vail v. Pennsylvania Fire Ins. Co., 67 N. J. L. 69, 50 Atl. 673, holding in action on similar policy general averment in complaint of performance of conditions precedent will embrace such condition as to time.

Allegation That Sum Sued for is Due is a mere conclusion of law.

Approved in Moriarity v. Cochran, 75 Neb. 837, 106 N. W. 1011, in petition declaring amount due on appeal bond there was no allegation of breach of undertaking.

44 Cal. 269-276, POORMAN v. MILLER.

Declarations of a Person, Since Deceased, in support of his own interest, are inadmissible.

Approved in Bauers v. Bull, 46 Or. 66, 78 Pac. 759, in case of death of person who probably attempted to assert adverse user of water, the law, from mere user, invokes presumption it was under

claim of right and imposes burden of proving use was in pursuance of license on adverse party.

Declarations of Grantor and Grantee in later deed that it was made in lieu of former deed to same land held inadmissible.

Distinguished in Edson & Folke Co. v. Winsell, 160 Cal. 787, 118 Pac. 245, in action to settle conflicting water rights, evidence of conversation between defendant and plaintiff's ditch-tender, in which former expostulated for interference with water, is admissible.

44 Cal. 276–279, HIMMELMANN v. HOADLEY.

The Including of Extra Work not Specified in Contract in assessment of lot for street work is an error which must be corrected by appeal to board of supervisors, and is no defense to an action to recover the assessment.

Approved in Fanning v. Leviston, 93 Cal. 188, 28 Pac. 944, holding in action on assessment for street work objection that the assessment and demand included charge for work not authorized by the contract should have been taken on appeal to board of supervisors; Bates v. Hadamson, 2 Cal. App. 577, 84 Pac. 52, holding objection that street assessment on lot was greater than it should have been should be raised on an appeal to city council and could not be complained of in action to foreclose the lien.

44 Cal. 280–283, ROGERS v. HATCH.

Successive Absences of Person from State must be aggregated and deducted from time necessary to bar action by limitation.

Distinguished in Stewart v. Stewart, 152 Cal. 165, 92 Pac. 88, if person takes up his residence in another state after a cause of action accrues against him, his open and unconcealed visits to this state are to be reckoned as time on the limitation period, though plaintiff did not know of the visits.

Sufficiency and Effect of "Return" to state by defendant to start limitations running. See note, 23 L. R. A. (n. s.) 548, 552.

Right to Recover from Agent Money paid him for principal. See note, 23 L. R. A. (n. s.) 553.

44 Cal. 284–288, McCREERY v. EVERDING.

Error in Granting New Trial as to one of several defendants cannot be corrected on appeal of others alone.

Approved in People v. Rea, 2 Cal. App. 111, 83 Pac. 165, where in quo warranto against three persons judgment was rendered ousting two from office of justice of peace and declaring the third entitled to office, errors relating to third cannot be reviewed on appeal by other two alone.

A Judgment in Favor of a Dead Man is a nullity.

Approved in More v. Miller (Cal.), 53 Pac. 1079, judgment against an administrator who was removed after submission of case but before judgment is invalid, though it might have been entered nunc pro tunc as of the date of submission.

Distinguished in Tyrrell v. Baldwin, 67 Cal. 5, 6 Pac. 868, holding death of a defendant in ejectment after answer filed and before trial does not render judgment against him void as to purchasers pendente lite of his interest in premises.

44 Cal. 288–294, PEOPLE v. ASHE.

Evidence of Good Character in the trait involved is admissible and should be considered with other evidence as bearing upon guilt or innocence of accused.

Approved in People v. Lee (Cal.), 8 Pac. 687, charge that "evidence of character can only be considered in relation to the particular crime charged in cases where the guilt of the accused is doubtful" is erroneous; People v. Piner, 11 Cal. App. 553, 554, 105 Pac. 784, charge that evidence of defendant's good character should be received "with great caution" erroneous, though harmless, since jury could have found consistently with its verdict that previous good character was conclusively established; United States v. Chung Sing, 4 Ariz. 219, 36 Pac. 206, questions propounded in prosecution for selling whisky to Indians did tend to show reputation as to trait involved; People v. Van Gaasbeck, 189 N. Y. 414, 82 N. E. 720, 22 L. R. A. (n. s.) 650, in prosecution for murder, evidence of reputation of accused as to quietness and peaceableness was admissible.

Evidence of Good Character to create doubt of guilt. See notes, 103 Am. St. Rep. 892, 905; 20 L. R. A. 617, 618.

What Constitutes Reasonable Doubt in criminal cases. See note, 17 L. R. A. 707.

44 Cal. 294–303, WETMORE v. SAN FRANCISCO.

In an Action for Money Due, defendant, under a general denial, may prove payment, or that plaintiff has transferred demand to another.

Approved in Brooks v. Ardizzone, 9 Cal. App. 216, 98 Pac. 300, reaffirming rule; Cunningham v. Springer, 13 N. M. 285, 82 Pac. 238, in suit to recover value of legal services, payment could be proven under general denial.

Action on Debt may be Maintained by one holding legal title, although without beneficial interest.

Approved in Pratt v. Northern Pac. Express Co., 13 Idaho, 376, 121 Am. St. Rep. 268, 90 Pac. 342, 10 L. R. A. (n. s.) 499, upholding right of consignee to maintain action against carrier to recover property consigned in payment of a debt due from consignor; Greene v. McAuley, 70 Kan. 611, 79 Pac. 137, 68 L. R. A. 308, where owner of land clothed another with authority to enforce payment of debt owing her, she was concluded by judgment in suit brought by him.

44 Cal. 303–305, OAKLAND v. WHIPPLE.

Taxes Levied Under Law That was Repealed by subsequent act should be collected where repealing act does not operate retrospectively.

Approved in Estate of Lander, 6 Cal. App. 746, 93 Pac. 203, right to collateral inheritance tax became vested on death of deceased and was not affected by subsequent repealing act; Blakemore v. Cooper, 15 N. D. 19, 125 Am. St. Rep. 574, 106 N. W. 572, 4 L. R. A. (n. s.) 1074, right to redeem from tax sale made under chapter 132, page 376, Laws of 1890, was a "right accrued," not affected by repeal of 1890 revenue laws by Revised Codes of 1895; Hagler v.

Kelley, 14 N. D. 225, 103 N. W. 631, judgment obtained and docketed for personal property taxes was a lien not affected by repeal of law under which it was acquired.

44 Cal. 309–320, ANDREWS v. PRATT.

Boards of Supervisors Occupy Positions of Trust toward their respective counties.

Approved in Woods v. Potter, 8 Cal. App. 44, 95 Pac. 1127, holding members of common council of San Diego could not claim or vote themselves compensation for their services not allowed by the city charter or any act of legislature; Johnson v. Black, 103 Va. 484, 106 Am. St. Rep. 890, 49 S. E. 635, 68 L. R. A. 264, equity has jurisdiction to entertain suit brought by a number of taxpayers against supervisors to compel restoration of money paid them in excess of their salaries notwithstanding adequate remedy at law.

Several Persons Jointly Concerned in a Series of fraudulent acts may be united as defendants in a suit to annul such acts.

Approved in North American Ins. Co. v. Yates, 214 Ill. 284, 73 N. E. 427, holding a bill to enjoin foreign insurance companies that had not complied with law from doing business in state which joined several such companies and individual defendants charging a common plan and conspiracy to avoid law was not multifarious.

Court of Equity will Enjoin Payment of county warrants illegally drawn at suit of taxpayer.

Distinguished in Morse v. Jacky, 34 Mont. 169, 85 Pac. 884, injunction will not lie at suit of taxpayer to restrain persons acting as trustees of free county high school from performing acts as such trustees.

Certiorari will not Lie to Correct mere irregularity intervening in the exercise of an admitted jurisdiction.

Approved in Matter of Hughes, 159 Cal. 364, 113 Pac. 686, determination of superior court that petition for writ of habeas corpus was sufficient, though erroneous, is not reviewable by certiorari.

Certiorari does not Lie to Set Aside proceedings of supervisors in allowing an illegal claim.

Approved in Cook v. Civil Service Commission, 160 Cal. 597, 117 Pac. 666, certiorari does not lie to review action of civil service commission in conducting examination and declaration of percentages attained by candidates.

44 Cal. 320–323, 13 Am. Rep. 165, CERF v. HOME INS. CO.

Insurance Policy Prohibiting Use of Burning Fluid or chemical oils on premises is rendered null and void by use of kerosene oil as night light in store.

Distinguished in Arnold v. American Insurance Co., 148 Cal. 667, 84 Pac. 185, 25 L. R. A. (n. s.) 6, insurance policy prohibiting keeping of gasoline on premises is not substantially violated by temporary use of small quantity of gasoline for cleansing purposes.

44 Cal. 323–326, PEOPLE v. GOLDTREE.

Legislature has Power to Pass Curative Acts relative to the levying and assessing of taxes.

Approved in City of Orlando v. Giles, 51 Fla. 436, 40 So. 839, act validating assessment of taxes could not be defeated by defense

that real estate was not assessed to true owner or valuation was unequal and discriminative.

44 Cal. 326–327, PEOPLE v. ARMSTRONG.

Bill of Exceptions not Signed by Trial Judge will be disregarded on appeal.

Approved in People v. Schultz, 14 Cal. App. 108, 111 Pac. 272, applying rule where bill of exceptions was not settled and approved in manner required by law as it existed at time of taking appeal.

44 Cal. 328–331, McDONALD v. EDMONDS.

Quitclaim Deed Does not Pass After-acquired Title.

Reaffirmed in Tabler v. Perevill, 4 Cal. App. 676, 88 Pac. 996.

Certificate of Federal Land Office Receiver that person named therein has made full payment for land described under pre-emption, is evidence that person has taken steps necessary to pre-emption.

Cited in dissenting opinion in Morrow v. Warrner Valley Stock Co., 56 Or. 352, 101 Pac. 186, arguendo.

44 Cal. 335–343, FREY v. CLIFFORD.

A Mortgagee in Mortgage to Secure Pre-existing Debt is a purchaser for valuable consideration.

Approved in Hoover v. Wasson, 11 Cal. App. 595, 105 Pac. 948, surrender of note barred by statute of limitations constitutes good and valuable consideration for land purchased; Lindley v. Blumberg, 7 Cal. App. 145, 93 Pac. 897, holding where husband after executing deed to wife which was unrecorded leased to plaintiff for value with option to purchase, latter could not enforce option against wife who had more than a year previously given notice of her deed; Virginia etc. Co. v. Glenwood Lumber Co., 5 Cal. App. 261, 90 Pac. 50, holding transfer of property in consideration of pre-existing debt was for valuable consideration; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 567, 86 Pac. 822, holding an order given as collateral security for pre-existing debt was supported by valuable consideration.

Pre-existing Debt as Consideration for mortgage as against other creditors or equities. See note, 33 L. R. A. 308.

Discharge of Antecedent Debt as Consideration entitling bona fide purchaser or encumbrancer to protection of recording acts. See note, 27 L. R. A. (n. s.) 622.

A Quitclaim Deed of "All My Right, Title, and Interest in Sacramento city, consisting of town lots and buildings thereupon," passes grantor's interest in his lots in Sacramento.

Approved in Reed v. Munn, 148 Fed. 751, 80 C. C. A. 215, holding description in sheriff's levy and sheriff's deed sufficient to identify property.

Quitclaim Deeds. See note, 105 Am. St. Rep. 860.

Effect of Quitclaim in Otherwise perfect record title. See note, 29 L. R. A. 42.

General Description in Grant may be Aided by extrinsic evidence to ascertain property, intended to be conveyed.

Approved in Chemung Min. Co. v. Hanley, 11 Idaho, 308, 81 Pac. 621, deed containing specific description of one-third interest in

mine, followed by general grant of all other assets and property, conveyed all other interests grantor owned; Halley's Executor v. Curry, 58 W. Va. 73, 112 Am. St. Rep. 944, 51 S. E. 136, upholding general description of real estate in deed of trust which did not state in what county or state the land was situated.

Parol Evidence is Admissible to Identify Property with reference to which contract is made.

Approved in Spongberg v. First Nat. Bank, 15 Idaho, 676, 99 Pac. 713, applying rule where contract to lease real property described it as "the side room in our bank."

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 33.

44 Cal. 353–355, WALBRIDGE v. ELLSWORTH.

In Ejectment a Deed is Admissible in evidence unless it shows on its face that it does not include the premises in question, and it is then necessary for the party claiming under it to show that it does embrace such premises.

Reaffirmed in Winchester v. Payne, 10 Cal. App. 503, 102 Pac. 531.

44 Cal. 355–363, McCAULEY v. FULTON.

An Equitable Defense in an Action of Ejectment must be distinctly pleaded and proved.

Approved in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987, reaffirming rule but holding that though evidence upon the defense was allowed to go in without being pleaded, the defense was not sufficiently supported by evidence.

Service of Process Sufficient to constitute due process of law. See note, 50 L. R. A. 578.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 461.

Rights and Position of Creditors, purchasers, and other third parties in partnership realty. See note, 28 L. R. A. 172.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 494, 495.

Right to Purchase One Partner's Interest in partnership realty without consent of others. See note, 18 L. R. A. (n. s.) 1180.

44 Cal. 366–371, RANDOLPH v. BAYNE.

Whether a Personal Liability may be Created for an easement. See notes, 133 Am. St. Rep. 932; 35 L. R. A. 61.

Conclusiveness of Probate as Res Judicata. See note, 21 L. R. A. 685.

44 Cal. 371–384, COLLINS v. BARTLETT.

Improvements on Public Lands, which become part of realty, pass to the purchaser from the United States.

Approved in Hereford v. Pusch, 8 Ariz. 84, 68 Pac. 550, holding a log and brush cabin built on public land had become part of realty and could not be removed; Helstrom v. Rodes, 30 Utah, 125, 83 Pac. 731, occupant of mining land who makes improvements, without title, acquires no claim of possession or of compensation for improvements when title is passed to another.

Right of One Who Buys, or Makes Lawful Entry on, public land, to crops and improvements placed thereon by another. See note, 70 L. R. A. 801.

Cross-complaint must Itself Contain all requisite facts to entitle pleader to affirmative relief.

Approved in Bacon v. Rice, 14 Idaho, 112, 93 Pac. 512, cross-complaint in action to quiet title was sufficient.

44 Cal. 389-392, HOPKINS v. WESTERN PAC. R. R. CO.

Motion for New Trial may be Dismissed in discretion of court for want of diligence in its prosecution.

Approved in Dorcy v. Brodis, 153 Cal. 675, 96 Pac. 279, holding inexcusable delay of almost four months in having proposed statement on motion for new trial heard and settled justified court in dismissing the motion.

44 Cal. 392-397, GATES v. LANE; S. C., 49 Cal. 266.

In Pleading, the Essential Facts upon which legal points in controversy depend should be stated with clearness and precision.

Approved in People v. Lanterman, 9 Cal. App. 682, 100 Pac. 723, holding language of indictment under Penal Code, section 72, for presenting false claim against county not sufficiently definite and clear.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 117.

Injunctions Against Judgments for want of jurisdiction or invalidity. See notes, 32 L. R. A. 329; 31 L. R. A. 210, 212.

44 Cal. 397-414, WELLS, FARGO CO. v. PACIFIC INSURANCE CO.

Policies of Insurance are to be Interpreted by same rules applicable to other contracts, and to be enforced according to intention of parties.

Approved in Rankin v. Amazon Ins. Co. (Cal.), 25 Pac. 261, holding evidence showed condition in insurance policy requiring watchman for premises when not in use was not sufficiently complied with.

44 Cal. 414-430, SHEA v. POTRERO ETC. R. R. CO.

Pedestrians Have Right to Walk upon street-car track in public street, and doing so instead of walking by side of track is not contributory negligence.

Approved in Acton v. Fargo & Moorhead St. Ry. Co., 20 N. D. 450, 129 N. W. 229, following rule; Scott v. San Bernardino Valley etc. Co., 152 Cal. 610, 93 Pac. 679, applying rule where street-car collided with plaintiff's buggy causing injury; Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 616, 86 Pac. 741, applying rule where plaintiff employed in street work was injured by street-car; dissenting opinion in Robards v. Indianapolis St. R. Co., 32 Ind. App. 310, 67 N. E. 956, majority holding that one, struck by car while riding bicycle near track, was guilty of contributory negligence in not looking and listening, notwithstanding injury could have been avoided by defendant's ordinary care.

Walking upon Street-car Track as negligence per se. See note, 9 L. R. A. (n. s.) 244.

In Action for Personal Injuries the wealth or poverty of plaintiff **cannot be** considered on question of damages.

Reaffirmed in Johnston v. Beadle, 6 Cal. App. 253, 91 Pac. 1012.

Necessity of Headlights on Street-cars. See note, 26 L. R. A. 301.

44 Cal. 435–440, PEOPLE v. McLAUGHLIN.

Statement of Wounded Person, since deceased, which was but a narrative of a past occurrence is inadmissible.

Approved in Bowles v. Commonwealth, 103 Va. 826, 48 S. E. 530, in prosecution for homicide conversation of witness with deceased had about six hours after affray was inadmissible on behalf of defendant.

Dying Declarations as Evidence. See note, 56 L. R. A. 368, 369.

44 Cal. 440–452, BLANCHARD v. KAULL.

Trustees of Corporation Who Sign Notes as such trustees are not personally liable thereon, though they had no authority from the corporation to make the notes.

Approved in Perkins v. Cooper (Cal.), 24 Pac. 377, holding letters from one of the executors of an estate authorizing agent to sell real estate on commission not sufficient memorandum under statute of frauds to hold executors individually; Mitchell v. Jensen, 29 Utah, 360, 81 Pac. 168, in order to hold defendants liable as partners for goods sold and delivered, merely because of their connection with a pretended corporation, a showing of their participation in and authorization of the business of the corporation must be made.

Personal Liability of Officers on Note made for corporation. See note, 19 L. R. A. 680.

Liability of Principal on Negotiable Paper executed by agent. See note, 21 L. R. A. (n. s.) 1059, 1073.

Transactions in Name of Supposed but nonexisting corporation. See notes, 94 Am. St. Rep. 594; 17 L. R. A. 552.

44 Cal. 452–462, PEOPLE v. DEVINE.

A Witness cannot be Impeached by Proof of contradictory statements made elsewhere where the matter is collateral and not relevant to the issue being tried.

Approved in Estate of Gird, 157 Cal. 548, 137 Am. St. Rep. 131, 108 Pac. 505, holding objection to testimony of previous contradictory statements of a witness relative to a collateral matter properly sustained; Moody v. Peirano, 4 Cal. App. 417, 88 Pac. 381, holding contradictory evidence to impeach a witness upon a collateral matter was admissible where such collateral matter was relevant to the issue.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 47.

Deposition of Witness Taken Before Coroner's Jury is admissible to contradict statements of witness, after proper foundation has been laid.

Distinguished in Aetna Life Ins. Co. v. Milward, 118 Ky. 728, 82 S. W. 367, 68 L. R. A. 285, holding in action on insurance policy the verdict of coroner's jury is not admissible on the issue of the cause of death.

Coroner's Inquest as Evidence. See note, 95 Am. St. Rep. 772.

44 Cal. 462–471, MAHON v. WOOD.

Agreement Showing Intent to Become Stockholder is sufficient as a contract of subscription.

Approved in Nebraska Chickory Co. v. Lednicky, 79 Neb. 593, 113 N. W. 247, one agreeing to take a number of shares in corporation thereafter to be formed is liable as shareholder after corporation is formed.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 337.

44 Cal. 471–475, LOVELL v. FROST.

To Acquire Title to Land by Statute of Limitations, not only must possession be adverse, but title must be claimed as against owner during entire period.

Approved in Anderson v. Bassman, 140 Fed. 26, holding right to use of water in stream not acquired by prescription against one who interrupted and prevented such use when the water was low; Union Mill etc. Co. v. Dangberg, 81 Fed. 91, holding where use was not continuous, evidence was insufficient to support prescriptive right to use of water in a stream; Co-operative Bldg. Bk. v. Hawkins, 30 R. I. 189, 73 Atl. 624, admission in a former suit that title to a portion of the land in controversy stood in the owner interrupted the continuity of adverse possession.

Offer by Party in Possession of Land to purchase it from true owner will stop running of statute of limitations.

Approved in Jensen v. Hunter (Cal.), 41 Pac. 17, holding title to a ditch diverting water from a stream on land of another cannot be claimed by adverse possession by one who after using it for three years acknowledged the other's title by offering to pay for a grant thereof.

44 Cal. 475–478, 13 Am. Rep. 167, GALLAND v. GALLAND.

A Husband may Purge Himself of contempt in not paying alimony allowed by court by showing his inability to pay, not caused by his own act.

Approved in Lutz v. District Court, 29 Nev. 153, 86 Pac. 445, holding affidavit for an order committing defendant for contempt in failing to pay alimony should show that he is able to make the payments.

Contempt Proceedings to Enforce Payment of alimony. See notes, 137 Am. St. Rep. 878; 24 L. R. A. 437, 438.

Statute Relative to Contempts is a Limitation upon power formerly exercised by courts to punish for contempts.

Approved in Trough v. Trough, 59 W. Va. 472, 115 Am. St. Rep. 940, 53 S. E. 633, 4 L. R. A. (n. s.) 1185, reaffirming rule; dissenting opinion in Ex parte Smith, 14 Haw. 270, majority holding upon facts right of court to punish for contempt not taken away by act of Hawaiian legislature of 1888 (chapter 42, Laws 1888), which is limited by construction.

Distinguished in Bennett v. Bennett, 15 Okl. 294, 81 Pac. 635, 70 L. R. A. 864, district court has power to punish contempt in refusing to pay alimony by striking defendant's answer from record or refusing to permit him to plead in case.

Legislative Power to Abridge Power of courts to punish for contempt. See note, 36 L. R. A. 257.

Contempt must be Shown Before Court has jurisdiction to punish.

Approved in State v. District Court, 37 Mont. 488, 97 Pac. 842, applying rule to one who was unable to obey order of court requiring

her to deposit money with clerk which had been paid her by clerk under judgment previously rendered but which had been set aside; Cline v. Langan, 31 Nev. 244, 101 Pac. 554, in action relating to leasehold and rents, where referees had ordered proceedings stayed pending motion for new trial, court could not punish defendant for contempt in bringing another action for accruing rents in violation of such void order of referees.

44 Cal. 479–481, LICK v. DIAZ.

Declarations in Disparagement of Title of declarant are admissible as original evidence.

Approved in Murphy v. Dafoe, 18 S. D. 47, 99 N. W. 87, statements of one, while in possession of property that he was acting as agent of another was in disparagement of his own title and therefore admissible.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

44 Cal. 489–494, RUSSELL v. HARRIS.

Decision of Supreme Court in a Case becomes the law of the case in all subsequent proceedings in the case.

Approved in Gaffey v. Mann, 5 Cal. App. 714, 91 Pac. 173, holding judgment upon former appeal allowing attorney's fees in action for slander had become the law of the case, and constitutionality of act allowing such attorney's fees could not thereafter be raised in the case; Belskis v. Dering Coal Co., 246 Ill. 65, 92 N. E. 577, rule does not apply where, in action for death of coal miner, on first appeal case was remanded for new trial and a different case was made out on second trial; Oklahoma City Elec., Gas & Power Co. v. Baumhoff, 21 Okl. 508, 96 Pac. 760, rule applies on second appeal, where supreme court had become successor of territorial supreme court which rendered former decision.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 332.

44 Cal. 494–496, PEOPLE v. WOOLEY.

In Indictment for Arson, Building Burned may be alleged to be property of person occupying it.

Approved in Kopcyznski v. State, 137 Wis. 361, 118 N. W. 864, discussing rule in prosecution of married man for burning home of his wife with whom he was not living.

44 Cal. 496–508, HERRINGTON v. SANTA CLARA CO.

District Attorney may Contract With County and receive compensation for services performed outside of his official duties.

Approved in Slayton v. Rogers, 128 Ky. 114, 107 S. W. 699, upholding power of fiscal court under Kentucky Statutes of 1903, section 4142, to appoint county attorney as commissioner to settle with the sheriff.

44 Cal. 508–519, THOMPSON v. PIOCHE.

Attornment of Tenant to Person Other than his landlord is void as to the landlord, unless made with his consent, or in consequence of a judgment of court.

Approved in Ashton v. Golden Gate Lumber Co. (Cal.), 58 Pac. 3, holding where plaintiff had sufficient title under a deed of trust to make a valid lease for term not exceeding life of beneficiary, tenant could not deny his title in action for rent accruing after death of beneficiary though such title then ceased.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 102, 104.

Possession, to be Adverse, must be Open and Notorious, under claim of right, and the owner must have knowledge or means of knowledge thereof.

Approved in Gurnsey v. Antelope Creek etc. Water Co., 6 Cal. App. 391, 92 Pac. 328, holding evidence sufficient to support right by prescription to use of water; Illinois Steel Co. v. Budzisz, 115 Wis. 87, 90 N. W. 1026, entry of true owner upon marshy lands not capable of physical occupancy, by having surveying party operate thereon for a time sufficient to do considerable work, interrupted existing adverse occupancy.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1189.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 68, 100.

44 Cal. 519–537, BARBER v. REYNOLDS.

A Mechanic's Lien will not be Rejected because the notice of lien was filed for too much, unless it appears to be a willfully false claim.

Approved in Lucas v. Rea (Cal. App.), 101 Pac. 539, following rule; Lucas v. Rea, 10 Cal. App. 646, 102 Pac. 824, and Lucas v. Gobbie, 10 Cal. App. 651, 103 Pac. 158, both holding fact that notice of claim of lien was filed for more than the amount due would not defeat recovery; Chicago Lumber Co. v. Newcomb, 19 Colo. App. 281, 74 Pac. 791, upholding rule where there were slight discrepancies as to amounts due between statements in lien claims and evidence.

Effect of Filing Excessive Mechanic's Lien. See note, 29 L. R. A. (n. s.) 306.

Where Judgment Creditor Having First Lien on real property levies on personalty to satisfy it, his judgment will be deemed satisfied as to junior claims on the real estate.

Approved in Valley Nat. Bk. v. Des Moines Nat. Bk., 116 Iowa, 546, 90 N. W. 344, creditor having mortgage on real estate, who levied execution on stock of goods to recover same debt, could not abandon levy and proceed against land to prejudice of second mortgagee.

Relation Back of Subcontractor's Lien to date of original contractor's. See note, 16 L. R. A. 336.

44 Cal. 538–542, PEOPLE v. RODUNDO.

Refusal of Codefendant to Testify until all indictments against him are dismissed is matter over which defendant has no control.

Reaffirmed in People v. Barnnovich, 16 Cal. App. 430, 117 Pac. 573.

Receiving Verdict Without Calling Names of jurors when all are present is not prejudicial error.

Approved in State v. De Lea, 36 Mont. 535, 93 Pac. 816, upholding rule where minutes failed to show names of jurors were called before verdict was delivered.

Court is not Called upon to Volunteer Instructions when none are asked.

Approved in Mickle v. United States, 6 Ind. Ter. 562, 98 S. W. 350, upholding rule in prosecution for grand larceny where no exceptions were taken or objections urged to instructions given.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 807.

44 Cal. 542–553, GAMBERT v. HART.

Liability of Attorney to Client for Mistake. See note, 52 L. R. A. 884, 887.

44 Cal. 555–558, EX PARTE RYAN.

Fixing Bail is Matter Within Discretion of Court in which indictment is found.

Approved in Ex parte Ruef, 7 Cal. App. 752, 96 Pac. 25, applying rule on habeas corpus for reduction of bail but allowing reduction of bail to extent imposed for reindictments.

Presumption of Innocence in Habeas Corpus Proceedings. See note, 22 L. R. A. 679.

44 Cal. 559–562, IRVINE v. ADLER.

Where Two Coterminous Land Owners, being uncertain of boundary line, fix a line, agreeing that each shall possess thereto until true boundary is ascertained, possession of either cannot be adverse.

Approved in Smith v. Robarts (Cal.), 9 Pac. 106, holding mutual mistake between coterminous owners of land as to location of division line does not render possession adverse.

Adverse Possession Due to Ignorance or mistake as to boundary. See note, 21 L. R. A. 831.

44 Cal. 579–581, EX PARTE MAX.

Questions of Mere Error cannot be inquired into upon writ of habeas corpus.

Approved in Ex parte Tani, 29 Nev. 390, 91 Pac. 138, 13 L. R. A. (n. s.) 518, denying writ of habeas corpus where the judgment of conviction was within jurisdiction of court.

44 Cal. 582-583, ETCHEMENDE v. STEARNS.

Proof Against One Person of Declarations by another to show partnership. See note, 20 L. R. A. 599.

44 Cal. 591–597, PRICE v. STURGIS.

Verbal Agreement by Grantee of Land to pay grantor a further sum as part of price out of proceeds of sale of the land when he sells it is not within statute of frauds, as conveying interest in land.

Approved in Hicks v. Post, 154 Cal. 27, 96 Pac. 880, holding agreement of owner of land with another whereby in consideration of money to be expended and services by latter he was to have exclusive right to sell the land for compensation measured by price did not give any interest in the land.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 238.

44 Cal. 609–612, LAMB v. GALLAND.

To Constitute "Probable Cause," Prosecutor need not have personal knowledge of transaction of which he complains.

Approved in Lane v. Pennsylvania R. R. Co., 78 N. J. L. 674, 76 Atl. 1017, facts constituted probable cause for suing out a warrant to search plaintiff's dwelling-house.

44 Cal. 620–623, PEOPLE v. CULVERWELL.

Blocks of Land in a City may be Assessed for taxation by blocks even if subdivided into lots.

Approved in Jacobs v. Buckalew, 4 Ariz. 355, 42 Pac. 620, block belonging to one person covered by buildings so joined as to have the appearance of one building was properly assessed as a block.

44 Cal. 630–635, LYMAN v. MILTON.

A Defendant has a Right to Appear for special purpose of moving to dismiss a defective summons.

Approved in Thomas v. Thomas, 98 Me. 188, 56 Atl. 652, party appearing and moving to dismiss for want of sufficient service becomes "prevailing party" entitled to costs if motion is granted.

Defendant Inefficiently Served may Answer after his objections are overruled, without waiving his rights or curing the error.

Approved in Fisher v. Crowley, 57 W. Va. 319, 50 S. E. 424, defect in summons was not waived by proceeding to trial after adverse ruling on motion to quash and exception taken thereto.

Denied in Corbett v. Physicians' Casualty Assn., 135 Wis. 513, 115 N. W. 368, 16 L. R. A. (n. s.) 177, party who submits to trial on the merits after making objection to service of process, waives defect and cannot afterward question jurisdiction of court.

Contest on Merits After Special Appearance, as waiver of objections to jurisdiction over person. See note, 16 L. R. A. (n. s.) 178, 186.

44 Cal. 646–648, CAMPBELL v. WEST.

Right to Maintain Water Ditch over land of another can be acquired by prescription.

Approved in Wutchumna Water Co. v. Ragle, 148 Cal. 764, 84 Pac. 165, where absolute right to divert water from ditch of another held to have been acquired by prescription.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 712.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 45 CALIFORNIA.

45 Cal. 6–7, LINDEN v. ALAMEDA COUNTY.

Private Party Seeking Mandamus must have Interest in subject matter distinct from public at large.

Approved in People v. Budd (Cal.), 47 Pac. 594, holding citizen of city could not sue for writ of mandate to compel governor to appoint police commissioners of city; Windsor v. Polk County, 115 Iowa, 741, 87 N. W. 705, party signing petition for special election entitled to mandate to compel holding of election.

45 Cal. 8–10, LOVENSOHN v. WARD.

In Action in Replevin Defendant cannot Set Up Claim for other and distinct property held by plaintiff.

Approved in Blair v. Johnson, 111 Tenn. 120, 76 S. W. 914, breach of warranty in conditional sale cannot be set off against replevin by vendor to enforce breach of condition by recovery of property.

Distinguished in McCormick Harvesting Co. v. Hill, 104 Mo. App. 555, 79 S. W. 748, where money claim set off in replevin.

45 Cal. 12–15, PLACER COUNTY v. DICKERSON.

Sureties are Liable on Official Bond Only for Breach of duty committed during term of office for which bond was given.

Approved in Priet v. De La Montanya (Cal.), 22 Pac. 172, following rule; City of Grand Haven v. United States Fidelity etc. Co., 128 Mich. 108, 92 Am. St. Rep. 446, 87 N. W. 104, holding sureties not liable on bond of treasurer for money received during his term of office but before approval of bond.

Liability of Sureties on Official Bond after expiration of term of office. See note, 103 Am. St. Rep. 933, 937.

Extension of Liability on Bond while officer is holding over. See note, 35 L. R. A. 91.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 169.

45 Cal. 19–21, PEOPLE v. MOORE.

It is not Competent to Use, as Evidence against one on trial for alleged crime, statements of accomplice not given as testimony in

case, nor made in presence of defendant, nor during pendency of the enterprise and in furtherance of it.

Approved in Del Campo v. Camarillo, 154 Cal. 653, 98 Pac. 1053, holding inadmissible, declaration of alleged co-conspirator not made while conspiracy was pending.

Distinguished in People v. Brady (Cal.), 36 Pac. 950, where defendant, in presence of witness, by consent of accomplice, agreed that witness should accompany accomplice, who would tell him where stolen property was and he would get it and deliver it to accomplice, statements made to witness by such accomplice in defendant's absence were admissible against him; People v. Ayhens, 16 Cal. App. 622, 117 Pac. 790, refusing to admit evidence of statements of co-defendant in defendant's presence charging defendant with crime, which defendant then denied.

45 Cal. 21-25, HUDSON v. JOHNSON.

Equity will not Enforce Contract to Obtain Title to public land by pre-emption and then convey to plaintiff, such agreement being illegal.

Approved in Armstrong v. Henderson, 16 Idaho, 577, 102 Pac. 365, holding void contract between trespassers on Indian lands looking to acquisition of title and conveyance when thrown open for settlement.

45 Cal. 29-30, PEOPLE v. EARNEST.

Organization of Grand Jury. See note, 27 L. R. A. 779.

45 Cal. 30-34, RICHARDSON v. TOBIN.

Newspaper Published Six Days a Week is a daily newspaper.

Reaffirmed in Wilson etc. v. Petzold, 116 Ky. 878, 76 S. W. 1093.

Publication of Statutory Notice in German Newspaper but in English language is valid.

Approved in Hyman v. Susemihl, 137 Wis. 300, 118 N. W. 838, holding statutory notice published at public expense must be in English.

45 Cal. 36-38, WINBIGLER v. CITY OF LOS ANGELES.

Incorporated Cities are not Liable for injuries sustained by individuals caused by neglect of city officers to keep streets in repair, unless so made liable by acts under which incorporated.

Approved in Healdsburg etc. Power Co. v. Healdsburg, 5 Cal. App. 562, 90 Pac. 957, holding complaint for injuries against municipal corporation stating acts of tort ultra vires shows no cause of action; Collier v. Ft. Smith, 73 Ark. 450, 84 S. W. 481, 68 L. R. A. 237, city not liable for injury resulting from failure of its servants to display danger signals where street was obstructed while being repaired; James v. Trustees of Wellston Township, 18 Okl. 66, 90 Pac. 103, township not liable for injury resulting from failure to keep highway in good condition.

Distinguished in Davoust v. City of Alameda, 149 Cal. 70, 75, 84 Pac. 761, 763, 5 L. R. A. (n. s.) 536, holding city liable for injury resulting from its neglect within its private proprietary rights.

Denied in Matsumura v. County of Hawaii, 19 Haw. 38, holding county liable for injury caused by trespass of road employee repair-

ing road; Carson v. City of Genesee, 9 Idaho, 251, 254, 108 Am. St. Rep. 127, 74 Pac. 864, 865, city liable for injury from defective sidewalk.

Municipal Liability to Persons Injured by defects in, or want of, repair of streets. See notes, 103 Am. St. Rep. 261, 262; 20 L. R. A. 516, 517.

As to What Municipal Corporations are Answerable for injuries due to defects in streets and other public places. See note, 108 Am. St. Rep. 151, 160.

45 Cal. 38–42, HAWKINS v. ROBERTS.

Right to Maintain Action to Recover Property in specie against one not in possession. See note, 18 L. R. A. (n. s.) 1266.

45 Cal. 44–46, PEOPLE v. PHILLIPS.

Transcript on Appeal must Show that an appeal has, in fact, been taken.

Approved in People v. Brown, 148 Cal. 744, 84 Pac. 205, People v. Swearinger (Cal.), 38 Pac. 973, and People v. Finerty, 8 Cal. App. 468, 97 Pac. 74, all holding transcript on appeal must show service of notice of appeal on opposing attorneys; State v. Preston, 30 Nev. 305, 95 Pac. 919, holding defective notice of "intention" to appeal when statute requires notice that he "appeals."

45 Cal. 51–53, MATHEWS v. FERREA.

Limitations Against Title Under Patent from United States begin to run only from date of patent.

Approved in Tyee Consolidated Min. Co. v. Langstedt, 136 Fed. 126, 69 C. C. A. 548, following rule.

Prescription or Adverse User cannot Mature into title as against the United States.

Reaffirmed in State v. Dickinson, 129 Mich. 227, 88 N. W. 623.

Adverse User as Defense to Action for diversion of water must be set up in answer.

Approved in State v. Quantic, 37 Mont. 55, 94 Pac. 500, holding such answer required reply.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 715.

45 Cal. 53–54, GRACIER v. WEIR.

Affidavit Made on Motion to Open Default cannot be contradicted by answering affidavit.

Reaffirmed in McLaughlin v. Nettleton, 25 Okl. 321, 105 Pac. 663.

45 Cal. 55–56, REQUENA v. CITY OF LOS ANGELES.

Whether Overflow of Sewer is Nuisance is question of fact.

Approved in Twenty-second Corporation etc. v. Oregon etc. R. R. Co., 36 Utah, 252, 103 Pac. 249, whether excessive noises in operation of trains was nuisance is question of fact.

45 Cal. 58–60, PRESCOTT v. PRESCOTT.

Claimant of Homestead must Actually Reside on premises at time of filing declaration.

Approved in Hanley v. Hanley, 4 Cof. Prob. 474, reaffirming rule.

45 Cal. 60–63, **KEYS v. WARNER.**

Court cannot Alter or Vary Terms of written stipulation made by attorneys or relieve them from its consequences.

Approved in Adams v. Hartzell, 18 N. D. 232, 119 N. W. 640, where case was submitted on stipulation of facts, court could not grant leave to one party to take testimony on other facts without granting leave to other party also.

45 Cal. 64–70, **ROUSSET v. BOYLE.**

Clerical Error in Judgment as Entered by Clerk may be corrected, even after appeal upon affirmance.

Approved in San Francisco v. Brown, 153 Cal. 651, 96 Pac. 284, holding court could correct error in entry of judgment even after six months.

Party Who has by Mere Misprision of Clerk obtained entry against adversary never in fact pronounced by court cannot while admitting the mistake retain its fruits.

Approved in Ex parte Marks, 136 Fed. 170, 69 C. C. A. 80, holding where plaintiff's attorney was relied on to compute amount of judgment and too large amount was entered by his mistake, he cannot later object to its correction.

45 Cal. 71, **SWEET v. TICE.**

Supreme Court has No Appellate Jurisdiction where demand is less than three hundred dollars.

Reaffirmed in Dungan v. Clark, 159 Cal. 33, 112 Pac. 719.

45 Cal. 72–73, **MOTT v. FOSTER.**

Stipulation Signed by Party in Person when he has attorney is a nullity.

Approved in Boca etc. R. R. Co. v. Superior Court, 150 Cal. 156, 88 Pac. 719, holding plaintiff having appeared by attorney could not itself give order to clerk to dismiss.

Extent to Which Litigant may Control Cause in which he has appeared as attorney. See note, 93 Am. St. Rep. 170.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 153.

45 Cal. 76–77, **BROWN v. JOHNSON.**

Judgment for Value Alone without alternative of return of property in replevin is not void, where it appears the property has been hopelessly lost.

Approved in Donovan v. Aetna Indemnity Co., 10 Cal. App. 728, 729, 103 Pac. 366, 367, following rule.

Duty to Preserve and Return Property Replevied. See note, 69 L. R. A. 283.

45 Cal. 78–80, **MURPHY v. ROONEY.**

Equity will Reform Mistake in Agreement due to error of draftsman and enforce it as reformed.

Approved in Hughes v. Payne, 22 S. D. 296, 117 N. W. 364, court will supply terms of contract omitted by mistake and enforce as reformed.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 814.

Extent of Rule That Parol Evidence is inadmissible to vary written contract. See note, 17 L. R. A. 273.

45 Cal. 80–86, BARRY v. BENNETT.

Partner cannot Make a Profit for himself at expense of his associates by deceiving them as to purchase price of property purchased.

Approved in Lomita Land and Water Co. v. Robinson, 154 Cal. 51, 97 Pac. 16, 18 L. R. A. (n. s.) 1106, and Walker v. Pike County Land Co., 139 Fed. 611, 71 C. C. A. 593, both following rule; Paddock v. Bray, 40 Tex. Civ. App. 230, 88 S. W. 421, joint purchaser cannot make secret profit in purchase over his associates.

45 Cal. 86–88, CLARKE v. SCOTT.

Debtor Owing Several Obligations to Same Creditor may give verbal directions as to application of payments.

Approved in Grogan v. Valley Trading Co., 30 Mont. 237, 76 Pac. 214, admitting parol evidence to show what application of payment was agreed on.

45 Cal. 90–92, CLEAR LAKE WATERWORKS CO. v. LAKE COUNTY.

Claim Against County for Damages to Property Destroyed by mob need not be presented to supervisors for allowance.

Distinguished in Gregg v. Board of County Commrs., 32 Colo. 361, 76 Pac. 377, 378, contractual claim must first be presented for allowance.

Act of Legislature Compelling County to Pay for property destroyed by mob created new right and provided new remedy.

Cited in Risse v. Collins, 12 Idaho, 693, 87 Pac. 1007, holding remedy given by statute for trespass of sheep could be pursued in district or justice court.

Liability for Property Destroyed by Mob. See note, 24 L. R. A. 593, 595.

45 Cal. 92–95, JONES v. SINGLETON.

Ruling of Lower Court on Matter of granting new trial made in view of diligence in seeking newly discovered evidence will rarely be disturbed.

Approved in People v. Boyd, 16 Cal. App. 134, 116 Pac. 324, discussing question of diligence in serving subpoena on witness so as to admit his evidence taken at preliminary examination.

45 Cal. 97–99, PEOPLE v. GRANT.

One not Party to Record may Call in Question writ of assistance by moving to vacate order granting writ, and then appealing from order refusing to vacate such order.

Reaffirmed in Mills v. Smiley, 9 Idaho, 323, 76 Pac. 785.

Distinguished in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 487, 488, 114 Pac. 839, 840, where order is not appealable, it is not reviewable on appeal from order refusing to set it aside.

45 Cal. 99–101, MAYO v. SPROUT.

Writ of Restitution cannot be Served on One in possession of premises who did not enter or does not hold under defendant.

Approved in King v. Davis, 137 Fed. 220, holding where tenant and not landlord was sued in ejectment, and after recovery and before execution tenant removed and landlord entered, landlord cannot be considered as claiming under tenant and as not bound by judgment as an estoppel.

45 Cal. 110–111, STILPHEN v. WARE.

Limitations Begin to Run Against Right of creditors to sue stockholders of corporation when debt falls due.

Approved in Gold v. Paynter, 101 Va. 718, 44 S. E. 921, statute begins to run when each assessment becomes due, as between creditors and stockholders; Boyd v. Mutual Fire Assn., 116 Wis. 169, 96 Am. St. Rep. 948, 90 N. W. 1091, 61 L. R. A. 918, limitations begin to run in favor of stockholders as against creditors of insolvent corporation when adjudged insolvent and receiver appointed.

Statute of Limitations in Actions against corporate officers and stockholders. See note, 96 Am. St. Rep. 982.

Time of Accrual of Right of Action as to stockholder's liability. See note, 10 L. R. A. (n. s.) 903.

Whether a Judgment is a Contract. See note, 17 L. R. A. 612.

45 Cal. 113–116, POWERS v. WHEATLEY.

Effect of Fraudulent Concealment to avoid promise of marriage. See note, 26 L. R. A. 431.

45 Cal. 121–125, ETCHEBORNE v. AUZERAIS.

Estoppel must be Pleaded to be available at trial.

Approved in Harper v. Hill, 159 Cal. 260, 113 Pac. 167, Fritz v. Mills, 12 Cal. App. 117, 106 Pac. 726, and Andrews v. Wheeler (Cal.), 103 Pac. 147, all following rule.

45 Cal. 125–128, LORENZANA v. CAMARILLO.

Filing Amended Complaint does not extend time for running of statute of limitations.

Approved in Link v. Jarvis (Cal.), 33 Pac. 207, following rule.

Relation of New Pleadings to statutes of limitations. See note, 3 L. R. A. (n. s.) 277.

45 Cal. 133–136, ROSS v. CORNELL.

Advances Made to One Partner, Although He has Retired, cannot be recovered in suit at law by other partners, unless there has been final settlement of partnership accounts.

Reaffirmed in Summerson v. Donovan, 110 Va. 659, 66 S. E. 822.

45 Cal. 137–146, PEOPLE v. MURPHY.

Evidence of Acts and Declarations of Wife of accused made and done at time of crime and in his presence are admissible on behalf of prosecution.

Distinguished in People v. Smith, 151 Cal. 626, 91 Pac. 514, holding inadmissible declaration of co-conspirator made after crime and not in presence of defendant.

Testimony of Witness, Since Deceased, given at former trial, may be admitted at subsequent trial and may be shown by testimony of

one who at time took notes of testimony and swears they contain its substance.

Approved in Havenor v. State, 125 Wis. 452, 104 N. W. 119, stenographic reports and minutes of grand jury proceedings are admissible only when grand jurors can themselves testify that at or about time records were made they knew their accuracy and contents thereof.

45 Cal. 146–148, PEOPLE v. McCAULEY.

New Trial will not be Granted on Ground of newly discovered evidence which is in conflict with evidence given on trial.

Approved in Kelleher v. Kenney (Cal.), 4 Pac. 1095, holding court did not err in refusing to consider newly discovered evidence which was merely cumulative and contradicted by affidavits; Johnson v. State, 128 Ga. 108, 57 S. E. 356, upholding refusal of new trial.

45 Cal. 149–152, STRATTON v. GREEN.

Specific Appropriation is an Act by Which Named Sum is set apart in treasury and devoted to payment of particular demand.

Approved in Menefee v. Askew, 25 Okl. 630, 107 Pac. 162, holding invalid statute providing game and fish warden shall be reimbursed for expenses as not being appropriation of definite sum.

45 Cal. 152–154, 13 Am. Rep. 172, CALLAHAN v. DONNOLLY.

Validity of Contract of Sale in restraint of trade without limitation of place. See note, 22 L. R. A. 674.

Validity of Agreement in Restraint of Trade, ancillary to sale of business or profession, as affected by territorial scope. See note, 24 L. R. A. (n. s.) 918, 919, 924, 931.

45 Cal. 154–161, SKAGGS v. ELKUS.

Payment of Usual Monthly Rent after expiration of lease for years does not create new term for more than a month.

Reaffirmed in White v. Sohn, 65 W. Va. 412, 64 S. E. 443.

Rent Period as Criterion of Term implied by holding over. See note, 25 L. R. A. (n. s.) 856.

45 Cal. 161–162, PLANT v. SMYTHE.

Levy of Attachment on Land After Defendant in attachment had sold it is ineffectual as against grantee in deed although deed is unrecorded, and attaching creditor had no notice of sale.

Approved in Judson v. Lyford (Cal.), 23 Pac. 59, following rule; Leonard v. Fleming, 13 N. D. 637, 102 N. W. 311, purchaser at sheriff's sale acquires no title as against deed delivered before levy of attachment but recorded after attachment.

45 Cal. 163–165, PEOPLE v. FELIX.

Judgment in Criminal Case Need not be Pronounced at same term at which verdict was rendered.

Approved in People v. Stokes, 5 Cal. App. 214, 89 Pac. 1000, holding delay in passing sentence at time fixed therefor and postponement thereof for thirty-five days does not show loss of jurisdiction.

45 Cal. 165–167, McDOUGAL v. DOWNEY.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 755.

45 Cal. 180–184, DONNER v. PALMER.

Where Defendant and Intervener Take Separate Appeals, supreme court may reverse its judgment for defendant when it afterward passes on intervener's appeal.

Approved in Lauchheimer v. Coop, 99 Tex. 391, 89 S. W. 1063, reversal of judgment against plaintiff did not carry with it reversal of judgment against intervener, their causes of action being distinct.

Miscellaneous.—Cited in Thorpe v. North Moneta etc. Water Co., 12 Cal. App. 187, 106 Pac. 1107, and Dollenmayer v. Pryor, 150 Cal. 3, 87 Pac. 617, both holding order denying intervention is final as to intervener and he may take appeal without waiting for final judgment as to other parties.

45 Cal. 184–186, ROGERS v. TENNANT.

Dissolution or Continuance of Injunction where answer denies allegations of complaint is largely a matter of judicial discretion and must be clearly abused before appellate court will refuse to sustain trial court.

Approved in Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 754, 115 Pac. 952, following rule; Humphrey v. Buena Vista Water Co., 2 Cal. App. 544, 84 Pac. 297, holding preliminary injunction granted on notice cannot be dissolved arbitrarily without good cause appearing merely because words "until further order of court" are inserted therein.

Appeal must be Determined on record of trial court.

Approved in People v. Johnson, 9 Cal. App. 235, 98 Pac. 683, holding appellate court cannot amend record on an appeal.

45 Cal. 189–193, POWNALL v. HALL.

When Qualified Redemptioner in Good Faith attempts to redeed in proper time, equity will relieve him from innocent mistake and allow him to perfect redemption after lapse of statutory time.

Approved in Walsh v. Erwin, 115 Fed. 536, holding valid certificate of redemption given by sheriff notwithstanding error of sheriff in computing amount; King v. Bender, 116 Fed. 816, 54 C. C. A. 317, holding only defects of substance will invalidate redemption.

45 Cal. 195–199, SNOW v. FERREA.

Right of Grantee in Possession to question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 387.

45 Cal. 199–219, IN RE MARKS.

Legislature may Provide for Trial of Civil Officers for misdemeanor in office, except as impeachment is provided for in Constitution.

Reaffirmed in State v. Richardson, 16 N. D. 4, 109 N. W. 1027.

45 Cal. 235–236, CRANE v. GHIRARDELLI.

Constructive Possession of Defendant in Ejectment is sufficient for that form of action.

Approved in Moore v. Moore (Cal.), 34 Pac. 91, following rule.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 570.

45 Cal. 241–243, PEOPLE v. BURDEN.

On Recount Ballots are not Best Evidence of election results if there is evidence tending to show they were not sealed after being counted by canvassers or were opened and changed after being received by clerk.

Approved in Chatham v. Mansfield, 1 Cal. App. 306, 82 Pac. 346, holding ballots received by clerk with envelopes broken and so kept that others might have access to them are prima facie impeached.

Scope and Effect of Election Law provisions for preserving ballots. See note, 30 L. R. A. (n. s.) 606.

45 Cal. 248–249, EX PARTE CAGE.

If Jury Disagrees and Term is Adjourned without anything of record to show discharge of jury, right of prisoner to discharge because of former jeopardy must be raised by motion in lower court.

Distinguished in dissenting opinion in People v. Bennett (Cal.), 50 Pac. 708, discussing whether court which has awarded new trial of one specific issue out of several is obliged to confine trial to that specific issue.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 907.

45 Cal. 257–259, ESTATE OF JOHNSON v. TYSON.

Voluntary Appearance of Executor in Probate Court is waiver of service of citation upon him.

Approved in Estate of Kearney, 13 Cal. App. 95, 109 Pac. 38, holding recital in decree appealed from that executor appeared by attorney is sufficient proof of service of citation upon him.

45 Cal. 262–265, McDONALD v. BACKUS.

Statement of Name of Member of Employing Firm as that of employer in mechanic's lien does not vitiate it, but all members of firm should be joined in suit to enforce lien.

Approved in H. F. Cady Lumber Co. v. Conkling, 70 Neb. 811, 98 N. W. 44, following rule.

Distinguished in Hogan v. Bigler, 8 Cal. App. 72, 96 Pac. 97, holding error in stating in mechanic's lien that materials were furnished to person, when they were in fact furnished to another, vitiates lien.

45 Cal. 273–275, MILLS v. LUX.

Courses and Distances in Description must yield to monuments.

Reaffirmed in Birk v. Hodgkins, 159 Cal. 579, 114 Pac. 824.

45 Cal. 275–276, HIXON v. BRODIE.

Posting of Notice Inviting Sealed Proposals for street improvement in manner directed by statute is condition precedent to letting the contract.

Approved in Sacramento Paving Co. v. Anderson, 1 Cal. App. 675, 82 Pac. 1070, holding notices need not be posted on books not mentioned in resolution of intention to improve street.

45 Cal. 278–280, LESZINSKY v. WHITE.

Party Relying upon Fraud must Set Up the Facts which constitute fraud in his pleadings.

Approved in Virginia etc. Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 260, 90 Pac. 49, holding it error to admit evidence of fraudulent purchase where fraud was not pleaded.

45 Cal. 280–281, PIERCE v. STUART.

Actual Possession of Plaintiff's Grantor followed by plaintiff's possession as pasture supports ejectment when defendant shows no right.

Approved in Ensley v. Coolbaugh, 160 Mich. 307, 125 N. W. 282, prior possession abandoned for three years does not support ejectment.

45 Cal. 285–286, PEOPLE v. GILL.

New Trial will not be Granted in Criminal Case on ground that evidence does not justify verdict if evidence is conflicting.

Approved in People v. Jones (Cal.), 8 Pac. 612, and People v. Burt (Cal.), 3 Pac. 653, both following rule.

Possession of Stolen Property Shortly After Theft, without explanation of mode of possession, is circumstance tending to show guilt of possessor.

Approved in People v. King, 8 Cal. App. 332, 96 Pac. 918, approving instruction in regard to possession of stolen property as evidence of guilt; People v. Abbott (Cal.), 34 Pac. 502, holding evidence of possession of stolen property not sufficient to justify instruction in regard to it.

45 Cal. 287–288, PEOPLE v. FENWICK.

Evidence and Instructions as to character of accused. See note, 20 L. R. A. 618.

45 Cal. 289–291, PEOPLE v. WOODY.

Where Two Persons Each at Same Time Fire at deceased, who is killed by one shot only, defendant on trial is entitled to benefit of doubt as to who fired that shot, in absence of showing of conspiracy.

Criticised in People v. Petruzo, 13 Cal. App. 581, 110 Pac. 329, refusing instruction that defendant was entitled to benefit as precluding theory that persons firing at same time may have aided and abetted each other.

45 Cal. 292–293, PEOPLE v. RAINA.

Evidence of Good Character to create doubt of guilt. See notes, 103 Am. St. Rep. 904, 905; 20 L. R. A. 613.

45 Cal. 293–294, PEOPLE v. WOODWARD.

One Who Merely Stands by When Rape is attempted is not guilty of attempt to commit rape.

Approved in Moore v. State, 4 Okl. Cr. 216, 11 Pac. 824, disapproving instruction to effect that one standing by and assenting to assault was guilty of assault.

45 Cal. 304–306, PEOPLE v. VALENCIA.

Certificate of Probable Cause, Granted by Trial Court, in capital case, is nothing more than certificate that case is debatable.

Approved in In re Neil, 12 Idaho, 752, 87 Pac. 882, following rule.

45 Cal. 306-316, 13 Am. Rep. 178, PEOPLE v. STOCKTON & VISALIA R. R. CO.

Where Checks are Issued Payable Immediately, they merely stand in place of coin which may be immediately drawn thereon.

Approved in Hibernia Savings etc. Society v. San Francisco, 200 U. S. 315, 26 Sup. Ct. 265, 50 L. ed. 495, 4 Ann. Cas. 934, holding state may tax checks signed by treasurer of the United States.

45 Cal. 316-321, SAN JOSE v. FULTON.

Ex Parte Order Granting Writ of Assistance may be set aside on motion.

Reaffirmed in Mills v. Smiley, 9 Idaho, 323, 76 Pac. 785.

Distinguished in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 487, 488, 114 Pac. 839, 840, nonappealable order not reviewable on appeal from order refusing to set it aside.

Writ of Assistance will not Issue if rights of parties have changed since decree and sale by reason of agreement between defendant and purchaser.

Approved in Escritt v. Michaelson, 73 Neb. 638, 103 N. W. 301, reaffirming rule; Emerick v. Miller, 159 Ind. 325, 64 N. E. 31, grantee of rights of purchaser at mortgage foreclosure sale is entitled to writ of assistance.

45 Cal. 321-323, PEOPLE v. DONAHUE.

Alleged Error in Giving Instruction in Criminal Case, where evidence is not brought up, will not be ground for reversal, if evidence might have shown such instruction proper.

Approved in People v. Mendenhall, 135 Cal. 347, 67 Pac. 326, refusing to reverse for alleged error in refusing instruction in regard to intoxication of accused when evidence was not before appellate court; Wickham v. People, 41 Colo. 360, 93 Pac. 482, error in instruction taking from jury consideration of degrees of murder held not ground for reversal when evidence waranted verdict in full degree as found.

45 Cal. 323-337, TAYLOR v. WESTERN PACIFIC R. R. CO.

In Action for Wrongful Death, jury is authorized to take into consideration pecuniary injury resulting to those most nearly related to deceased.

Approved in Simoneau v. Pacific Electric Ry., 159 Cal. 505, 115 Pac. 326, admitting evidence of special medical care needed for children in action for damages for wrongful death of father.

Railroad is Liable for Injury resulting from negligence of switchman at crossing although employed by the other road.

Approved in Cleveland etc. R. R. Co. v. Gossett, 172 Ind. 536, 87 N. E. 728, following rule; Floody v. Great Northern Ry. Co., 102 Minn. 86, 112 N. W. 877, 13 L. R. A. (n. s.) 1196, railroad liable for wrongful death resulting from acts of union depot employees acting as switchman in depot yards; Floody v. Chicago St. P. M. & O. Ry. Co., 109 Minn. 237, 134 Am. St. Rep. 771, 123 N. W. 819, railroad liable to its employee for injury resulting from act of switchman employed by union depot company.

Which of Two or More Persons is Master of another conceded to be servant of one. See note, 37 L. R. A. 40, 43.

Liability of Master for Injuries to Servant by incompetency of fellow-servant. See note, 25 L. R. A. 710.

Duty of Master With Respect to Employment of his servants. See note, 48 L. R. A. 373, 378.

Inference as to Breach of Duty to employ or retain none but competent servants, from fact of incompetence. See note, 20 L. R. A. (n. s.) 323.

Evidence of Habits and Character of Person injured or killed, as affecting damages. See note, 1 L. R. A. (n. s.) 199.

45 Cal. 337–342, RUSSELL v. DENNISON.

Objections to Rulings will not be Considered where record fails to show exceptions.

Reaffirmed in Annans v. Sewell, 47 Or. 373, 84 Pac. 395.

45 Cal. 344–365, KIMBALL v. RECLAMATION FUND COMMRS.

Object of General Government in Donating swamp lands to state was to procure speedy reclamation and settlement.

Approved in Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 410, 105 Pac. 282, holding reclamation districts are governmental agencies for accomplishment of special purpose which cease when that purpose is accomplished.

Party Claiming Title to State Swamp Lands under patent from state is deemed to have accepted his title in subordination to paramount right and duty of state to cause land to be reclaimed.

Approved in Packard v. Johnson (Cal.), 4 Pac. 638, following rule.

45 Cal. 365–379, 13 Am. Rep. 181, OAKLAND R. R. CO. v. OAKLAND ETC. R. R. CO.

Where Forfeiture of Franchise is Declared by Statute, the title to the thing forfeited immediately vests in the state upon happening of event determining forfeiture.

Approved in Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 248, 91 N. W. 1086, reaffirming rule; Kaiser Land & Fruit Co. v. Curry, 155 Cal. 649, 103 Pac. 345, holding failure of corporation to pay state license tax ipso facto dissolves corporation; Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 245, 125 Am. St. Rep. 54, 92 Pac. 491, 15 L. R. A. (n. s.) 1269, holding Civil Code, section 502, is self-executing in working forfeiture of street railway corporation franchise for failure to comply with provision of section; Santa Rosa etc. R. Co. v. Central St. Ry. Co. (Cal.), 38 Pac. 990, holding street railway franchise not forfeited ipso facto by failure of condition in absence of express provision to that effect in statute creating the condition; McConathy v. Deck, 34 Colo. 471, 83 Pac. 138, 4 L. R. A. (n. s.) 368, concealed weapon taken from person is forfeited by such taking; State v. King, 64 W. Va. 610, 63 S. E. 495, holding lands forfeited for nonentry on tax-books without office found; Wheeling etc. R. R. Co. v. Triadelphia, 58 W. Va. 512, 52 S. E. 509, 4 L. R. A. (n. s.) 321, judicial proceeding is necessary to declare forfeiture for noncompliance with condition subsequent.

Failure to Perform Condition Precedent to franchise right forfeits such right.

Approved in Adams v. Guyandotte Valley Ry. Co., 64 W. Va. 188, 61 S. E. 344, holding failure to perform condition precedent to right

to real estate prevented vesting of right; dissenting opinion in Denison etc. Ry. Co. v. St. Louis etc. Ry., 96 Tex. 246, 30 Tex. Civ. 480, 72 S. W. 204, majority holding license to use street for railway not forfeited by fourteen years' failure to use license.

Disapproved in Reed v. Sampson, 54 Tex. Civ. App. 559, 118 S. W. 753, under Rev. Stats. 1895, articles 680, 681, failure of corporation to commence active operation within three years did not ipso facto dissolve it.

Assignment of Franchise can Only be Questioned by authority which granted it.

Reaffirmed in Evans v. Krontinger, 9 Idaho, 159, 72 Pac. 884.

Right to Transfer or Mortgage Privilege to use streets for telegraph, telephone, or other quasi-public purposes. See note, 47 L. R. A. 88.

Miscellaneous.—Cited in South Pasadena v. Pasadena Land etc. Co., 152 Cal. 584, 93 Pac. 492, to point that only stockholders and creditors can object to transfer of entire property of ordinary business corporation.

45 Cal. 379–393, MOTT v. REYES.

Harmless Error in Rulings of Lower Court is not ground for reversal.

Approved in Union Transportation Co. v. Bassett (Cal.), 46 Pac. 911, holding error in admitting certain hearsay testimony harmless.

45 Cal. 394–395, LACORE v. LEONARD.

Judgment for Money Only is Properly Given when, in action on mechanic's lien, lien has expired.

Approved in Becker v. Superior Court, 151 Cal. 317, 90 Pac. 690, holding court could render personal judgment against defendants in action to foreclose mechanic's lien; Ascha v. Fitch (Cal.), 46 Pac. 299, holding claimant on mechanic's lien entitled to personal judgment, although lien was invalid for failure to state name of party for whom work was done.

45 Cal. 399–405, WILSON v. WILSON.

If, After Decree of Divorce is Granted and Custody of child awarded to wife, she petitions for allowance for support of child, court may modify its decree to make such provision both past and future.

Approved in Meyers v. Meyers, 91 Mo. App. 156, following rule; Soule v. Soule, 4 Cal. App. 104, 87 Pac. 208, holding under section 139, Civil Code, court can at any time modify decree granting alimony.

45 Cal. 406–429, 13 Am. Rep. 190, REDINGTON v. WOODS.

Bank is Liable to Depositor for Payment of forged check.

Approved in Kenneth Inv. Co. v. National Bk. of Republic, 103 Mo. App. 619, 77 S. W. 1003, following rule.

Right of Drawee to Recover Money Paid on forged check or draft. See note, 10 L. R. A. (n. s.) 51.

Bank is Only Required to Know Signature of drawer of check.

Approved in First State Bank of Scott City v. Vogeli, 78 Kan. 269, 96 Pac. 492, 19 L. R. A. (n. s.) 402, body of check may be

written in handwriting of another, and bank need only scan signature; Nat. Bank of Rolla v. First National Bk., 141 Mo. App. 725, 125 S. W. 514, where drawee bank paid check to another bank, which was bona fide holder, drawee could not recover money back on discovering check to be forgery; Kenneth Inv. Co. v. National Bank of Republic, 96 Mo. App. 145, 70 S. W. 179, bank liable for payment of forged checks, although agent of depositing corporation forged same and destroyed them as returned without depositor's knowledge.

Liability of One Receiving Payment of check through forged indorsement. See note, 94 Am. St. Rep. 643.

Unauthorized Alteration of Written Instruments. See note, 86 Am. St. Rep. 124.

45 Cal. 429–433, EX PARTE GUTIERREZ.

Enhancing Penalty for Crimes by Habitual Criminals or prior offenders. See note, 34 L. R. A. 399.

45 Cal. 433–439, SCHADT v. HEPPE.

When Probate Homestead is Set Apart, it ceases to be part of assets of estate and is no longer subject to control of probate court.

Approved in Estate of Hayes, 1 Cof. Prob. 552, following rule.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 57.

45 Cal. 455–467, DRAKE v. DUVENICK.

Default of Party Need not be Actually Entered up by clerk before taking judgment against him by default.

Approved in Brown v. Caldwell, 13 Cal. App. 32, 108 Pac. 875, following rule; Harpold v. Doyle, 16 Idaho, 691, 102 Pac. 164, default judgment cannot be collaterally attacked on ground default was not indorsed on complaint.

On Collateral Attack on Judgment all intendments are in favor of its validity.

Approved in Page v. Graver, 5 Cal. App. 385, 90 Pac. 482, following rule; County Bank v. Jack, 148 Cal. 439, 113 Am. St. Rep. 285, 83 Pac. 706, applying rule as to service of summons; Welsh v. Koch, 4 Cal. App. 580, 88 Pac. 608, holding jurisdiction presumed even if record of judgment collaterally attacked did not show service of summons on defendant.

Distinguished in Aldrich v. Barton, 153 Cal. 494, 95 Pac. 903, holding certificate of discharge from state hospital is not conclusive of jurisdiction of officer to make it.

Only Purpose of Entering Default is to Limit Time during which defendant may file answer.

Approved in Lunnun v. Morris, 7 Cal. App. 716, 95 Pac. 909, when answer filed after default, which has not been entered, though out of time and without leave, his default cannot be entered while answer stands.

45 Cal. 467–485, 13 Am. Rep. 204, BURKE v. CASSIN.

Word, Figure, etc., in Common Use as indicating name, nature, kind, quality, or character of the article, cannot be appropriated as trademark.

Approved in Italian-Swiss Colony v. Italian Vineyard Co., 158 Cal. 258, 110 Pac. 915, refusing to enjoin use of "tipo" as applied to

wines by rival firm; Trinidad Asphalt Mfg. Co. v. Standard Paint Co., 163 Fed. 979, 90 C. C. A. 195, holding "Ruberoid" could not be appropriated as trademark for roofing.

What Words or Phrases may constitute a valid trademark. See note, 85 Am. St. Rep. 102.

Right to Protection in Use of geographical name. See note, 26 L. R. A. (n. s.) 83.

45 Cal. 482–485, ALFORD v. BARNUM.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 804.

45 Cal. 485–495, CUNNINGHAM v. ASHLEY.

Administrator Who is Party to Action involving title of intestate to realty represents the title which deceased had at time of his death, and judgment therein binds the heirs.

Approved in McCaughey v. Lyall, 152 Cal. 617, 93 Pac. 682, holding heirs at law may be devested of title without being made parties to action to foreclose mortgage against estate of deceased; McClung v. Cullison, 15 Okl. 408, 82 Pac. 501, heir to intestate concluded by foreclosure decree and sale under mortgage, though not a party to action.

45 Cal. 495–511, BOWERS v. CHEROKEE BOB.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 374, 377, 384.

45 Cal. 515–519, JOHNSON v. MOSS.

Party Who First Violates a Contract cannot complain of later violation by another party.

Approved in Wood, Curtis & Co. v. Seurich, 5 Cal. App. 255, 90 Pac. 52, holding failure of vendee to pay on delivery by installments as per contract excused further delivery by vendor.

45 Cal. 519–522, CALDERWOOD v. BROOKS.

Mere Possession Without Title is Sufficient to maintain ejectment.

Approved in Kraus v. Congdon, 161 Fed. 20, 28, 88 C. C. A. 182, holding possession taken for purpose of maintaining suit sufficient in ejectment.

Effect of Judgment Against Tenant as res judicata. See note, 112 Am. St. Rep. 26.

45 Cal. 522–527, GREEN v. OPHIR COPPER ETC. MINING CO.

Judgment will not be Reversed because erroneous instructions were given when it is apparent verdict would have been the same with correct instructions.

Approved in Grubb v. Chase, 158 Cal. 353, 111 Pac. 91, People v. Taggart, 1 Cal. App. 426, 82 Pac. 397, and Hamlin v. Pacific Electric Ry. Co., 150 Cal. 783, 89 Pac. 1112, all following rule; Greene v. Murdock, 1 Cal. App. 139, 81 Pac. 993, holding erroneous instructions of no consequence when pleadings and evidence failed to show plaintiff entitled to verdict; Spear v. United Railroads, 16 Cal. App. 665, 117 Pac. 969, applying rule in action for personal injuries.

Declarations of Agent of Corporation are admissible against corporation.

Approved in Hupfer v. Nat. Distilling Co., 119 Wis. 424, 96 N. W. 811, following rule.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 321.

45 Cal. 527–541, CHIPLEY v. FARRIS.

If Decree of Confirmation of Mexican Grant covers land not included in approved survey, claimant has no title to the surplus.

Approved in Valentine v. Sloss (Cal.), 37 Pac. 329, following rule.

Distinguished in United Land Assn. v. Knight (Cal.), 23 Pac. 270, holding in ejectment for tide lands that boundaries recited in decree confirming Mexican grant and in patent issued thereon would prevail over those given in survey and granting clause of patent.

45 Cal. 544–549, SPERRY v. SPALDING.

If Note is Fraudulently Put in Circulation, indorsee, in action on note, must prove he gave value for it.

Approved in Pierson v. Huntington, 82 Vt. 486, 137 Am. St. Rep. 1029, 74 Atl. 89, evidence by defendant in action on note that consideration failed required indorsee to show purchase in good faith, for value, before maturity.

Effect of Partial Eviction upon liability for rent. See note, 17 L. R. A. 326.

45 Cal. 553–559, IN RE BULGER.

Constitution Does not Prohibit the Legislature from conferring on voluntary association of persons who are not citizens nor electors the power to elect a person to fill an office created by the legislature.

Approved in Election of Officers by the Senate, 28 R. I. 620, 69 Atl. 561, upholding law authorizing election of nonconstitutional officers by Senate in conjunction with governor; Richardson v. Young, 122 Tenn. 519, 125 S. W. 675, upholding statute requiring legislature to choose board of elections; Southern Pac. Co. v. Bartine, 170 Fed. 746, upholding statute authorizing fixing of rates by railroad commission.

45 Cal. 559–564, HAYES v. MARTIN.

Where Defendant in Ejectment Shows adverse possession of only part of the premises, judgment in his favor for all is erroneous.

Approved in Reay v. Butler (Cal.), 7 Pac. 672, holding judgment for intervener in ejectment for all of premises is error when he claims a part only.

Adverse Possession Ripens into Title only after five years.

Approved in Anderson v. Bassman, 140 Fed. 26, holding adverse user of water to ripen into title as against another must have been to detriment of other and with his acquiescence for statutory period.

Occupant of Land may Claim Title as against all others while recognizing superior title of United States.

Approved in Northern Pacific Ry. Co. v. Pyle, 19 Idaho, 15, 17, 112 Pac. 682, 683, applying rule where defendant in ejectment admits title in government; Boe v. Arnold, 54 Or. 65, 102 Pac. 294, applying rule to such occupant as against person claiming under prior grant; Maas v. Burdetzke, 93 Minn. 298, 106 Am. St. Rep. 436, 101 N. W. 183, party entering on land believed to be public for purpose of acquiring homestead title may acquire title by adverse possession as against true owner; Silverstone v. Hamley, 55 Wash. 460, 104 Pac.

768, holding taking of tax certificate by one in adverse possession of land assessed to unknown owner was not recognition of superior title inconsistent with claim of ownership.

When Findings Afford No Basis for modification of erroneous judgment, new trial must be had.

Reaffirmed in Murdock v. Clarke (Cal.), 24 Pac. 274, 275.

45 Cal. 564–572, HOFFMAN v. VALLEJO.

Contracts, Consideration for Which has Partly Failed, or is partly illegal. See note, 117 Am. St. Rep. 524.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 171, 175, 181.

Validity of Provision, in Contract for contingent fee, forbidding client to settle without attorney's consent. See note, 14 L. R. A. (n. s.) 1101.

Miscellaneous.—Cited in Levy v. Ryland, 32 Nev. 466, 109 Pac. 907, where two persons purchase land and title is taken in name of one, he holds as trustee for other.

45 Cal. 573–580, POLHEMUS v. HEIMAN.

One Buying With Warranty, on discovery of breach, may return goods and rescind contract or retain goods and bring action for breach, or plead breach as offset in action by vendors for purchase money.

Approved in Erie City Iron Works v. Tatum, 1 Cal. App. 293, 82 Pac. 94, following rule; North Alaska etc. Co. v. Hobbs, Wall & Co., 159 Cal. 384, 113 Pac. 872, buyer under warranty may recover damages for breach on accepting goods with knowledge of defect and paying price; Hills v. Edmund Peycke Co., 14 Cal. App. 35, 36, 110 Pac. 1088, 1089, seller suing for values of quantities of goods delivered under contract need not anticipate counterclaim for damage for failing to deliver whole amount contracted for; Ellis v. Riddick, 34 Tex. Civ. 261, 263, 76 S. W. 722, 723, holding party could keep defective goods delivered under contract and seek redress for breach of contract.

If Vendee Accepts Goods on Delivery and renders vendor an account, he is not thereby prevented from suing for damages for breach of warranty as to quality if he accepted and rendered account in ignorance of true condition of goods.

Approved in Luitweiler Engine etc. Co. v. Ukiah Water etc. Co., 16 Cal. App. 205, 116 Pac. 710, discussing warranty as to fitness of pump sold.

Right to Reject Goods for Breach of Warranty. See note, 27 L. R. A. (n. s.) 918.

No Expression of Opinion, however strong, would impart a warranty.

Approved in Brackett v. Martens, 4 Cal. App. 255, 87 Pac. 413, holding expression of opinion as to merchantability of nursery stock not a warranty; Tustin Fruit Assn. v. Earl Fruit Co. (Cal.), 53 Pac. 698, holding warranty as to quality not implied in contract of sale of oranges.

45 Cal. 580–584, CONNECTICUT LIFE INS. CO. v. McCORMICK.

Mortgage Given by Wife Under Undue Influence of husband does not render it void as against mortgagee without notice of undue influence.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, holding grantors in deed cannot avoid it for fraud upon them by third person, of which grantee was ignorant.

Party Seeking to Avoid Mortgage on Ground of undue influence must allege defense in answer.

Approved in Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 590, 606, 119 S. W. 566, 572, duress as affirmative defense to contract must be specially pleaded.

45 Cal. 592–594, DOUGLAS v. FULDA.

Tenant cannot Justify Attornment to Third Party by showing such party has obtained judgment against him for possession, but he must show that landlord had notice of action and opportunity to defend.

Approved in Ashton v. Golden Gate Lumber Co. (Cal.), 58 Pac. 3, holding tenant of trustee under deed of trust with power to lease during life of beneficiary cannot dispute trustee's right to collect rents after such death.

Unlawful Detainer. See note, 120 Am. St. Rep. 58.

Effect of Judgment Against Tenant as res judicata. See notes, 112 Am. St. Rep. 27; 26 L. R. A. (n. s.) 595.

45 Cal. 597–609, CONROY v. DUANE.

In Order to Maintain Action of Forcible Entry and detainer, it is necessary to prove that defendant made forcible entry or forcibly detained premises.

Approved in Steil v. Dessmore, 3 Alaska, 399, following rule.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 382, 391.

Constructive and Scrambling Possession is not sufficient to support forcible entry and detainer.

Approved in Perry Naval Stores Co. v. Griffin, 57 Fla. 139, 49 So. 555, holding inclosure of portion of land by plaintiff's agent not to support unlawful detainer; Chezum v. Campbell, 42 Wash. 567, 85 Pac. 51, owner of land in possession of tenant cannot maintain forcible entry against person dispossessing tenant.

45 Cal. 610–613, GROGAN v. VACHE.

Deed Purporting to Convey Specific Tract, giving area, and calling it parcel of larger tract, but calls of which fail to describe any tract of land, does not convey undivided interest in larger tract.

Distinguished in Crozer v. White, 9 Cal. App. 620, 100 Pac. 134, holding that grant of dwelling-house and land appurtenant included farm surrounding house; Adams v. Hopkins (Cal.), 69 Pac. 234, holding deed considered conveyed undivided interest in ranch.

45 Cal. 616–631, REYNOLDS v. HOSMER.

If Real Estate is Sold on Judgment and judgment afterward reversed, former owner may elect to have sale set aside and possession restored, or action for damages.

Approved in Florence Cotton etc. Co. v. Louisville Banking Co., 138 Ala. 592, 593, 100 Am. St. Rep. 50, 36 So. 457, 458, where payment of judgment was coerced and judgment later reversed, judgment debtor could recover sums paid regardless of merits of cause.

Distinguished in Purser v. Cady (Cal.), 49 Pac. 181, holding title acquired at execution sale on judgment in part afterward reversed not affected where reversal only went to awarding counsel fees.

Reversal of Judgments. See note, 96 Am. St. Rep. 145.

Defect in Complaint for Uncertainty should be taken advantage of by general demurrer.

Approved in San Gabriel Valley Bank v. Lake View Town Co. (Cal. App.), 86 Pac. 729, following rule.

45 Cal. 631–640, PORTER v. HAIGHT.

When State Confers on Board of Public Officers Jurisdiction to exercise discretion over matters within their power to perform, the courts cannot review the exercise of such discretion.

Approved in De Merritt v. Weldon, 154 Cal. 551, 98 Pac. 539, holding compensation of municipal officer fixed by council not subject to review by courts.

Right to Compel Prisoners to Labor. See note, 27 L. R. A. 609.

45 Cal. 643–647, STOCKTON v. CREANOR.

Delegation by City Council of Power to determine width, grade, material, etc., of street, sidewalk, or sewer improvements. See note, 20 L. R. A. 656.

45 Cal. 647–650, HENDERSON v. McTUCKER.

Writ of Assistance can Issue only against defendants and parties holding under them bound by decree.

Reaffirmed in Fox v. Stubenrauch, 2 Cal. App. 93, 83 Pac. 84.

Jurisdiction of Equity to Put Party in possession in aid of decree. See note, 93 Am. St. Rep. 164.

45 Cal. 673–676, TOWNSEND v. LITTLE.

Right to Civil Action for Forcible entry and detainer. See note, 121 Am. St. Rep. 400.

45 Cal. 677–678, POWELL v. LANE.

One Who has Title and Present Right of entry is not guilty of unlawful or forcible entry if he enter into a building, in absence of owner, peaceably and in good faith.

Approved in Goldstein v. Wesbter, 7 Cal. App. 708, 709, 95 Pac. 678, holding where no possession was ever taken under lease, action of forcible entry and detainer did not lie by lessee against owner who entered peaceably and leased to third party, placing him in possession.

45 Cal. 680–685, STOCKTON ETC. GRAVEL ROAD CO. v. STOCKTON ETC. R. R. CO.

What Constitutes a Corporation De Facto. See note, 118 Am. St. Rep. 257.

45 Cal. 686–689, BIRD v. WILCOX.

One Who Obtains Patent to Public Lands as pre-emptioner by fraudulently obtaining and forcibly retaining possession from one who had taken preliminary steps to enter it as homestead, and by fraudulently procuring cancellation of homestead entry, holds title in trust for pre-emptioner.

Distinguished in Cragie v. Roberts, 6 Cal. App. 317, 92 Pac. 101, holding agricultural claimant to land determined to be mineral who has had opportunity to contest question as to character of land before land department cannot apply to courts to enforce trust in his favor against mineral claimant, on ground mineral patent was obtained by fraud.

45 Cal. 696–699, ESTATE OF BALLENTINE.

Probate Court has No Discretion to Refuse to set apart homestead for use of widow and minor children if none was selected prior to death of decedent, and due application made therefor.

Approved in Estate of Shively, 145 Cal. 402, 78 Pac. 870, Estate of Green, 1 Cof. Prob. 453, and Estate of Maxwell, 1 Cof. Prob. 128, all reaffirming rule; Hoppe v. Hoppe (Cal.), 36 Pac. 392, 394, holding homestead must be set apart and cannot be partitioned until youngest child came of age; Estate of Hessler, 2 Cof. Prob. 359, where there are no children, homestead must be set apart for widow; Estate of Hayes, 1 Cof. Prob. 552, applying rule where minor child applied for homestead; Estate of Tate, 1 Cof. Prob. 218, setting apart for life of widow homestead in separate estate of husband.

Distinguished in Estate of Leahy, 3 Cof. Prob. 369, where realty was purchased mainly with decedent's separate funds, and there are adult heirs, such realty should not be set apart to widow and minor child absolutely.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 49.

Word "May," Used in Statute Providing for probate homestead, is to be construed "shall."

Approved in In re Chadbourne, 15 Cal. App. 369, 114 Pac. 1014, applying rule in construing Code of Civil Procedure, section 1511; Brenner v. Los Angeles, 160 Cal. 79, 116 Pac. 400, construing section 63 of Los Angeles city ordinance for assessment and collection of city taxes; Estate of Hessler, 2 Cof. Prob. 355, Code of Civil Procedure, section 1465, relating to homestead, is mandatory. See notes, 1 Cof Prob. 219, 556.

Distinguished in Estate of Graber, 2 Cof. Prob. 351, refusing to remove executor for failure to file inventory within statutory time, where dereliction caused by attorney's negligence.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 46 CALIFORNIA.

46 Cal. 7–16, BRENNAN v. FORD.

Specification of Statute of Limitations as Ground of demurrer is sufficient to raise question without referring to particular section relied on.

Approved in Donahue v. Stockton Gas etc. Co., 6 Cal. App. 281, 92 Pac. 198, and Fay v. Costa, 2 Cal. App. 243, 83 Pac. 276, both following rule.

Law Implies Mutual Conveyances are to be made concurrently under contract for exchange of lands.

Reaffirmed in Dunn v. Oneida Community, 177 Fed. 547.

Where Pleading Alleges Agreement, but does not aver whether it was oral or written, it is presumed on demurrer that it was in writing.

Reaffirmed in Levy v. Ryland, 32 Nev. 469, 470, 109 Pac. 908.

46 Cal. 17–19, STOKES v. GEDDES.

Allegation in Complaint in Equity to set aside judgment for tax that no notice was given of proceedings which resulted in judgment is allegation of law and not of fact.

Distinguished in Whittle v. Vanderbilt Mining etc. Co., 83 Fed. 53, where stockholder deals with corporation, corporation is not imputed to have notice of defect in title of land conveyed by reason of knowledge of stockholder.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 856.

46 Cal. 19–24, KIMBALL v. ALAMEDA COUNTY.

Appearance Before Board of Supervisors, in proceedings to take private land for road, by one whose land is about to be taken, is waiver of notice of meeting.

Approved in County of San Luis Obispo v. Simas, 1 Cal. App. 180, 81 Pac. 974, following rule.

46 Cal. 26–29, MARIANI v. DOUGHERTY.

New Trial may be Granted for Insufficiency of damages awarded.

Approved in Aboltin v. Heney, 62 Wash. 68, 113 Pac. 247, granting new trial where fifteen hundred dollar verdict rendered for carpenter who had hand taken off.

Inadequacy of Damages as Ground for setting aside verdict. See note, 47 L. R. A. 33, 45.

46 Cal. 33–42, STRANG v. RYAN.

Cotenants in Mines. See note, 91 Am. St. Rep. 861.

Right of Cotenant, Agent, or Other Fiduciary to relocate mining claim for own benefit. See note, 50 L. R. A. 185.

46 Cal. 42–45, FRIERMUTH v. FRIERMUTH.

A Son Remaining With and Laboring for his father after majority is not ordinarily entitled to pecuniary compensation, but circumstances may show it was expectation of both parties that he should be paid, in which case he may sue on quantum meruit.

Approved in Crane v. Derrick, 157 Cal. 672, 109 Pac. 33, holding circumstances show son not entitled to compensation for care of mother.

Presumption of Gratuitous Services by Relations. See notes, 133 Am. St. Rep. 252; 11 L. R. A. (n. s.) 880, 900.

Miscellaneous.—Cited in Castagnino v. Balletta (Cal.), 21 Pac. 1098, to point that common counts may be used in pleading.

46 Cal. 45–49, PEOPLE v. DEVINE.

Voluntary Confession Made to Officer while under arrest after being detained in custody more than twenty-four hours without being brought before magistrate cannot be excluded on ground detention was illegal.

Approved in People v. Siemsen, 153 Cal. 395, 95 Pac. 866, holding admissible voluntary confession to officer while under arrest.

Illegality of Arrest as Affecting Confession. See note, 27 L. R. A. (n. s.) 152.

Proof of What Witness Testified to on former trial may be introduced if witness has left state.

Approved in Atchison, Topeka etc. R. R. Co. v. Osborn, 64 Kan. 189, 91 Am. St. Rep. 189, 67 Pac. 548, following rule.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 362.

Constitutional Right of Accused to be confronted by witnesses. See note, 129 Am. St. Rep. 42.

46 Cal. 52–53, PEOPLE v. GATES.

Proof of Notoriety is as Material as Proof of fact of adultery in making out offense of living in state of open and notorious adultery.

Approved in People v. Salmon, 148 Cal. 305, 113 Am. St. Rep. 268, 83 Pac. 43, 2 L. R. A. (n. s.) 1186, following rule.

Evidence and Instructions as to character of accused. See note, 20 L. R. A. 611.

46 Cal. 68–70, RICHARDSON v. LEYDENFELDT.

Notice of Intention to Improve Streets must describe place where street is to be improved.

Approved in Pacific Paving Co. v. Verso, 12 Cal. App. 365, 107 Pac. 591, holding improper assessment for street improvement when resolution of intention described limits of work inadequately.

Work to be Done upon Street Improvement must be determined by board of supervisors, and judgment of no other person can be substituted.

Approved in Hildreth v. City of Longmont, 47 Colo. 91, 105 Pac. 112, holding city engineer could determine location of subdrains to protect sewer system when their number and length had been determined by city.

Delegation by City Council of Power to determine width, grade, material, etc., of street, sidewalk, or sewer improvements. See note, 20 L. R. A. 655.

46 Cal. 70–73, MEYER v. TULLY.

Injunctions Against Judgment for Matters subsequent to rendition. See note, 30 L. R. A. 563.

46 Cal. 85–91, CALIFORNIA PACIFIC R. R. CO. v. ARMSTRONG.

Entry on Land Prior to Condemnation Proceedings and construction of road thereon does not defeat right to condemn.

Approved in Blackwell etc. Ry. Co. v. Bebout, 19 Okl. 72, 91 Pac. 881, either party may institute condemnation proceedings after entry by railroad on land with or without owner's consent.

Nature of Railroad as Realty or Personalty. See note, 66 L. R. A. 48.

Value of Improvements Made by One taking property by eminent domain as element of damages. See note, 16 L. R. A. 807.

Right to Set Off Benefits Against Damages on condemnation. See note, 9 L. R. A. (n. s.) 828.

46 Cal. 100–102, PEOPLE v. EATON.

Fact That Assessment was Made and Issued is material averment in complaint to enforce collection of street assessment in San Francisco.

Approved in Doane v. Barber (Cal.), 9 Pac. 89, when pleadings put in issue question of assessment, any facts going to show no valid assessment was ever levied were within isues.

46 Cal. 103–108, KIMBALL v. MACPHERSON.

Title to Land Between High and Low Water Mark. See note, 45 L. R. A. 239.

Grant of Tide Lands to Municipality. See note, 3 L. R. A. (n. s.) 823.

Right of State to Grant Tide Lands. See note, 22 L. R. A. (n. s.) 340.

46 Cal. 108–112, STANISLAUS BRIDGE CO. v. HORSLEY.

Rights and Duties of Toll-bridge Proprietors. See note, 58 L. R. A. 164.

46 Cal. 114–120, PEOPLE v. MORTIMER.

Law Changing Forms of Criminal Procedure relating to crimes committed before act was passed is not ex post facto.

Approved in Harris v. United States, 4 Okl. Cr. 318, 111 Pac. 983, applying rule to law curtailing number of peremptory challenges; State v. Newcomb, 58 Wash. 420, 109 Pac. 357, applying rule to mode of selecting.

46 Cal. 121–124, PEOPLE v. RUSSELL.

Defendant Who Undertakes, as Witness on his own behalf, to state all that transpired may be asked on cross-examination if he has omitted anything pertinent, and his attention may be directed to the precise point, by asking if a certain thing did not occur.

Reaffirmed in People v. Davis, 1 Cal. App. 11, 81 Pac. 717.

Cross-examination of Defendant in Criminal Cases. See note, 15 L. R. A. 672.

46 Cal. 124–134, VAN VACTOR v. WALKUP.

Court may Determine That Alleged Libelous Language is susceptible to double meaning, one of which is libelous.

Approved in Lauder v. Jones, 13 N. D. 540, 101 N. W. 911, upholding complaint when language was susceptible to libelous construction.

46 Cal. 134–138, ANDERSON v. RIDER.

Later Tax Deed Prevails Over Earlier.

Approved in Excelsior Springs v. Henry, 99 Mo. App. 453, 73 S. W. 944, purchaser at tax sale takes subject to all subsequent valid tax liens; Oakland Cemetery Assn. v. County of Ramsey, 98 Minn. 408, 116 Am. St. Rep. 377, 108 N. W. 858, tax title based on later sale under earlier lien prevails over title on earlier sale under later lien.

Distinguished in Parker-Washington Co. v. Corcoran, 150 Mo. App. 195, 129 S. W. 1032, as between assessments for different street improvements, lien of one earlier in point of time is superior.

Necessity of Immediate Payment on Tax Sale. See note, 33 L. R. A. 481.

46 Cal. 141–154, PEOPLE v. SOUTHWELL.

Under Section 278, Practice Act, Motion to set aside indictment is addressed to irregularities in proceedings of valid grand jury, and not to irregularities in formation of grand jury.

Approved in People v. Hatch, 13 Cal. App. 526, 109 Pac. 1099, holding under section 995, Penal Code, no mere irregularities in formation and impanelment of grand jury, other than such as are grounds of challenge, are grounds for setting aside indictment; Shivers v. Territory of Oklahoma, 13 Okl. 472, 74 Pac. 901, objection that indictment was not properly indorsed cannot first be presented on appeal.

Enumeration in Statute of Grounds for setting aside indictment excludes all other grounds.

Reaffirmed in State v. Tough, 12 N. D. 429, 96 N. W. 1026.

Organization of Grand Jury. See note, 27 L. R. A. 776.

Number of Grand Jurors Necessary to concur in indictment. See note, 28 L. R. A. 35.

Miscellaneous.—Cited in Evans v. Willis, 22 Okl. 322, 97 Pac. 1051, 19 L. R. A. (n. s.) 1050, prohibition lies to restrain proceedings under void indictment.

46 Cal. 154–162, PITTE v. SHIPLEY.

Plaintiff in Action to Quiet Title cannot prevail unless he shows title in himself.

Approved in Williams v. San Pedro, 153 Cal. 49, 94 Pac. 236, holding plaintiff in action to quiet title to tide lands cannot have judgment when he holds under void certificates of purchase.

Word Repeatedly Used in Statute is presumed to have same meaning throughout.

Approved in State v. Greene, 154 Ala. 257, 46 So. 271, following rule; City of Elkhart v. Lipschitz, 164 Ind. 674, 74 N. E. 529, holding words "to direct location" of slaughter-houses have same meaning in two sections of statute.

46 Cal. 171–174, LINDEN v. CASE.

Injunction Does not Lie to Restrain supervisors from incurring liabilities which are not legal charge against county.

Approved in Winn v. Shaw (Cal.), 25 Pac. 244, denying injunction at suit of taxpayer to restrain county auditor from issuing warrant for payment of alleged illegal claim allowed against county by supervisors.

No Order of Board of Supervisors is valid unless authorized by law.

Approved in Theis v. Board of Commrs. of Beaver Co., 22 Okl. 340, 341, 97 Pac. 976, holding void contract of supervisors with broker for sale of county bonds.

46 Cal. 187–190, LAWRENCE v. BOOTH.

In Action Brought by State to Annul Certificate of purchase of state land for failure to make payment, cost of publishing summons must be taxed to defendant, but must be paid by state if it cannot be had from defendant.

Approved in Cahill v. Colgan (Cal.), 31 Pac. 618, holding state liable for costs of receivership in suit brought by state, when appointment was void.

46 Cal. 201–204, HARTLEY v. BROWN.

Judgment Dissolving Partnership and Directing Sale of partnership property and division of proceeds is final judgment.

Approved in Costello v. Scott, 30 Nev. 88, 90, 94 Pac. 223, holding judgment dissolving partnership as final and appealable, although right was reserved to make supplemental decree.

46 Cal. 204–208, CLARK v. DUNNAM.

Judgment Dissolving Partnership and Directing Sale of partnership property and division of proceeds is final judgment.

Distinguished in Doudell v. Shoo, 159 Cal. 453, 114 Pac. 581, judgment determining fact of partnership and existence of mutual unliquidated claims not final.

46 Cal. 209–213, GOLDSMITH v. SAWYER.

Facts of Which Courts will take judicial notice. See note, 124 Am. St. Rep. 52.

46 Cal. 214–217, McMAHON v. SAN MATEO COUNTY.

Under Act of 1870, for Improvement of San Mateo Highways, supervisors cannot submit bond issue unless proclamation states specific object for which money is to be expended.

Cited in Jenkins v. Williams, 14 Cal. App. 95, 111 Pac. 118, arguendo.

46 Cal. 218–222, STONE v. BUMPUS.

Liability for Damming back stream. See note, 59 L. R. A. 900.

46 Cal. 222–234, HARP v. CALAHAN.

Mortgage Claim Against Estate must be presented for allowance to administrator.

Distinguished in Clayton v. Dinwoodey, 33 Utah, 263, 93 Pac. 727, holding presentation to executors of claim based on breach of decedent's warranty deed not jurisdictional to action thereon.

46 Cal. 245–248, PEOPLE ex rel. BURDELL v. PROBATE COURT.

Probate Court can Order Change of Venue of trial of issue of fact to be tried during probate proceedings.

Approved in State v. Superior Court, 40 Wash. 448, 111 Am. St. Rep. 915, 82 Pac. 876, 2 L. R. A. (n. s.) 568, upholding change of venue ordered in garnishment proceedings.

46 Cal. 248–256, BEE v. SAN FRANCISCO ETC. R. R. CO.

Right of Servant to Remuneration for Extra Work. See note, 30 L. R. A. (n. s.) 655.

46 Cal. 259–266, HIGGINS v. HIGGINS.

Where Property Purchased With Community Funds is conveyed to wife by husband with intent that it shall be her separate property, it operates as gift from husband to wife.

Approved in Wright v. Wright (Cal.), 41 Pac. 696, following rule.

What is Community Property. See notes, 126 Am. St. Rep. 107; 4 Cof. Prob. 49.

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 378.

Wife may Claim Homestead to Extent of husband's interest in property owned by him as tenant in common, and on which they reside.

Approved in Estate of Davidson, 159 Cal. 100, 103, 115 Pac. 50, 51, following rule; Swan v. Walden, 156 Cal. 199, 200, 134 Am. St. Rep. 118, 103 Pac. 933, holding void deed by husband to property held in joint tenancy after declaration of homestead thereon by wife.

Widow to Whom Probate Court has Set Apart a homestead may, if she remarries, claim second homestead on estate of second husband.

Cited in Estate of Green, 1 Cof. Prob. 454, arguendo.

Wife may Show by Parol That Conveyance of Property to her by bargain and sale deed was gift.

Approved in Estate of Fay, 3 Cof. Prob. 271, declarations of person since deceased are admissible to effect that his estate is community property.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 112.

46 Cal. 266–269, SWIFT v. SWIFT.

Where Contract to Repay Money Loaned is Void under statute of frauds, law presumes promise to repay on demand.

Reaffirmed in Bowman v. Wade, 54 Or. 352, 103 Pac. 74.

When Forcible Entry was upon Possession of Tenant, landlord cannot maintain action.

Reaffirmed in Chezum v. Campbell, 42 Wash. 567, 85 Pac. 51.

Statute of Frauds—Agreements not to be performed within a year. See note, 138 Am. St. Rep. 596.

46 Cal. 270–279, POLACK v. SHAFER.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 373, 374.

46 Cal. 279–286, BOWERS v. CHEROKEE BOB.

Court has Discretion to Allow Renewal of motion once denied.

Reaffirmed in Lawson v. Lawson, 15 Cal. App. 500, 115 Pac. 463.

46 Cal. 287–289, BRADBURY v. CRONISE.

Findings Contrary to Admitted Facts must be disregarded.

Reaffirmed in Lambert v. Lambert, 1 Cal. App. 115, 81 Pac. 716.

46 Cal. 302–304, PEOPLE v. STRONG.

Jury may Consider Attempt to Escape as circumstance in determining guilt or innocence of prisoner.

Reaffirmed in People v. Petruzo, 13 Cal. App. 579, 110 Pac. 328.

Judgment will not be Reversed for Alleged Errors in instructions, in criminal case, when testimony is not in record, if from nature of case testimony might have justified the instructions.

Reaffirmed in People v. Horton, 7 Cal. App. 36, 93 Pac. 383.

Miscellaneous.—Cited in People v. Bowers (Cal.), 18 Pac. 667, to point that in criminal case court may permit state to offer evidence after defense is begun.

46 Cal. 304–320, ESTATE OF SCHROEDER.

Statute of Limitations Does not Run while administration is pending and unsettled as to claims against estate which have been allowed.

Approved in In re Tuohy's Estate, 33 Mont. 247, 83 Pac. 491, following rule; Shively v. Harris, 5 Cal. App. 515, 90 Pac. 971, final judgment against estate is an allowed claim, and statute does not run against it while administration is pending.

One Who Does not Claim Any Interest in real estate cannot contest order of probate court directing it to be sold to pay debts.

Approved in Estate of Bishop, 5 Haw. 289, holding appellant from order admitting will to probate must show prima facie that he is an heir at law of deceased.

46 Cal. 323–327, ATHERTON v. FOWLER; S. C., 91 U. S. 143, 23 L. Ed. 265.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 46.

46 Cal. 332–342, HAYDEN v. HAYDEN.

Amendments to Pleadings may be Refused at discretion of court unless good cause is shown.

Approved in H. P. Smith Co. v. Suttich, 10 Cal. App. 541, 102 Pac. 684, holding proposed amendment to conform to evidence properly refused when there was no evidence to support it, and no good cause shown.

If Judgment Removing Alleged Cloud on Title is obtained by fraud, it may be set aside in equity.

Approved in Hanley v. Hanley, 4 Cof. Prob. 479, upholding equity jurisdiction to set aside order setting apart homestead procured by fraud.

Where Judgment, Though Void in Fact, is valid on face, bona fide purchasers under it are protected.

Reaffirmed in Doyle v. Hampton, 159 Cal. 734, 116 Pac. 41.

46 Cal. 342–346, DE WITT v. DUNCAN.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 21, 72, 111, 113.

46 Cal. 346–354, 13 Am. Rep. 213, OGBURN v. CONNOR.

Upper Owner of Land has Easement over land of lower owner for purpose of natural discharge of surface water.

Approved in Heier v. Krull, 160 Cal. 444, 117 Pac. 531, and McDaniel v. Cummings (Cal.), 22 Pac. 217, both following rule; West v. Girard (Cal.), 4 Pac. 566, where coterminous tracts of land are in such position that lower tract owes servitude to upper to receive surface water, it cannot be forced back on dominant tract by any act of servient owner; Hume v. City of Des Moines, 146 Iowa, 641, 125 N. W. 852, holding city liable for injury to lands of upper owner due to negligence in constructing street embankment by which water was dammed back; Chicago R. I. & P. Ry. Co. v. Groves, 20 Okl. 111, 93 Pac. 758, 22 L. R. A. (n. s.) 802, holding water flowing in well-defined channel cannot be thrown back on upper tenement.

Natural Mode of Discharge of Surface Drainage cannot be changed by ditches to injury of lower owner.

Approved in Shaw v. Sebastopol, 159 Cal. 624, 115 Pac. 214, Galbreath v. Hopkins, 159 Cal. 302, 113 Pac. 76, Peck v. Peterson, 15 Cal. App. 547, 115 Pac. 328, Humphreys v. Moulton, 1 Cal. App. 258, 81 Pac. 1085, and Davis v. Fry, 14 Okl. 348, 78 Pac. 182, 69 L. R. A. 460, all following rule; Cox v. Odell, 1 Cal. App. 686, 82 Pac. 1087, holding where surface waters have no natural channel of escape, owner of land on which they accumulate cannot alter mode of escape to injury of lower owners.

Distinguished in Drew v. Hicks (Cal.), 35 Pac. 565, holding rule does not apply where surface water is turned on lower owner by artificial changes in land of upper owner.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 720, 721.

Right of Owner of Lower as Against Upper Land Owner to obstruct surface water in natural channel. See note, 22 L. R. A. (n. s.) 791, 792, 801.

Rights as to Flow of Surface Water. See note, 21 L. R. A. 598.

46 Cal. 355–357, PEOPLE v. KELLY.

Separation of Jury Held Insufficient to constitute misconduct warranting new trial.

Approved in Shivers v. Territory, 13 Okl. 477, 74 Pac. 903, technical separation of jury held harmless.

Order of Court Made by Consent of Defendant allowing jury to deliver sealed verdict to sheriff and be discharged when they should agree during night cannot be complained of by defendant.

Approved in People v. Duffek, 163 Mich. 209, 128 N. W. 250, upholding order allowing jury without defendant's consent to deliver sealed verdict to sheriff and open same when they reassembled in court.

Misconduct of Jurors, Other Than Their Separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1041.

Crime of Arson, and who may commit same. See note, 101 Am. St. Rep. 24.

46 Cal. 361–379, GATES v. SALMON.

Parol Partition by Tenants in Common is void when any of cotenants are married women.

Approved in Oliver v. Williams, 163 Ala. 382, 50 So. 939, parol partition between tenants in common followed by possession held binding.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 75.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324.

46 Cal. 385–387, MASON v. AUSTIN.

Question as to Sufficiency of Pleading cannot be raised on appeal from order granting new trial.

Approved in Raskin v. Robarts (Cal.), 35 Pac. 764, question whether conclusion of law is justified by finding of fact cannot be considered on appeal from order denying new trial.

46 Cal. 389–392, WOODS v. SAWTELLE.

Application to Purchase State Lands must conform to statute.

Approved in Moran v. Bonynge, 157 Cal. 299, 107 Pac. 314, holding pleadings by intervener in contest of right to purchase state lands do not show conformity to statute in application to purchase; Gilson v. Robinson (Cal.), 7 Pac. 430, holding void certificate of purchase of state lands issued before plat of survey has been approved by government officer or filed.

Approval of Application to Purchase State Lands does not raise presumption that application conformed to statute.

Approved in Moran v. Bonynge, 157 Cal. 299, 107 Pac. 314, acceptance by surveyor general of part of purchase money and issuance of certificate of purchase does not excuse interveners in contest of right to purchase state lands from alleging facts to show valid application.

46 Cal. 398–407, KIRK v. RHOADS.

Ballot Should not be Rejected Simply because it differs from regulations prescribed in code in matters over which elector has no control.

Approved in Rampendahl v. Crump, 24 Okl. 888, 105 Pac. 206, reaffirming rule; Matter of the Contested Senatorial Election, 10 Haw. 224, upholding ballot containing mark evidently result of accident in printing; Remster v. Sullivan, 36 Ind. App. 396, 75 N. E. 864, statutes affecting franchise must be liberally construed; Esquibel v. Chaves, 12 N. M. 504, 78 Pac. 512, fact that ballot contains party emblem at head but not all names of party candidates does not render it void; State v. Spires, 152 N. C. 6, 67 S. E. 41, differences in sizes of ballots does not avoid election; Town of Westville v. Town of Stillwell, 24 Okl. 897, 105 Pac. 666, construing section 12 of election law of 1907, requiring elector at special election to subscribe certain affidavit; Town of Grove v. Haskell, 24 Okl. 725, 104 Pac. 63, upholding election although ballots differed in details from those required by statute.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 81.

Affidavit to Written Statement of Grounds of election contest may be in ordinary form of verification to pleading.

Approved in Lane v. Bailey, 29 Mont. 551, 75 Pac. 192, following rule; Murphy v. Levengood, 31 Mont. 35, 77 Pac. 311, upholding affidavit when grounds were on information and belief.

Miscellaneous.—Cited in Lantz v. Fishburn 3 Cal. App. 665, 91 Pac. 817, to point that validity of deeds under bond act must depend upon strict compliance with statutory provisions.

46 Cal. 409–415, MALONE v. HAWLEY.

Defendant, in Action for Damages caused by injury from defective appliance, must have known, or ought to have known, of defect to justify recovery.

Approved in Sterne v. Mariposa Commercial etc. Co., 153 Cal. 523, 97 Pac. 69, following rule.

An Essential Condition for Right of Recovery for injury from defective appliance is that servant did not know of defect and had no equal means of knowing with master.

Approved in Wright v. Pacific Coast Oil Co. (Cal.), 53 Pac. 1090, refusing recovery for injury from defective appliance where servant had equal means of knowing with master.

Knowledge as Element of Employer's Liability. See note, 41 L. R. A. 67.

Condition in Life of Injured Party cannot be considered in his action for damages for wrongful injury.

Reaffirmed in Johnston v. Beadle, 6 Cal. App. 253, 91 Pac. 1012.

Mental Suffering of Injured Party is Element of damages in action for wrongful injury.

Approved in Merrill v. Los Angeles Gas etc. Co., 158 Cal. 508, 139 Am. St. Rep. 134, 111 Pac. 538, and Melone v. Sierra Ry. Co., 151 Cal. 116, 91 Pac. 523, both following rule.

46 Cal. 415–520, SAVINGS & LOAN SOCIETY v. AUSTIN.

If Tax is Conceded to be Illegal, it does not necessarily follow that equity will restrain sale for delinquency.

Approved in Crocker v. Scott, 149 Cal. 594, 87 Pac. 110, dissolving injunction to restrain enforcement of illegal tax.

Injunction Against Collection of Illegal Taxes. See note, 22 L. R. A. 704.

Taxation of Mortgage and Real Estate at full value as double taxation. See note, 23 L. R. A. (n. s.) 154.

Power to Tax Mortgages. See note, 16 L. R. A. 60.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

46 Cal. 530–534, THORNE v. HAMMOND.

Failure to Pay Purchase Money on Tender of deed according to contract of sale destroys right to set up contract as defense to action of ejectment by vendor.

Approved in Hooper v. Young, 10 Cal. App. 595, 102 Pac. 952, plaintiffs in ejectment claiming under mortgagor whose debt is outlawed and which they repudiate have no equities as against legal title.

Nature of Interest of Vendor or Vendee in land contract as real or personal property. See note, 57 L. R. A. 653.

46 Cal. 535–540, MILLER v. MYLES.

Possession of One Tenant in Common is deemed to be possession of both, until notice of adverse holding is given.

Approved in Tabler v. Peverill, 4 Cal. App. 676, 88 Pac. 996, holding community property held by divorced wife not adverse until notice of such adverse holding was brought to husband.

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 620.

46 Cal. 540–545, PEOPLE v. HAMILTON.

It is Only When Testimony of Prosecutrix, in case of rape upon young girl, is not only uncorroborated but inherently improbable that verdict of guilty will be set aside.

Approved in People v. Ah Lung, 2 Cal. App. 280, 83 Pac. 297, refusing to interfere with conviction for rape on young girl where there was some corroboration; People v. Moore, 155 Cal. 241, 100 Pac. 690, refusing to reverse conviction in case of rape on young girl where testimony was conflicting and both prosecutrix and defendant were to some extent corroborated; People v. Caulfield, 7 Cal. App. 657, 95 Pac. 666, sustaining conviction for rape where testimony of prosecutrix was not inherently improbable, and was corroborated; State v. Cowing, 99 Minn. 135, 108 N. W. 856, reversing conviction for rape where testimony of prosecutrix was conflicting and but slightly corroborated; Reeves v. Territory, 2 Okl. Cr. 359, 101 Pac. 1042, upholding conviction on uncorroborated testimony of prosecutrix.

46 Cal. 545–546, HARASZTHY v. HORTON.

Extract from Minutes of Clerk Signed by Judge in course of proceedings from day to day is not bill of exceptions.

Approved in Big Kanawha Co. v. Jones, 45 Colo. 384, 102 Pac. 172, stenographer's notes signed by judge but certified and approved as bill of exceptions is unavailable as bill.

46 Cal. 547–549, TREADWELL v. HOLLOWAY.

Factor Selling Goods on Commission and failing to remit to principal creates debt in fiduciary capacity.

Disapproved in Crosby v. Miller, Vaughn & Co., 25 R. I. 175, 55 Atl. 329, discharge in bankruptcy cancels debt incurred by failure of broker to return collateral securities deposited by customer.

46 Cal. 549–553, LOW v. LEWIS.

Municipal Corporation cannot Tax its own property.

Approved in Kleinsorge v. Burgbacher, 6 Cal. App. 352, 92 Pac. 202, holding timber lands which have reverted to state for nonpayment of cash price not subject to taxation.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 298, 309, 349.

46 Cal. 553–556, WILLIAMS v. CORCORAN.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 34.

46 Cal. 557–559, HUTCHINGS v. EBELER.

Default to Complaint Confesses all material facts alleged.

Approved in Madison v. Octave Oil Co., 154 Cal. 770, 99 Pac. 177, holding default to cross-complaint waived by consent to allow plaintiff to file amended complaint.

Defendant Who has had His Day in court is estopped from questioning validity of decree.

Approved in San Gabriel Valley Bank v. Lake View Town Co., 4 Cal. App. 634, 89 Pac. 362, holding defendant could not contest validity of decree of foreclosure when by default he had confessed essential allegations; San Gabriel Valley Bank v. Lake View Town Co. (Cal. App.), 86 Pac. 729, holding default of party in suit to foreclose mortgage, where it was alleged on information and belief that such party had an interest in premises mortgaged, but subject to mortgage, confesses such allegations and bars assertion of his claim.

46 Cal. 560–564, 13 Am. Rep. 217, KING v. HANEY.

Cross-examination of Ineligible Witness whose testimony was admitted subject to motion to strike out waives objection thereto.

Approved in McWilliams v. Lake Shore etc. R. Co., 146 Mich. 221, 109 N. W. 273, holding court had discretion to refuse to strike out certain testimony as hearsay; Menardi v. Wacker, 32 Nev. 172, 105 Pac. 288, arguendo.

46 Cal. 564–573, ESTATE OF MINER.

Administrator's Commissions Should not be Allowed until final account and distribution.

Approved in Estate of Shillaber, 1 Cof. Prob. 125, following rule. See note, 2 Cof. Prob. 369.

Administrator is Entitled to Counsel Fees for all matters touching estate.

Approved in Estate of Chittenden, 1 Cof. Prob. 2, allowing counsel fees incurred by executor in probating will though he renounced right before letters granted. See note, 1 Cof. Prob. 155.

46 Cal. 575–576, O'NEIL v. DOUGHERTY.

Bankruptcy of Party After Judgment does not prevent appeal being taken in his name, but it may be prosecuted in name of assignee.

Approved in Sykes v. Beck, 12 N. D. 252, 96 N. W. 846, appeal prosecuted by purchaser of subject matter after judgment.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 748.

46 Cal. 576–580, SHERMAN v. MITCHELL.

Rule That Where There is Substantial Conflict of evidence appellate court will not grant new trial because verdict is against weight of evidence does not apply to trial court, where judge may grant new trial even if evidence is conflicting.

Approved in Scrivani v. Dondero (Cal.), 44 Pac. 1036, sustaining order for new trial when verdict was rendered on conflicting evidence.

Where Order Granting New Trial is Made on Condition, compliance therewith operates as grant of new trial.

Approved in Winningham v. Philbrick, 56 Wash. 41, 105 Pac. 145, failure to accept reduction of verdict in time limited by order granting new trial on such condition renders order absolute.

46 Cal. 582–589, NORTHAM v. GORDON.

Offer to Perform Services for Another if he will comply with conditions of offer creates no contract unless such other complies with conditions.

Approved in State v. Board of State Prison Commrs., 37 Mont. 392, 96 Pac. 741, following rule; Arnold v. Cason, 95 Mo. App. 437, 69 S. W. 37, holding offer of building materials not accepted by order differing in specifications from offer.

46 Cal. 589–600, 13 Am. Rep. 220, BUCKNALL v. STORY.

Payment of Money on Assessment for street improvement which was void on its face is voluntary.

Approved in Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 759, 103 Pac. 943, payment of higher market price for boxes, after expiration of contract, as condition for delivery, is not compulsory payment; Null v. Superior Court, 4 Cal. App. 211, 87 Pac. 394, where judgment is paid under legal compulsion it may be reviewed on certiorari.

Distinguished in Lewis v. San Francisco, 2 Cal. App. 117, 82 Pac. 1108, holding that payment of illegal fees exacted as condition to filing legal papers is compulsory payment.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 430.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 807.

46 Cal. 601–603, GOODRICH v. VAN LANDIGHAM.

Neither Good and Substantial Fence nor residence upon land are necessary to possession so as to enable possessor to maintain forcible entry and detainer.

Approved in Daubenbiss v. White (Cal.), 31 Pac. 362, following rule; Knowles v. Crocker Estate Co., 149 Cal. 284, 86 Pac. 717, holding inclosure by fences and natural barriers sufficient to maintain forcible entry and detainer.

Right to Civil Action for Forcible Entry and Detainer. See note, 121 Am. St. Rep. 387.

46 Cal. 603–609, ODD FELLOWS' SAVINGS BANK v. BANTON.

Sections 1213, 1214, and 1215, Civil Code, govern recordation of mortgage of real estate as against section 2937.

Approved in Hubbard v. Superior Court, 9 Cal. App. 169, 98 Pac. 395, Code of Civil Procedure, section 581, requiring summons to be served in three years, does not apply to justices' courts; State v. Campbell, 3 Cal. App. 605, 86 Pac. 841, holding section 433, Political Code, prevails as to duties of controller to recover money coming into hands of superintendent of state insane asylum, while section 395, Code of Civil Procedure, prevails as to place of trial.

46 Cal. 609–636, PEARSON v. PEARSON.

When Testator Leaves No Wife nor Issue except child, who is not provided for in the will, without showing such failure to be intentional, such child takes entire estate, as if testator had died intestate.

Approved in Smith v. Olmstead (Cal.), 22 Pac. 1144, holding power of sale in will does not authorize sale of interests of children not mentioned in will; Brown v. Brown, 71 Neb. 207, 115 Am. St. Rep. 568, 98 N. W. 721, burden of proof is on pretermitted heir to show omission was not intentional.

Pretermitted Heirs. See note, 115 Am. St. Rep. 581, 582.

Declarations Made by Testator in Will are competent evidence, after his death, tending to prove his marriage and the legitimacy of his children, where wife and children are devisees.

Approved in Estate of Hartman, 157 Cal. 209, 107 Pac. 106, holding admissible declarations of father to daughter during testator's life that testator was his brother, to prove such relationship, in action to establish relationship on settlement of estate; Estate of Mackay, 3 Cof. Prob. 323, 325, acts of testator in making bequest to woman under surname other than his own and describing her as his housekeeper, and in acknowledging deed before officer as an unmarried man, are evidence that he was not married to woman.

Entries in Family Bible or other religious book as evidence. See note, 41 L. R. A. 452.

46 Cal. 637–638, WOOD v. WREDE.

Claim of Mechanic's Lien must State Name of person by whom claimant was employed.

Approved in Ascha v. Fitch (Cal.), 46 Pac. 298, following rule; Hogan v. Bigler, 8 Cal. App. 73, 96 Pac. 97, holding invalid claim of lien where name of persons to whom materials were furnished was wrongly given; Gordon Hardware Co. v. San Francisco etc. R. R. Co. (Cal.), 22 Pac. 406, lien stating names of persons to whom different portions of materials were furnished, without designating what portion was furnished to each severally, is invalid.

46 Cal. 638–640, McLAUGHLIN v. HART.

Where Husband and Wife Mortgaged Property and then declared homestead on part of it, and husband later mortgaged property for his own debts, junior mortgagee cannot compel senior mortgagee to resort first to homestead, but homestead is exempt except so far as necessary, after all other property is taken for that purpose, to satisfy senior mortgage.

Approved in While v. Horton, 154 Cal. 105, 97 Pac. 71, 18 L. R. A. (n. s.) 490, following rule; Blood v. Munn, 155 Cal. 233, 100

Pac. 697, claimants of homestead in bankruptcy have right to have all other property first sold to satisfy mortgage on homestead, before resorting to mortgage lien thereon; In re Bailey, 176 Fed. 993, mortgage on homestead and other property of bankrupt constituting unlawful preference is void only as to nonexempt property; In re Barrett's Estate, 140 Fed. 570, where homestead was sold under mortgage and proceeds were more than sufficient to satisfy mortgage and costs, homesteader is entitled to his exemption out of surplus.

Distinguished in Nolan v. Nolan, 155 Cal. 483, 486, 132 Am. St. Rep. 99, 101 Pac. 523, 524, where vendee whose land is subject to vendor's lien has later mortgaged it, and also other land later acquired and on which he has procured homestead, he cannot demand sale of land subject to vendor's lien to satisfy mortgage, but mortgagee can demand sale of homestead.

46 Cal. 641–642, SANCHEZ v. LOUREYO.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 405.

46 Cal. 644–649, MURRAY v. DAKE.

Parol Testimony is Admissible to Correct Mistake in written contract in suit for that purpose.

Approved in Hughes v. Payne, 22 S. D. 296, 117 N. W. 364, following rule; Naden v. Christopher, 62 Wash. 418, 113 Pac. 1118, admitting parol to show clause in deed transferring right to collect rents under specified lease was, by special agreement, not to be considered as a warranty, but only as transfer of right to back rent.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 826, 877, 895.

How Far Statutes will be Regarded as abrogating maxim that one cannot profit by his own wrong. See note, 25 L. R. A. 570.

46 Cal. 654–656, ROGERS v. DRUFFEL.

Judgment Creditor to Preserve Priority of Lien must sell real property within period of statutory lien of judgment, and an order enjoining execution sale does not extend such time.

Approved in Union Contracting etc. Co. v. Campbell, 2 Cal. App. 536, 84 Pac. 305, holding injunction at suit of private person against contractor for street improvement does not extend time for performance; Miller & Co. v. Melone, 11 Okl. 256, 67 Pac. 484, 56 L. R. A. 620, lapse of judgment lien pending proceeding in nature of creditor's bill terminates proceeding.

Priority of Judgment Over Conveyance made after beginning of term. See note, 38 L. R. A. 248.

46 Cal. 656–661, WILKINS v. McCUE.

There can be No Prescription in Land as against the government.

Distinguished in State v. Dickinson, 129 Mich. 227, 88 N. W. 623, where claimants held land for one hundred years and records of grants were lost, there is sufficient evidence of title to raise presumption of grant from government.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 715.

46 Cal. 661–663, PENNYBECKER v. McDOUGAL.

Replevin by or Against One in Adverse Possession of land for things severed. See note, 69 L. R. A. 737.

46 Cal. 667–672, CENTRAL PACIFIC R. R. CO. v. BOARD OF EQUALIZATION.

Certiorari Does not Lie to Correct Errors committed within jurisdiction of lower court.

Approved in Dahlgren v. Superior Court, 8 Cal. App. 625, 97 Pac. 682, and St. Paul etc. Ry. Co. v. Blakemore, 17 N. D. 73, 114 N. W. 732, both following rule; Matter of Hughes, 159 Cal. 364, 113 Pac. 686, erroneous determination that petition for habeas corpus is sufficient not reviewable on certiorari; Bergevin v. Wood, 11 Cal. App. 645, 105 Pac. 936, holding certiorari lies only to review excess of jurisdiction of lower court.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 47 CALIFORNIA.

47 Cal. 7–9, **FAUT v. MASON.**

Certiorari cannot be Substituted for an appeal where the time for taking the latter has elapsed.

Approved in Hall v. Justice's Court, 5 Cal. App. 139, 89 Pac. 872, reaffirming rule; Chapman v. Justice Court, 29 Nev. 161, 86 Pac. 554, applying rule to criminal case.

Exceptions to Rule that Certiorari will not lie where there is an appeal. See note, 50 L. R. A. 788.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 34, 75.

47 Cal. 9–15, **DOUGHERTY v. HENARIE.**

A Party Who Does not Appeal cannot, on an appeal by the opposing party, obtain a review of a ruling of the court against him.

Approved in People v. Rea, 2 Cal. App. 111, 80 Pac. 165, where court decides that defendants appealing are not entitled to hold office, it cannot review judgment that defendant respondent is entitled to office.

Tax Sale Extinguishes All Prior Liens, whether for taxes or otherwise.

Approved in Auditor Gen. v. Clifford, 143 Mich. 631, 107 N. W. 289, where land has been sold to state for taxes and auditor general thereafter sells same he cannot cancel original tax sale.

Superiority of Lien of Local Assessment over prior lien. See note, 35 L. R. A. 374.

47 Cal. 18–20, **SMITH v. CHRISTIAN.**

It is not Error of Law that evidence is insufficient to justify particular finding of fact.

Reaffirmed in Schilling v. Curran, 30 Mont. 376, 76 Pac. 1001.

47 Cal. 21–31, **CLINK v. THURSTON.**

Plaintiff in Ejectment may Introduce a former judgment as estoppel without pleading it.

Reaffirmed in Ahlers v. Smiley, 11 Cal. App. 347, 104 Pac. 998.

Rule That Estoppel by Former Judgment must be pleaded does not apply where no opportunity to plead it is given.

Approved in Cleveland etc. Ry. Co. v. Moore, 170 Ind. 353, 82 N. E. 60, holding that, owing to form of complaint, it was unnecessary for defendant to plead estoppel; Powell v. Tinsley, 137 Mo. App. 560, 119 S. W. 49, where complaint stated cause of action, plaintiffs held entitled to show estoppel in rebuttal.

Judgment in Former Action between same parties is estoppel as to questions then decided.

Approved in Clark v. Knox, 32 Colo. 348, 76 Pac. 374, decree on issue whether conveyance of lands was fraudulent as to creditors is binding in subsequent action between same parties as to other lands included in same conveyance.

47 Cal. 32–39, TERRY v. HAMMONDS.

Judgment on Demurrer to Complaint is not bar unless judgment went to merits.

Approved in Wilson v. Lowry, 5 Ariz. 341, 52 Pac. 778, where demurrer is sustained because essential averment omitted, judgment thereon is not bar to subsequent action; Terre Haute etc. R. Co. v. State, 159 Ind. 470, 65 N. E. 412, refusing to admit opinion of judges to show that decision was on merits and not on form of complaint; Frye v. Miley, 54 W. Va. 333, 46 S. E. 138, in decree dismissing bill to set aside fraudulent conveyance because attachment not sued out, clause should be inserted to show that cause was not decided on merits.

47 Cal. 52–56, SERRANO v. RAWSON.

Location of Boundaries. See note, 129 Am. St. Rep. 991, 994.

47 Cal. 60–61, CLEMENTS v. STANTON.

Wife may Acknowledge Declaration of Homestead, selected by her alone in same manner as unmarried woman may acknowledge a deed.

Distinguished in Estate of Goodale, 5 Cof. Prob. 289, arguendo.

47 Cal. 62–64, ESLINGER v. ESLINGER.

The Discretion of the Court in dividing community property is subject to revision on appeal.

Distinguished in Pereira v. Pereira, 156 Cal. 7, 134 Am. St. Rep. 107, 103 Pac. 491, 23 L. R. A. (n. s.) 880, refusing to increase wife's share in community property on appeal by husband.

Where Divorce is Granted on Ground of adultery or extreme cruelty, injured party is entitled to more than one-half of the common property.

Approved in Huneke v. Huneke, 12 Cal. App. 202, 107 Pac. 132, one-half of homestead least interest which could be assigned to husband obtaining divorce for extreme cruelty.

47 Cal. 65–67, PICO v. COLEMAN.

The Construction Placed upon a Deed by subsequent acts of the parties is to be considered.

Approved in Kyle v. Hamilton (Cal.), 68 Pac. 485, recognition of contract by party is evidence of its delivery; Grant v. Bannister, 160 Cal. 781, 118 Pac. 255, applying rule where doubt exists as to whether

deed conveying land to individuals constituting partnership conveyed interests in common or in partnership; Hamilton v. Jones, 32 Tex. Civ. 600, 75 S. W. 556, deed held to pass title in praesenti in spite of clause which seemed to reserve all potential elements of absolute ownership.

Repugnant Clauses in Deeds. See note, 111 Am. St. Rep. 777.

Duty of One Debtor to Exonerate the Other, as ground for marshaling assets. See note, 12 L. R. A. (n. s.) 965.

47 Cal. 73–76, ELLIS v. WHITE.

An Unmarried Woman, Who has Care and custody of her illegitimate child, may select homestead.

Approved in Fox v. Waterloo Nat. Bank, 126 Iowa, 485, 102 N. W. 426, homestead of man who resided thereon with his adult daughter, who kept house for him, is exempt.

What Constitutes a "Family" under homestead and exemption laws. See note, 4 L. R. A. (n. s.) 384.

47 Cal. 77–79, HART v. COOPER.

When There has Been No Opportunity to plead cross-demand, it may be proved without pleading it.

Approved in Davis v. Rawhide Gold Min. Co., 15 Cal. App. 118, 113 Pac. 902, reaffirming rule.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 797.

47 Cal. 79–80, CAMETO v. DUPUY.

Probate Court Did not Err in refusing to set apart homestead where no petition filed therefor.

Approved in dissenting opinion in Estate of McVay, 14 Idaho, 72, 93 Pac. 33, majority upholding petition for probate homestead.

Lands Held in Joint Tenancy or tenancy in common were not subject to homestead prior to 1868.

Approved in Schoonover v. Birnbaum, 148 Cal. 549, 83 Pac. 999, rule must be regarded as settled law under rule of stare decisis.

Under the Act of 1868 Lands held in joint tenancy or tenancy in common may be homesteaded if exclusively occupied by homesteader.

Approved in Swan v. Walden, 156 Cal. 199, 134 Am. St. Rep. 118, 103 Pac. 933, land held in joint tenancy by husband and wife may be homesteaded by wife.

47 Cal. 81–82, PEOPLE ex rel. BRUNDAGE v. KERN COUNTY.

Prohibition will not Lie against board of supervisors unless proceedings are absolutely beyond their jurisdiction.

Approved in Board of Home Missions v. Maughn, 35 Utah, 520, 101 Pac. 583, prohibition will not lie to restrain abuse of legal process.

Writ of Prohibition. See note, 111 Am. St. Rep. 956.

47 Cal. 87–90, COX v. WESTERN PACIFIC R. R. CO.

If a Party Who Contracts to grade railroad is prevented from completing contract, he may abandon it and claim fair compensation for work performed.

Approved in Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 273, 110 Pac. 955, defendant in default under contract to

deliver asphalt could not rescind because of plaintiff's failure to keep up monthly payments.

47 Cal. 91–93, WILSON v. SUTTER COUNTY.

Act Authorizing Board of Supervisors to remit taxes is void.

Approved in Louisville v. Louisville Ry. Co., 111 Ky. 19, 98 Am. St. Rep. 387, 63 S. W. 19, city council has no power to compromise claim for taxes; Day v. Roberts, 101 Va. 252, 43 S. E. 363, town charter which undertakes to relieve property within town from payment of county taxes is void.

Power of Municipality to Exempt Property from taxation. See note, 15 L. R. A. 861.

47 Cal. 96–97, PEOPLE v. BRANNON.

What Constitutes Reasonable Doubt in criminal cases. See note, 17 L. R. A. 709.

47 Cal. 98–101, PEOPLE v. ASHWAUER.

The Supreme Court will not Deal with a question of the mere preponderance of evidence.

Approved in People v. Burt (Cal.), 3 Pac. 653, reaffirming rule.

47 Cal. 103–106, PEOPLE v. MURPHY.

Elements of Asportation in Larceny. See note, 88 Am. St. Rep. 584, 585.

47 Cal. 109–111, PEOPLE v. O'NEIL.

An Appeal may be Taken from a judgment for contempt.

Overruled in Estate of Wittmeier, 118 Cal. 256, 50 Pac. 393, refusing appeal to executrix from order committing her for disobeying order to distribute sum of money.

Disobedience of Void Order as Contempt. See note, 16 L. R. A. (n. s.) 1065.

47 Cal. 113–121, 17 Am. Rep. 401, PEOPLE v. STANLEY.

A Person Subjected to Increased Punishment for a second offense is not put twice in jeopardy.

Approved in In re Finley, 1 Cal. App. 208, 81 Pac. 1045, upholding statute imposing death penalty for assault with deadly weapon by life convict; State v. Dowden, 137 Iowa, 576, 577, 115 N. W. 212, such increased punishment is not "cruel or unusual"; Kinney v. State, 45 Tex. Cr. 503, 79 S. W. 571, statute does not warrant cumulation of punishment for cases occurring simultaneously.

The Flight of a Person Suspected of crime is a fact entitled to more or less weight according to circumstances.

Approved in Smith v. People, 38 Colo. 511, 88 Pac. 453, reaffirming rule; People v. Mar Gin Suie, 11 Cal. App. 49, 103 Pac. 955, flight of defendant, carrying revolver, from scene of homicide and immediately thereafter, strongly incriminating circumstance; Grant v. State, 122 Ga. 742, 50 S. E. 947, evidence that accused, some months after crime charged, ran away when he saw chief of police is admissible.

The Flight of One Conspirator is not evidence against another.

Approved in Saucier v. State, 95 Miss. 232, 48 So. 840, on prosecution for perjury at trial of third person accused of robbery, evidence

of flight of third person inadmissible; Pulpus v. State, 82 Miss. 555, 34 So. 4, evidence that codefendant had left state inadmissible.

Distinguished in People v. Hayes, 9 Cal. App. 311, 99 Pac. 390, evidence that crowd of persons associated with defendant scattered immediately after shooting admissible.

Acts of an Accomplice are not Evidence against accused unless they are part of res gestae.

Approved in State v. Moeller, 20 N. D. 120, 126 N. W. 571, holding instruction in abortion case as to declarations of co-conspirator erroneous as omitting element that statements must have been made in furtherance and prosecution of conspiracy.

47 Cal. 125–126, PEOPLE v. KELLEY.

Testimony of Accused at Preliminary Examination may be used as evidence against him, if voluntary and free from undue influence.

Approved in Wisdom v. State, 42 Tex. Cr. 582, 61 S. W. 927, statements of accused before grand jury, after being warned, are admissible; State v. Washing, 36 Wash. 490, 78 Pac. 1020, admitting statements of accused at preliminary examination, though he was without counsel.

47 Cal. 127–129, EX PARTE SIMPSON.

Title 3, Part IV, of the Political Code, does not apply to municipal corporations existing when it went into effect.

Approved in In re Pfahler, 150 Cal. 88, 88 Pac. 277, 11 L. R. A. (n. s.) 1092, initiative and referendum in freeholders' charter not affected by general municipal corporation act.

47 Cal. 129–131, EX PARTE HARROLD.

If Indictment Does not Charge a public offense, habeas corpus will lie.

Reaffirmed in Ex parte Goldman (Cal. App.), 88 Pac. 820.

Miscellaneous.—Cited in Ex parte Rickey, 31 Nev. 89, 135 Am. St. Rep. 651, 100 Pac. 137, petitioner discharged on habeas corpus because indictment against him did not charge public offense.

47 Cal. 131–134, EX PARTE LATIMER.

Section 1219, Code of Civil Procedure, applies to justice's courts.

Approved in In re Niday, 15 Idaho, 568, 98 Pac. 848, probate court may punish for contempt witness who refuses to produce documents before commissioner appointed to take deposition.

Courts, Tribunals and Persons authorized to punish contempts. See note, 117 Am. St. Rep. 955.

47 Cal. 134–138, PEOPLE v. McDONELL.

Number of Grand Jurors Necessary or proper to act. See note, 27 L. R. A. 846.

Presumption and Burden of Proof as to sanity. See note, 36 L. R. A. 727.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 737, 741, 742.

47 Cal. 138–142, McCARGER v. ROOD.

A Court of Equity will, in a Proper Case, specifically enforce parol contract to execute lease.

Approved in Carnegie etc. Gas Co. v. South Penn. Oil Co., 56 W. Va. 415, 49 S. E. 553, specifically enforcing provision in lease for sale of gas wells developed in boring for oil.

47 Cal. 142–144, MAYER v. CHILD.

A Contract for the Sale of Mining Stock is within the statute of frauds.

Approved in Franklin v. Matoa Gold Min. Co., 158 Fed. 944, 86 C. C. A. 145, reaffirming rule; Stifft v. Stiewel, 91 Ark. 450, 125 S. W. 1009, parol of contract for sale of bank stock is within statute of frauds.

Contract for Sale of Corporate Stock as one for sale of "goods" within statute of frauds. See note, 19 L. R. A. (n. s.) 874.

47 Cal. 144–145, COHN v. KEMBER.

In Proceedings Against an Absent Defendant, upon constructive service, the conditions of the statute must be strictly complied with.

Approved in Harris v. Morris, 3 Cal. App. 154, 84 Pac. 679, affidavit that summons was mailed, directed to four specified defendants, does not show that copies were directed to each.

47 Cal. 146–147, MILLER v. FULTON.

Equitable Defense in Action of ejectment should contain all the elements of a bill in equity.

Approved in Swanston v. Clark, 153 Cal. 303, 95 Pac. 1119, defense of rescission insufficiently pleaded.

47 Cal. 147–150, QUINN v. KENNEY.

Right of Redemption is Subject to all limitations and conditions imposed by statute.

Approved in White Pine Mfg. Co. v. Morey, 19 Idaho, 59, 112 Pac. 676, where time to redeem from tax sale has expired, there is no right to redeem whether or not tax deed has been issued.

47 Cal. 151–154, CENTRAL PACIFIC R. R. CO. v. BEAL.

Whenever It is Apparent that grantor in deed has used technical word in other than its technical sense, court will give it the construction intended.

Approved in Toothman v. Courtney, 62 W. Va. 173, 58 S. E. 917, words importing absolute grant held, under circumstances, to create lease only.

47 Cal. 154–160, PONCE v. McELVEY.

Transfer of Note and Mortgage as collateral security passes title only so far as to enable pledgee to collect same.

Reaffirmed in Sparks v. Caldwell, 157 Cal. 403, 404, 108 Pac. 277.

47 Cal. 161–162, HANCOCK v. PICO.

If an Attorney is Employed by Party to Action and there is but one employment, limitations do not run against them for legal services until services are ended.

Approved in Felt v. Mitchell, 44 Ind. App. 98, 88 N. E. 723, following rule.

47 Cal. 165–166, POTTER v. FROMENT.

Special Damages must be Pleaded.

Approved in Razzo v. Varni (Cal.), 21 Pac. 763, loss of future profits must be pleaded.

Plaintiff cannot Recover for the Diminution of rental value of his farm where it does not appear that he rented it or was prevented from doing so.

Disapproved in Swift v. Broyles, 115 Ga. 888, 42 S. E. 279, 58 L. R. A. 390, owner and occupant of house is entitled to damages for depreciation in rental value caused by nuisance.

Miscellaneous.—Cited in Mogollon G. & C. Co. v. Stout, 14 N. M. 254, 91 Pac. 726, legal and equitable relief may be asked for in same complaint.

47 Cal. 167–168, GRAZIDAL v. BASTANCHURE.

A Party Desiring to have an Order reviewed must take an exception to it unless it is one of those which the code declares shall be deemed excepted to.

Cited in Cannon v. McKenzie, 3 Cal. App. 288, 85 Pac. 131, arguendo.

An Order Setting Aside a Default must be excepted to.

Distinguished in Roberts v. Wilson, 3 Cal. App. 33, 84 Pac. 217, rule changed by statute.

47 Cal. 168–170, MEEKS v. KIRBY.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 790.

47 Cal. 171–174, TREADWELL v. REYNOLDS.

A Deed is Presumed to have Been Delivered on the date given therein.

Approved in Gerke v. Cameron (Cal.), 50 Pac. 436, proof that consideration was not paid not sufficient to rebut presumption.

47 Cal. 174–179, PICO v. CUYAS.

Only Ultimate Facts Found can be considered.

Approved in Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, findings that plaintiff is owner of realty and entitled to possession are sufficient.

Miscellaneous.—Cited in Karcher v. State, 80 Kan. 761, 104 Pac. 570, where three persons jointly maintain nuisance upon premises owned by two of them, and third is alone convicted, fine of latter is lien upon premises.

47 Cal. 183–187, BEAUDRY v. FELCH.

What is Community Property. See notes, 126 Am. St. Rep. 114; 4 Cof. Prob. 56.

Injunctions Against Judgments for Defenses existing prior to rendition. See note, 31 L. R. A. 770.

Equitable Jurisdiction in Regard to Injunctions against judgments. See note, 32 L. R. A. 323.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 341.

47 Cal. 180–181, PICO v. CUYAS.

Effect of Acquisition of Landlord's Title on unlawful detainer. See note, 120 Am. St. Rep. 59.

Miscellaneous.—Cited in Pico v. Cuyas, 48 Cal. 642, on subsequent appeal.

47 Cal. 192–193, HANCHETT v. FINCH.

A Motion for Change of Venue for convenience of witnesses is addressed to the discretion of the trial court.

Approved in Bird v. Utica Gold Min. Co., 2 Cal. App. 673, 86 Pac. 509, mere preponderance in number of witnesses does not necessarily control.

47 Cal. 194–205, REED v. CLARK.

Discovery of New Evidence which is merely cumulative is not ground for new trial.

Approved in Patterson v. San Francisco etc. Ry. Co., 147 Cal. 186, 81 Pac. 534, reaffirming rule.

In Action for Breach of Contract of marriage, plaintiff may show, in enhancement of damages, that she announced engagement to her friends and invited them to the wedding.

Approved in Lanigan v. Neely, 4 Cal. App. 775, 89 Pac. 448, knowledge of birth of child by plaintiff's mother and sister admissible; Mainz v. Lederer, 24 R. I. 25, 26, 96 Am. St. Rep. 702, 51 Atl. 1045, 59 L. R. A. 954, attachment will not issue in action for breach of promise of marriage.

Distinguished in Cooper v. Bower, 78 Kan. 158, 96 Pac. 60, declarations of plaintiff to other persons as to conduct of defendant in regard to his agreement to marry her are inadmissible; State v. Sortviet, 190 Minn. 15, 110 N. W. 101, in trial for seduction, it is error to permit prosecutrix to testify that, soon after alleged promise of marriage, she informed her sister thereof.

Denied in Leibbrandt v. Sörg (Cal.), 65 Pac. 319, 320, plaintiff's declarations to third persons that she was engaged to marry inadmissible.

It is not Error for Court to State, in Passing upon admissibility of evidence, that prima facie some preliminary fact has been proved.

Approved in People v. Ruef, 14 Cal. App. 599, 114 Pac. 63, certain remarks of court to counsel during cross-examination held not prejudicial error.

47 Cal. 205–207, PEOPLE ex rel. JACKSON v. KERN COUNTY.

Exclusiveness of Jurisdiction of Highest Court to issue remedial writs for prerogative purposes. See note, 13 L. R. A. (n. s.) 771.

47 Cal. 207–210, MAYNARD v. FIREMAN'S FUND INS. CO.

When Words Which are not Libelous Per Se contain a covert meaning which makes them libelous, the plaintiff must aver that the words were intended to be understood as imputing wrong and were, in fact, so understood.

Approved in Baxter v. Dorrington, 13 Ariz. 143, 108 Pac. 460, reaffirming rule; Ervin v. Record Publishing Co., 154 Cal. 82, 97 Pac. 22, 18 L. R. A. (n. s.) 622, equivocal language which might readily be understood as implying that plaintiff was a woman of low character actionable.

Corporate Liability for Libel and Slander. See note, 115 Am. St. Rep. 722.

Liability of Partnership for Torts. See note, 51 L. R. A. 466.

47 Cal. 213–222, **RUTENBERG v. MAIN.**

The Statute of Frauds Only Requires that the memorandum for the sale of land shall be signed by vendor or his agent.

Approved in Tharaldson v. Everts, 87 Minn. 171, 91 N. W. 468, deed deposited in escrow is sufficient memorandum.

Distinguished in Harper v. Goldschmidt, 156 Cal. 247, 249, 134 Am. St. Rep. 124, 104 Pac. 452, 453, under statutory amendment, the memorandum must be signed by party to be charged, or his agent, whether vendor or vendee.

As to Who must Sign Memorandum of executory sale contract within statute of frauds. See note, 28 L. R. A. (n. s.) 701.

The Authority of a Real Estate Broker is limited to finding a purchaser satisfactory to the principal, unless the terms of employment clearly show that a more extensive power was intended.

Approved in Stemler v. Bass, 153 Cal. 795, 96 Pac. 811, holding evidence did not show authority in agent to convey; Bacon v. Davis, 9 Cal. App. 92, 93, 94, 98 Pac. 74, 75, authority to agent "to sell for me, in my name," held to give latter power to convey; Johnson v. Fecht, 94 Mo. App. 617, 68 S. W. 618, description in written authority of principal to agent held insufficient; Jasper v. Wilson, 14 N. M. 491, 94 Pac. 953, circumstances held to show that agent had power to convey.

Power of Real Estate Broker to make contract of sale. See note, 17 L. R. A. (n. s.) 215.

Where There is No Plea of Misjoinder of parties defendant, plaintiff will have judgment against those defendants only who are shown to have joined in contract.

Approved in Jewell v. Colonial Theater Co., 12 Cal. App. 684, 108 Pac. 528, reaffirming rule.

Power to Agent to Execute Memorandum for sale of land need not be in writing.

Approved in Murphey v. Brown, 12 Ariz. 276, 100 Pac. 804, lease for more than a year, signed by one party and by person verbally authorized by the other party, is not valid lease, but is binding as agreement to lease.

Performance by Real Estate Broker of contract to find purchaser or effect exchange. See note, 44 L. R. A. 593.

47 Cal. 222–235, **HAGAR v. YOLO COUNTY.**

The Title is Never Allowed to enlarge or control the language in the body of the act.

Approved in dissenting opinion in Estate of Clark, 148 Cal. 123, 113 Am. St. Rep. 197, 82 Pac. 766, 1 L. R. A. (n. s.) 996, 7 Ann. Cas. 306, majority holding words "all wills," in section 1322, Code of Civil Procedure, controlled by words "foreign wills" in title.

Legislature has Power to Impose local assessments to reclaim swamp and overflowed lands.

Approved in Rico v. Snider, 134 Fed. 957, Billings Sugar Co. v. Fish, 210 Mont. 269, 278, 106 Pac. 570, 573, 26 L. R. A. (n. s.) 973, and Mound City Land etc. Co. v. Miller, 170 Mo. 256, 94 Am. St. Rep. 727,

70 S. W. 726, 60 L. R. A. 190, all reaffirming rule; People v. Sacramento Drainage Dist., 155 Cal. 381, 103 Pac. 212, upholding act of 1905 establishing "Sacramento Drainage District"; Clute v. Turner, 157 Cal. 81, 106 Pac. 243, sustaining special assessment for opening and extending street; Sisson v. Buena Vista Co., 128 Iowa, 458, 104 N. W. 460, 70 L. R. A. 440, upholding action authorizing creation of drainage districts.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 34.

Exceptions to Rule That Certiorari will not lie where there is an appeal. See note, 50 L. R. A. 788.

Who is Liable for Expense of Drainage. See note, 58 L. R. A. 355.

47 Cal. 242–248, **JONES v. MARKS.**

Lease for More Than Year is "conveyance" within meaning of recording act.

Approved in Dority v. Dority, 96 Tex. 221, 71 S. W. 953, 60 L. R. A. 941, husband not authorized to lease wife's real estate for more than one year without her signature.

Lease as Conveyance. See note, 11 L. R. A. (n. s.) 99.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 81.

47 Cal. 252–259, **LICK v. OWEN.**

Rule That Court will not Grant new trial where plaintiff is entitled only to nominal damages does not apply to cases of libel.

Reaffirmed in Von Shroeder v. Spreckels, 147 Cal. 187, 81 Pac. 516.

47 Cal. 259–265, **GILLISPIE v. JONES.**

Court may Deny New Trial on condition that plaintiff remit excess in judgment.

Approved in Bentley v. Hurlburt, 153 Cal. 803, 96 Pac. 893, where plaintiff remits excess pending motion, court may deny motion at once, reciting such waiver.

47 Cal. 265–269, **IBURG v. SUANET.**

Where There is a Substantial Conflict in the evidence, court will not grant new trial on the ground that the verdict is against evidence.

Approved in Humphrey v. Pope, 1 Cal. App. 375, 82 Pac. 224, reaffirming rule.

47 Cal. 294–348, **SILL v. REESE.**

Entries in Account-books kept by third persons, not parties to the suit, may be received in evidence, after the death of the party making the entries.

Reaffirmed in Austin v. Wicoxson, 149 Cal. 31, 84 Pac. 419.

Distinguished in People v. Lanterman, 9 Cal. App. 683, 100 Pac. 723, reports of conductors showing travel by defendant upon pass inadmissible when conductors themselves were in court.

Use of Person's Books of Account as evidence upon issues between other parties. See note, 53 L. R. A. 515, 521, 523, 532.

Admissibility in Evidence of books of account. See note, 138 Am. St. Rep. 472.

An Objection to an Oral Charge to a jury should specifically point out in what the objection consists.

Approved in Moore v. Moore (Cal.), 34 Pac. 92, mere exception to instructions insufficient.

Unauthorized Alteration of Written Instruments. See note, 86 Am. St. Rep. 117.

Competency of Witnesses to Handwriting. See note, 63 L. R. A. 984.

Miscellaneous.—Cited in In re Chartz, 29 Nev. 117, 124 Am. St. Rep. 915, 85 Pac. 355, 5 L. R. A. (n. s.) 916, as to right of court to curb counsel.

47 Cal. 348–351, MILLER v. LITTLE.

Land Claimed as Homestead Under Federal Law and patented as such is exempt from debt contracted before patent issued.

Reaffirmed in Sprinkle v. West, 62 Wash. 588, 114 Pac. 430.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 101.

47 Cal. 353–361, PEOPLE v. AUSTIN.

A Burden Placed upon Adjacent Property to pay for opening a street is an assessment and not a tax.

Distinguished in Union Trust Co. v. State, 154 Cal. 723, 99 Pac. 186, 24 L. R. A. (n. s.) 1111, neither act to open Montgomery avenue, San Francisco, nor bonds issued thereunder, created contractual liability on the part of the state of California.

The Property of the State or United States is not subject to taxation.

Approved in Kleinsorge v. Burgbacher, 6 Cal. App. 352, 92 Pac. 202, timber lands which have reverted to state because of nonpayment of price are not subject to taxation; Van Brocklin v. Anderson, 117 U. S. 166, 6 Sup. Ct. 670, 29 L. Ed. 850, lands situated in state and acquired by United States through sales for direct taxes levied pursuant to federal statute are not taxable by state while so owned by United States; In re Inheritance Tax on Macky's Estate, 46 Colo. 97, 102 Pac. 1081, 23 L. R. A. (n. s.) 1207, bequests to city and county for hospital and to regents of state university for auditorium are not subject to inheritance tax.

Distinguished in Edwards & Walsh Con. Co. v. Jasper County, 117 Iowa, 375, 94 Am. St. Rep. 301, 90 N. W. 1009, city property owned by county is not exempt from street assessments.

Exemption from Taxation or assessment of lands owned by governmental bodies or in which they have an interest. See note, 132 Am. St. Rep. 298, 309, 310.

Municipal Assessment of State Property. See note, 23 L. R. A. 808.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 33.

47 Cal. 361–364, PEOPLE v. COGHILL.

Commissioners to Assess Swamp Lands cannot act unless all are present.

Distinguished in Schuerman v. Territory, 7 Ariz. 66, 60 Pac. 895, two members of board of loan commissioners might act in absence of third.

47 Cal. 364–371, LOVE v. BAEHR.

If Legislature Imposes Additional Duties on attorney general and he voluntarily performs them, it may give additional compensation for such unofficial service.

Approved in State v. La Grave (Nev.), 48 Pac. 195, Secretary of State entitled to additional salary as reporter of supreme court; State v. Grant, 12 Wyo. 12, 73 Pac. 473, Secretary of State, acting as governor, entitled to salaries of both offices.

Distinguished in Moore v. Nation, 80 Kan. 677, 103 Pac. 109, 23 L. R. A. (n. s.) 1115, judge in office when statute took effect not entitled to additional compensation for acting as jury commissioner; Warner v. Auditor General, 129 Mich. 651, 652, 89 N. W. 592, 593, state treasurer, Secretary of State and commissioner of land office not entitled to additional compensation as members of board of auditors.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 37.

47 Cal. 371–377, FLEGE v. GARVEY.

Guardian of Insane Husband cannot sell homestead.

Approved in Cordano v. Wright, 159 Cal. 619, 115 Pac. 231, wife's signature to husband's deed of homestead, which purported to convey his interest alone is ineffective; Murphy v. Renner, 99 Minn. 351, 116 Am. St. Rep. 418, 109 N. W. 594, 8 L. R. A. (n. s.) 565, conveyance of homestead by husband alone is void, though wife has abandoned him and is living in adultery; Curry v. Wilson, 45 Wash. 24, 87 Pac. 1067, husband cannot mortgage homestead in his individual capacity and as guardian of his insane wife.

Abandonment, Conveyance, or Encumbrance of homestead during insanity of spouse. See note, 13 L. R. A. (n. s.) 433.

47 Cal. 378–388, PRATALONGO v. LARCO.

When Case has been Tried by referee, it is not good practice for court to strike out referee's finding and substitute one of its own.

Approved in United States v. Ramsey, 158 Fed. 491, consent that judge try issues of fact not to be implied from mere agreement that cause be referred to a referee.

47 Cal. 388–407, PEOPLE v. BROTHERTON.

Evidence That Defendants Possessed Chemicals that might be used in perpetrating forgery is admissible.

Approved in dissenting opinion in Sorenson v. United States, 168 Fed. 809, 94 C. C. A. 181, majority rejecting evidence of weapons and implements found on the defendant when arrested eighteen days after the burglary.

The Burden is upon the Defendant to show that a technical error committed during his trial was prejudicial to him.

Approved in People v. Hutchings, 8 Cal. App. 558, 97 Pac. 328, reaffirming rule; People v. Casselman, 10 Cal. App. 238, 101 Pac. 695, where court cuts short examination of witness, prejudice will not be presumed where counsel made no offer of proof.

Order of Proof Rests in discretion of court.

Cited in Hudson v. State, 43 Tex. Cr. 424, 66 S. W. 670, arguendo.

Limitations of Evidence to Handwriting. See note, 64 L. R. A. 304.

47 Cal. 416–432, FERRER v. HOME MUTUAL INS. CO.

Plaintiff Taken by Surprise should move for continuance to produce rebutting evidence, and not wait to move for new trial on ground of surprise.

Approved in Rauer's Law etc. Co. v. Bradbury, 3 Cal. App. 261, 84 Pac. 1009, reaffirming rule.

Allegation "All Thereof Being the Property of the plaintiff," is sufficient.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, allegation that plaintiff is " the owner in fee" is sufficient.

47 Cal. 432–436, SHOEMAKE v. CHALFONT.

Effect of Divorce on Homestead Rights. See note, 23 L. R. A. 240.

What Constitutes a "Family" under homestead and exemption laws. See note, 4 L. R. A. (n. s.) 397.

47 Cal. 442–447, PEOPLE ex rel. LOVE v. MATHEWSON.

It is Essential to the Validity of an election that it be authorized by some statute.

Approved in dissenting opinion in Rodwell v. Rowland, 137 N. C. 644, 50 S. E. 329, majority holding that clerk of superior court, appointed for unexpired term, held only until next general election.

47 Cal. 447–450, PEOPLE v. BROWN.

A Conviction of Assault With Intent to commit rape will be set aside where the evidence shows want of resistance on the part of the woman.

Approved in People v. Caulfield, 7 Cal. App. 657, 95 Pac. 666, but holding testimony of prosecutrix to be neither improbable nor uncorroborated.

Indictment for Assault With Intent to commit rape is good without allegation that force and violence used were against resistance of prosecutrix.

Disapproved in State v. Cowing, 99 Minn. 126, 108 N. W. 852, specific acts of resistance not sufficiently proved; Daggs v. Territory, 11 Ariz. 451, 94 Pac. 1107, indictment must allege that defendant accompanied attempt with intention of pressing his threats or violence to point of overcoming active resistance.

47 Cal. 456–457, PEOPLE v. CLARK.

Notice of Intention to Lay new cross-walks and repair street where necessary is insufficient.

Distinguished in Treanor v. Houghton, 103 Cal. 58, 36 Pac. 1083, where resolution of intention is for improvement as a unit, contracts may be let for performing work in sections.

47 Cal. 459–460, PERALTA v. GINOCHIO.

Defendant in Possession at Time lease was made is not estopped from disputing his landlord's title.

Disapproved in dissenting opinion in Illinois Steel Co. v. Budzisz, 139 Wis. 310, 119 N. W. 942, majority holding that one who takes lease while in possession is not estopped from denying his landlord's title.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 95.

47 Cal. 461–473, HOSMER v. WALLACE.

Miscellaneous.—Cited in Orchard v. Alexander, 157 U. S. 380, 15 Sup. Ct. 635, 39 L. Ed. 740.

47 Cal. 474–477, HOLLOWAY v. GALLIAR.

Miscellaneous.—Cited in Hayden v. Collins, 1 Cal. App. 261, 81 Pac. 1121, as to averments necessary in complaint in ejectment.

47 Cal. 477–481, PILLSBURY v. BROWN.

A Misdemeanor is an Act or Omission for which punishment, other than death or imprisonment in state prison, is denounced by law.

Approved in Union Ice Co. v. Rose, 11 Cal. App. 360, 104 Pac. 1007, violation of Cartwright law forbidding conspiracies against trade is misdemeanor.

The Legislature may Provide that suits for the violation of a city ordinance shall be prosecuted in the name of the people of the state.

Approved in Territory of Hawaii v. Whitney, 17 Haw. 186, prosecutions for offenses against county ordinances should be in the name of the territory.

47 Cal. 484–485, HUSTON v. WALKER.

Executory Contract, Made by a Pre-emptor, to convey land after he receives a patent, is null and void.

Approved in Roy v. Harney Peak Min. Co., 21 S. D. 143, 130 Am. St. Rep. 706, 110 N. W. 107, agreement not to protest against another's application for patent to public land is void.

47 Cal. 488–514, BABCOCK v. GOODRICH.

In Pleading Determination of board or officer, it is not necessary to state jurisdictional facts.

Approved in Bituminous Lime Rock Pav. etc. Co. v. Fulton (Cal.), 33 Pac. 1118, applying rule to action to enforce lien of street paving assessment.

Action on Auditor's Official Bond does not preclude remedy by mandamus.

Approved in American Bridge Co. v. Wheeler, 35 Wash. 45, 76 Pac. 535, reaffirming rule.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 868.

To Supersede Mandamus Party must have legal remedy competent to afford relief upon the very subject matter of his application.

Approved in State v. Collins, 41 Mont. 528, 110 Pac. 527, mandamus will lie to compel sheriff to deliver property to plaintiff in claim and delivery; State v. Chicago etc. R. R. Co., 83 Neb. 526, 120 N. W. 164, granting mandamus to compel railway company to furnish cars.

Expression "Current Expenses of the Year" is equivalent to "the expenses for the current year."

Approved in Samuelson v. State, 116 Tenn. 497, 115 Am. St. Rep. 805, 95 S. W. 1019, words "issued and sold" held not necessarily to refer to past transaction.

47 Cal. 515–517, UNITED STATES v. LAND IN MONTEREY COUNTY.

The Owner of Land on Which the Government has wrongfully entered and erected a building is entitled to have the value of the latter allowed him in condemnation proceedings.

Approved in Village of St. Johnsville v. Smith, 184 N. Y. 347, 77 N. E. 619, 5 L. R. A. (n. s.) 922, owner entitled to value of land as increased by structures, but not to cost of structures or their value to municipality.

Value of Improvements Made by One taking property by eminent domain as element of damages. See note, 16 L. R. A. 807.

47 Cal. 517–524, DAVIS v. SAN LORENZO R. R. CO.

Act is Void Which Provides that railroad company may enter into possession of land pending eminent domain proceedings, without providing compensation for use and waste committed if proceedings finally fail.

Approved in De Hansen v. District Court, 11 Ariz. 385, 94 Pac. 1127, holding similar statute void.

Distinguished in Portneuf Irr. Co. Ltd. v. Budge, 16 Idaho, 122, 123, 100 Pac. 1048, upholding statute giving immediate possession upon tender of amount of damages assessed by three commissioners appointed by court.

47 Cal. 524–526, PEOPLE ex rel. VEJAR v. METZKER.

Where City Charter Provides That Council shall judge of the qualifications of its own members, courts have no jurisdiction over matter.

Approved in McGregor v. Board of Trustees, 159 Cal. 445, 114 Pac. 568, such provision does not conflict with constitutional declaration that judicial power shall be vested in certain courts.

Provision for Testing Election of Officer before municipal body as exclusive remedy. See note, 26 L. R. A. (n. s.) 209.

47 Cal. 526–528, FLYNN v. COTTLE.

Under Section 68 of the Practice Act, the judge could cancel the certificate to a statement on appeal during the term, or within five months thereafter.

Approved in Fountain Water Co. v. Superior Court, 139 Cal. 650, 651, 73 Pac. 590, court has no jurisdiction to cancel settlement of statement on motion for new trial after six months from date of order.

Judge may Cancel Certificate to statement on appeal after appeal has been taken.

Approved in James v. Lepert (Nev.), 2 Pac. 753, statement on appeal may be settled after appeal has been taken.

47 Cal. 528–531, CALIFORNIA PACIFIC R. R. CO. v. CENTRAL PACIFIC R. R. CO.

Where Court in Condemnation Proceeding makes order, beyond its jurisdiction, as to use of property, certiorari is the proper remedy.

Approved in De Hansen v. District Court, 11 Ariz. 363, 94 Pac. 1126, certiorari will lie to annul order letting plaintiff into possession where statute does not secure compensation for use of land or waste committed.

Distinguished in Moore v. Rennick, 1 Alaska, 174, allowing certiorari to correct action of justice's court where amount involved was less than two hundred dollars.

47 Cal. 531–535, FONG YUEN LING v. LOS ANGELES.

Liability for Property Destroyed by Mob. See note, 24 L. R. A. 594, 596.

47 Cal. 536–542, GREEN v. SWIFT.

Damage Caused by Turning or straightening the channel of a river is not a taking of land for public use.

Approved in Green v. State (Cal.), 12 Pac. 684, and Hoagland v. State (Cal.), 22 Pac. 143, both reaffirming rule; Durham v. Lisbon Falls Fibre Co., 100 Me. 246, 61 Atl. 180, damage to bank of river from deflecting of current caused by dam, lawfully constructed, is damnum absque injuria.

Distinguished in Bradbury v. Vandalia Drainage District, 236 Ill. 47, 86 N. E. 166, 19 L. R. A. (n. s.) 991, drainage district liable for damage from flooding of lands caused by construction of levee below them.

Board of Commissioners Appointed to straighten river are not liable for damage caused by mere errors of judgment, if they do not act dishonestly or maliciously.

Approved in Black v. Linn, 17 S. D. 338, 96 N. W. 697, commissioners of soldiers' home are liable in damages if they maliciously expel a member.

Personal Liability of Highway Officers for negligence. See note, 22 L. R. A. 827.

What Claims Constitute Valid Demands against a state. See notes, 42 L. R. A. 37, 66.

47 Cal. 542–548, MERRITT v. CAMPBELL.

A Nonsuit Suffered for Any Cause is not a bar to a subsequent action.

Approved in San Francisco v. Brown, 153 Cal. 647, 648, 96 Pac. 283, reaffirming rule; Smith v. Superior Court, 2 Cal. App. 531, 84 Pac. 55, where judgment of justice's court granting nonsuit is reversed, case will be remanded for new trial; Carr v. Howell, 154 Cal. 384, 97 Pac. 890, dismissal obtained by plaintiff of suit removed to federal court by defendant is not bar to subsequent action in state court.

A Judgment of Dismissal, Rendered upon oral agreement of the parties in open court, is bar to another action.

Distinguished in Cleary v. Folger (Cal.), 33 Pac. 878, withdrawal of defendant's cross-bill for specific performance does not estop him from claiming damages under prayer of his answer; Lindsay v. Allen, 112 Tenn. 651, 653, 82 S. W. 173, 174, persons who assume to appear for public as parties complainant do not bind public by abandoning litigation.

Disapproved in State Medical Examining Board v. Stewart, 46 Wash. 81, 82, 123 Am. St. Rep. 915, 89 Pac. 476, 11 L. R. A. (n. s.) 557, dismissal of proceeding on written stipulation of both parties does not constitute bar.

A Retraxit at Common Law must be the Act of the party himself.

Approved in Forrest Coal Co. v. Doolittle, 54 W. Va. 225, 46 S. E. 244, disclaimer must be act of party himself, not of his counsel.

Right of Attorney to Enter Retraxit. See note, 25 L. R. A. (n. s.) 1314.

47 Cal. 549–554, CALIFORNIA PACIFIC R. R. CO. v. CENTRAL PACIFIC R. R. CO.

In Proceedings for Condemnation of Land, court exercises limited and statutory jurisdiction.

Approved in Gano v. Minneapolis etc. R. R. Co., 114 Iowa, 722, 89 Am. St. Rep. 393, 87 N. W. 718, 55 L. R. A. 263, upholding statute requiring railroad companies condemning land to pay land owner reasonable attorney's fees.

47 Cal. 570–578, GARDINER v. MILLER.

The California Statute of Limitations has no application to the title of a patentee from the United States prior to the issuance of patent.

Approved in Valentine v. Sloss (Cal.), 37 Pac. 329, reaffirming rule.

47 Cal. 584–585, PEOPLE ex rel. SCANNELL v. WHITNEY.

Trial of Case After Appeal from Order denying change of venue is not beyond jurisdiction of court.

Approved in First National Bank of Webster v. Dutcher, 128 Iowa, 426, 104 N. W. 501, 1 L. R. A. (n. s.) 142, appeal from order denying motion to set cause down for trial as equitable action does not deprive trial court of jurisdiction.

Prohibition to Restrain Court from Proceeding in case in which change of venue erroneously denied. See note, 2 L. R. A. (n. s.) 396.

47 Cal. 585–588, SIMPSON v. PACIFIC MUTUAL LIFE INS. CO.

Miscellaneous.—Cited in Manitoba Mtg. etc. Co. v. Weiss, 18 S. D. 464, 112 Am. St. Rep. 799, 101 N. W. 38, delay of five days in presenting check converted check into absolute payment.

47 Cal. 588–591, GARDINER v. SCHMAELZLE.

If a Nonsuit is Asked for Defect of proof on some point, the court will permit the plaintiff to supply the defect if he can do so.

Approved in San Pedro Lumber Co. v. Schroeter, 156 Cal. 160, 103 Pac. 889, plaintiff permitted to reopen case to explain variance.

Motion for Nonsuit must Distinctly Point out grounds on which it is asked.

Approved in Schroeder v. Mauzy, 16 Cal. App. 450, 118 Pac. 462, following rule; Mackel v. Bartlett, 33 Mont. 132, 82 Pac. 798, sufficiency of complaint will not be considered where not made ground of motion.

47 Cal. 591–592, PEOPLE v. WHIPPLE.

An Assessment of Property to a Name which is neither the true name of the owner nor one by which he has been known is void.

Approved in Houser v. Haines Mfg. Co. v. Hargrove (Cal.), 59 Pac. 949, reaffirming rule.

47 Cal. 602–603, CROSS v. ZANE.

Vacating Satisfaction of Execution because title of purchaser fails. See note, 134 Am. St. Rep. 37.

47 Cal. 604–606, REYNOLDS v. COUNTY COURT.

The Petition for a Writ of Certiorari is no part of the judgment-roll.

Distinguished in Stoner v. Los Angeles, 8 Cal. App. 611, 97 Pac. 694, where only demurrer is filed to petition, latter is part of judgment-roll.

47 Cal. 608–612, **SPANAGEL v. REAY.**

When New Trial has Been Granted by supreme court, defendant should not be allowed to amend verified answer by changing admission into denial.

Approved in Parke v. Boulware, 9 Idaho, 231, 73 Pac. 20, on new trial, amendments to pleadings are in sound discretion of court.

47 Cal. 612–614, **REGLI v. McCLURE.**

Evidence Held not to Show Change of possession required by statute.

Approved in Kennedy v. Conroy (Cal.), 44 Pac. 796, bill of sale of cattle void where all parties continued to live on ranch as before.

47 Cal. 614–616, **LANDER v. FLEMMING.**

Delay of Two Years and three months in serving summons is ground for dismissal.

Distinguished in Luke v. Bennion, 36 Utah, 67, 106 Pac. 714, action in justice court does not abate from mere failure to serve summons within year.

47 Cal. 617–618, **CRAWFORD v. SCHMIDT.**

Assessment of Land to Owner by surname only is void.

Approved in Houser & Haines Mfg. Co. v. Hargrove (Cal.), 50 Pac. 949, assessment of personalty to one not owner is void.

47 Cal. 619–620, **EKEL v. SWIFT.**

Failure of Attorney to Attend trial, due to chronic illness, is not ground for vacating judgment.

Approved in Cox v. O'Neil (Cal.), 4 Pac. 457, insufficient showing of mistake and surprise; Utah-Nevada Co. v. De Lamar, 9 Cal. App. 763, 100 Pac. 886, chronic defect in attorney's eyesight did not excuse default, where he had four able associates.

Vacation of Judgments for Negligence or mistake of attorney. See note, 96 Am. St. Rep. 108.

47 Cal. 621–622, **ESTATE OF BEVERSON.**

Agreement for Present Cohabitation and future marriage does not constitute marriage.

Approved in In re Estate of Maher, 204 Ill. 29, 68 N. E. 160, where evidence failed to show present agreement of parties to live together as husband and wife.

Common-law Marriages. See notes, 124 Am. St. Rep. 121; 3 Cof. Prob. 212.

47 Cal. 624–625, **WYATT v. BUELL.**

In Order That Defamatory Words published in the course of judicial procedure may be absolutely privileged, they must be relevant to the cause in hand.

Approved in Myers v. Hodges, 53 Fla. 209, 44 So. 361, defamatory words in bill in equity.

Liability for Libel or Slander in course of judicial proceedings. See notes, 123 Am. St. Rep. 636; 23 L. R. A. 650.

47 Cal. 626–627, **MAYO v. BRYTE.**

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 143.

Equitable Jurisdiction in Regard to Injunctions against judgments. See note, 32 L. R. A. 327.

47 Cal. 627–629, ENGLEBRECHT v. SHADE.

Use of Adjoining Lot for Drying Clothes and as means of access is sufficient to support declaration of homestead including it.

Approved in In re Allen (Cal.), 16 Pac. 319, lot used for outbuildings properly included in homestead.

47 Cal. 632–638, MEGERLE v. ASHE.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324.

47 Cal. 640–642, CALDWELL v. PARKS.

Bill of Exceptions, Settled Within Thirty Days after judgment is rendered, becomes part of record on appeal from judgment.

Approved in Bank of Commerce v. Ada County etc. Co., 11 Idaho, 760, 85 Pac. 920, bill of exceptions may be used on appeal from judgment, though settled after judgment-roll was made up.

47 Cal. 646–674, HOUGHTON v. AUSTIN.

An Injunction will not be Granted to restrain the collection of a tax by a sale of the property of the taxpayer.

Approved in Crocker v. Scott, 149 Cal. 594, 87 Pac. 110, denying injunction to restrain collection of tax on shares in national bank.

The Doctrine of Stare Decisis should not be pressed beyond its just and established limitations.

Approved in dissenting opinion in Walling v. Brown, 9 Idaho, 749, 76 Pac. 321, majority refusing to reconsider constitutionality of statute forbidding pasturing of sheep within two miles of house.

Section 3666, Political Code, is Void in so far as it delegates to state board of equalization power to fix rate of taxation.

Distinguished in Chicago etc. R. R. Co. v. State, 128 Wis. 630, 108 N. W. 576, action of state board in determining rate of taxation upon railway property is wholly ministerial.

Boards or Bodies to Which Power of taxation delegable. See note, 15 L. R. A. (n. s.) 67.

Miscellaneous.—Cited in Contra Costa Water Co. v. Van Rensselaer, 155 Fed. 142, to point that corporation plaintiff in eminent domain proceedings acts as agent of state.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 48 CALIFORNIA.

48 Cal. 3–7, EX PARTE HOGE.

The Discretion Allowed the Court by Statute concerning admission to bail is a legal discretion and not an arbitrary one.

Approved in In re Neil, 12 Idaho, 752, 87 Pac. 882, defining what is meant by "probable cause for the appeal" in section 8048, Revised Statutes of 1887; dissenting opinion in Bates v. Gregory (Cal.), 22 Pac. 687, majority deciding case on other grounds.

Defendant After Conviction is Entitled to Bail, pending appeal taken bona fide, in case not capital.

Approved in In re Schriber, 19 Idaho, 535, 114 Pac. 30, admitting defendant to bail pending appeal from sentence to pay fine.

48 Cal. 7–19, McMANUS v. O'SULLIVAN.

Possession of Land in Subordination to Title of United States may be adverse as to another claimant.

Approved in Northern Pacific Ry. Co. v. Pyle, 19 Idaho, 17, 112 Pac. 683, admission of title in United States is no bar to adverse possession; Maas v. Burdetzki, 93 Minn. 298, 106 Am. St. Rep. 436, 101 N. W. 183, one who took possession of land under erroneous belief it was public land could acquire title by adverse possession as against true owner; Boe v. Arnold, 54 Or. 66, 102 Pac. 294, upholding right to assert such adverse possession as against one claiming under prior grant.

48 Cal. 19–26, PEOPLE v. ONTEVERAS.

Principals in Second Degree, and accessories before the fact, are to be indicted, tried and punished as principals in first degree.

Approved in Rosencranz v. United States, 155 Fed. 42, 83 C. C. A. 634, holding under Alaska Penal Code, sections 186, 188, one who aids and abets another in commission of crime may be charged in indictment and convicted as principal; Trimble v. Territory, 8 Ariz. 285, 71 Pac. 935, holding, under similar statute, indictment charging defendant with aiding and abetting another to commit rape insufficient in not showing crime actually committed.

48 Cal. 26–28, YOUNG v. SHINN.

A Certificate of Purchase of State Lands from the state confers sufficient title to maintain ejectment.

Approved in Hockett v. Alston, 3 Ind. Ter. 444, 58 S. W. 679, sheriff's certificate of sale of land issued in compliance with a Cherokee statute was sufficient evidence of title to support ejectment.

48 Cal. 36–57, 17 Am. Rep. 405, WARD v. FLOOD.

Motion by Applicant for Writ of Mandamus that writ issue notwithstanding averments of answer amounts to demurrer to answer.

Approved in Kelley v. Sersanous (Cal.), 46 Pac. 299, holding in mandamus to compel county treasurer to pay warrant, pleadings made prima facie case in favor of plaintiff.

Party Who, upon Tender or Demand made, puts his refusal upon some particular defect in proceedings of his adversary, cannot later base such refusal upon new or additional ground.

Approved in Herberger v. Husmann (Cal.), 24 Pac. 1059, where contract for purchase of land provides that vendee may disaffirm at end of year, whereupon he shall be repaid his purchase money and shall surrender title acquired by him thereunder, disaffirmance and offer to surrender his claim on repayment of purchase money is sufficient tender by vendee.

Equality Clause in Fourteenth Amendment of the constitution did not create any new legal rights but operated on such as were established.

Approved in State v. Leavitt, 105 Me. 83, 72 Atl. 878, 26 L. R. A. (n. s.) 799, upholding statute forbidding the digging of clams between certain dates in each year by any person except inhabitants or residents of the town or hotel-keepers in the town taking clams for use of hotels.

Law Providing for the Education of Colored Children in separate schools to be provided at public expense is valid.

Approved in Reynolds v. Board of Education of Topeka, 66 Kan. 690, 72 Pac. 280, upholding chapter 81, page 163, Laws of 1879, providing that boards of education in cities of the first class shall have power to maintain separate schools for white and colored children except in the high school; Kingfisher Board of Education v. County Commrs., 14 Okl. 331, 78 Pac. 458, where by statute separate schools for white and colored children was mandatory, injunction may issue to prevent disposal of schoolhouse property for minor class except for purpose of rebuilding suitable buildings for that class; Morrison v. State, 116 Tenn. 550, 95 S. W. 497, upholding acts of 1905, page 321, chapter 150, requiring separation of white and colored passengers on street-cars.

Mandamus will Lie to Reinstate Pupil excluded from public school on ground of color.

Approved in Harley v. Lindemann, 129 Wis. 521, 522, 109 N. W. 573, 8 L. R. A. (n. s.) 124, mandamus lies to compel granting of school privileges to child not complying with illegal requirement of school board for change of text-books.

Miscellaneous.—Cited in State v. Treadway, 126 La. 314, 139 Am. St. Rep. 514, 52 So. 505, discussing what is meant by "a person of the negro or black race."

48 Cal. 61–65, PEOPLE v. AH FAT.

If Evidence is Introduced Tending to Induce the Belief that an opposing witness was suborned, evidence of the character of such witness for truth and veracity is admissible.

Distinguished in Title Insurance etc. Co. v. Ingersoll, 153 Cal. 8, 94 Pac. 96, holding evidence of contradictory testimony of defendant not such impeachment of his character as to authorize admission of evidence to support his character for truth, honesty and integrity; First Nat. Bank of Bartlesville v. Blakeman, 19 Okl. 113, 91 Pac. 871, where witness has not been impeached or discredited, it is reversible error to permit the introduction of evidence as to his general reputation for truth and veracity.

Continuance in Criminal Cases for absence of witnesses. See note, 122 Am. St. Rep. 749.

The Killing of Person may be Murder though latter had already been mortally wounded.

Approved in Hopkins v. Commonwealth, 117 Ky. 945, 80 S. W. 157, one who unlawfully wounds another and thereby hastens death by reason of disease with which latter is afflicted is guilty of homicide.

Homicide Resulting from Injuries by different persons acting independently. See note, 67 L. R. A. 527.

48 Cal. 70–74, SPENCER CREEK WATER CO. v. VALLEJO.

Though the Legislature may Authorize Judges, at chambers, to perform certain duties in respect to cause, yet some court must have jurisdiction of cause.

Distinguished in Carter v. Gear, 197 U. S. 353, 25 Sup. Ct. 491, 49 L. Ed. 787, affirming 16 Haw. 244, and holding statutes of 1892 of Hawaii, conferring upon judges at chambers judicial powers not incident or ancillary to some cause pending before a court, are not in conflict with section 81 of the organic act of the territory.

48 Cal. 74–80, BALLARD v. CARR.

Specific Performance of an Agreement to convey land to an attorney in compensation for services if he succeeds will not be refused for want of mutuality where the services have been performed.

Approved in Smith v. Bangham, 156 Cal. 363, 104 Pac. 691, holding one having optional right to purchase land, by electing to purchase within terms of option, binds himself and removes any objection to specific performance by him for want of mutuality; Turley v. Thomas, 31 Nev. 205, 135 Am. St. Rep. 667, 101 Pac. 578, contract for delivery of corporate stock in payment for personal services to be rendered, unenforceable when made, may be enforced after services are rendered.

48 Cal. 85–97, PEOPLE v. DOYELL.

If Evidence is Admitted Tending to Show that testimony of a witness is a fabrication of late date, prior statements of witness are admissible in support of such testimony.

Approved in Dimmick v. United States, 135 Fed. 270, 70 C. C. A. 141, reaffirming rule.

Distinguished in People v. Wright, 4 Cal. App. 709, 89 Pac. 366, holding where defendant's witness had testified to threats made by deceased and was impeached by proof of his bad reputation for

honesty and integrity, defendant could not prove in rebuttal prior consistent statement made by witness; People v. Taylor, 4 Cal. App. 35, 87 Pac. 217, holding prior statements made by defendant not admissible, there being no pretense that his testimony was fabricated; Burks v. State, 78 Ark. 273, 274, 93 S. W. 984, where evidence of statements of a witness contradictory, if his testimony had been admitted, former statements consistent with his testimony were inadmissible.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 67.

The Whole Charge to Jury must be considered together.

Approved in People v. Quimby, 6 Cal. App. 488, 92 Pac. 496, reaffirming rule; People v. Wah Hing, 15 Cal. App. 199, 114 Pac. 418, instruction which is favorable to defendant cannot be set off by one prejudicial to him; People v. Del Cerro, 9 Cal. App. 769, 100 Pac. 890, holding single instruction, though not sufficiently clear alone, when taken in connection with the whole charge, was not erroneous; People v. Cain, 7 Cal. App. 168, 93 Pac. 1039, holding instruction upon circumstantial evidence not erroneous when read in connection with other portions of charge.

Unlawful Killing, Accompanied With Malice, but not deliberate and premeditated, is murder in second degree.

Approved in People v. Quimby, 6 Cal. App. 488, 92 Pac. 496, holding instruction as to law of murder in first degree not correct.

Rules as to Presumption of Malice in case of killing in perpetration of felony and in voluntary manslaughter, stated.

Cited in People v. Jones, 160 Cal. 371, 117 Pac. 182, under Penal Code, section 1105, in murder, proof of homicide shifts burden on defendant of showing justification or mitigation.

Homicide in Commission of Unlawful Act. See note, 63 L. R. A. 372.

48 Cal. 99–118, THOMPSON v. TOLAND.

Pledgee of Stock is not Obliged to Return the identical certificates pledged; but may return other certificates for equal amount of stock.

Approved in Bell v. Bank of California, 153 Cal. 239, 94 Pac. 892, but holding a bill to redeem a pledge of stock which shows on its face that the particular certificates have passed out of hands of pledgee must show that he has other similar shares which can be redeemed.

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 739, 765.

What Circumstances Sufficient to put purchaser of negotiable paper on inquiry. See note, 29 L. R. A. (n. s.) 367.

48 Cal. 123–124, PEOPLE v. NOREGEA.

Possession of Stolen Property is not Sufficient without other evidence indicative of guilt to warrant conviction of larceny.

Approved in People v. Elster (Cal.), 3 Pac. 885, holding where there is no evidence tending to prove inculpatory facts and circumstances in connection with possession of recently stolen goods, an instruction authorizing a verdict of guilty is error.

48 Cal. 127–131, DALEY v. COX.

Action of Water Commissioners in distributing water may be attacked by aggrieved parties in appropriate proceedings.

Approved in Ryan v. Tutty, 13 Wyo. 133, 78 Pac. 664, under Revised Statutes of 1899, section 888, decision of commissioner and superintendent as to right to use of water, though not appealed from, is not conclusive on the courts.

48 Cal. 133–143, CLARK v. SAWYER.

Writ of Execution Directed to Improper Officer, but executed by proper officer, is not void.

Approved in Christy v. Springs, 11 Okl. 717, 69 Pac. 866, applying rule where writ which was directed to sheriff of Kingfisher county was received and executed by sheriff of proper county.

48 Cal. 143–147, PEOPLE v. EUREKA LAKE ETC. CANAL CO.

Tax Levy is not Void Because Levy is not signed by chairman and clerk of board of supervisors.

Approved in Miller v. Kern County, 150 Cal. 800, 90 Pac. 121, holding fact that tax collector had published notice to taxpayers under Political Code, section 3746, before affidavits of clerk of supervisors and of auditor were attached to corrected assessment-book did not affect validity of tax.

48 Cal. 147–151, 17 Am. Rep. 418, LANGENBERGER v. KROEGER.

Unauthorized Alteration of written instruments. See note, 86 Am. St. Rep. 102, 104, 105.

48 Cal. 152–156, HUTCHINGS v. CASTLE.

Judgment will not be Reversed for Failure to find upon a material issue if the finding must have been adverse to appellant.

Approved in Gerth v. Gerth, 7 Cal. App. 737, 95 Pac. 905, and Craig v. Gray, 1 Cal. App. 601, 82 Pac. 701, both holding failure to find on special issue not prejudicial where finding on such issue could not have affected the judgment.

Allegation of Wrongful Taking is equivalent to averment that defendant converted property to his own use.

Reaffirmed in Phillipos v. Mihran, 38 Wash. 405, 80 Pac. 528.

Declarations of an Agent are Inadmissible against his principal unless made within scope of his authority.

Approved in Sweeney v. Sweeney, 119 Ga. 82, 100 Am. St. Rep. 159, 46 S. E. 78, declarations of agent in possession of property simply for purpose of caring for it are inadmissible to show title out of his principal.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 322.

48 Cal. 157–160, ATHERTON v. SAN MATEO COUNTY.

Where upon Argument of a Cause an issue of fact is waived, counsel cannot after decision on point of law have rehearing on ground that question of fact should have been determined.

Approved in Buhman v. Nickels & Brown Bros., 1 Cal. App. 271, 82 Pac. 87, denying rehearing to respondent where point in question was presented and argued by appellant at hearing but taken no notice of by respondent.

48 Cal. 160–165, PENNYBECKER v. McDOUGAL.

A Building Set upon Blocks Resting upon the ground is personal property.

Distinguished in Miller v. Waddingham (Cal.), 25 Pac. 689, holding houses built on mudsills resting upon the soil, which is not disturbed, are affixed to the land within terms of Civil Code, section 660, and could not be removed by vendee in possession who defaulted.

A Person Putting Improvements upon public domain cannot remove them as against owner when land has become private property.

Approved in Hereford v. Pusch, 8 Ariz. 84, 68 Pac. 550, holding a brush and log fence built partly on public land could not be removed by builder as against one who had acquired title to the land.

Right of One Who Buys, or Makes Lawful Entry on, public land, to crops and improvements placed thereon by another. See note, 70 L. R. A. 804.

48 Cal. 165–171, 22 Am. Rep. 422, ESTATE OF MILLER.

Word "Money" Used in Devise will be Construed to include both realty and personalty if context and face of will show such was testator's intention.

Approved in Estate of Fitzgerald, 2 Cof. Prob. 175, construing word "heirs" in will.

48 Cal. 175–178, WHITTIER v. WILBUR.

Materialman is not Bound by Stipulation of principal contractor of which he has no notice.

Approved in Cost v. Newport Builders' Supply etc. Co., 85 Ark. 412, 108 S. W. 511, stipulation by principal contractor with owner that no liens for labor or material shall be filed against the building was not binding on subcontractor.

48 Cal. 185–189, SILVEY v. HODGDON.

Credibility of Witness may be Assailed by proof of previous acts or declarations of his showing hostility to a party, provided his attention is first called to them.

Approved in Estate of Bedford, 158 Cal. 148, 110 Pac. 304, there was no foundation laid for the introduction of impeaching testimony; Fagan v. Lentz, 156 Cal. 689, 105 Pac. 954, before evidence of previous statements by a witness showing hostility to a party can be introduced, the witness must be asked as to the making of such statements.

48 Cal. 189–190, PEOPLE v. SHEPARDSON.

One Receiving Stolen Property, Knowing It was Stolen, cannot be convicted as accessory to the theft.

Approved in Street v. State, 39 Tex. Cr. 136, 45 S. W. 578, one who received flour which had been burglariously taken, and concealed same, was not an accessory in the burglary.

Distinguished in Dent v. State, 43 Tex. Cr. 150, 65 S. W. 633, there are several legal differences between receiver of stolen property and accessory to murder after the fact.

48 Cal. 194–197, EDWARDS v. ESTELL.

County Surveyor is One of the Agents of the state for the sale of swamp and overflowed lands.

Approved in County of Kings v. County of Tulare, 119 Cal. 516, 51 Pac. 869, holding state statutes providing for swamp land fund in various counties where swamp land districts exist was creation of a trust fund for state and subject to its control.

Services Rendered will not be Considered Part Performance of an oral contract for sale of land sufficient to take it out of statute of frauds, which do not put purchaser in position which is fraud on him unless the contract performed.

Approved in Cooley v. Miller & Lux, 156 Cal. 514, 105 Pac. 982, reaffirming rule but deciding case on other grounds; Price v. Walker, 43 Ind. App. 523, 88 N. E. 79, upholding rule where broker had fully performed his part of contract by finding purchaser for real estate; Cooper v. Colson, 66 N. J. Eq. 333, 105 Am. St. Rep. 660, 58 Atl. 339, parol agreement for sale of land in consideration of services to be rendered will not be specifically enforced because services have been rendered thereunder where such services can be compensated upon quantum meruit.

Public Officers are not Permitted to be personally interested in contracts for public work.

Approved in Cheney v. Unroe, 166 Ind. 556, 117 Am. St. Rep. 391, 77 N. E. 1043, superintendent of roads appointed by board of commissioners, was not in position to accept employment from contractors for work on road though his act was without prejudice to interests of taxpayers.

Distinguished in Gibbs v. Scales, 54 Tex. Civ. App. 101, 118 S. W. 190, county attorney may purchase for own use at tax sale.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 522.

48 Cal. 197–201, OAKS v. RODGERS.

Oath Administered by the Clerk in open court is administered by the court.

Approved in State v. Mercer, 101 Md. 539, 61 Atl. 221, competency of the person who reads the words of the oath and does the ministerial part of its administration to the witness is immaterial; State v. Townley, 67 Ohio St. 27, 93 Am. St. Rep. 636, 65 N. E. 150, upholding indictment for perjury charging oath was administered in open court by a deputy clerk, which was administered by one performing duties as such; State v. Pratt, 21 S. D. 309, 112 N. W. 153, where, in prosecution for perjury, it was alleged in information defendant was sworn by the court, and evidence showed oath was administered by clerk, there was no variance.

48 Cal. 201–208, POEHLMANN v. KENNEDY.

Assignee in Insolvency Becomes Vested With Title to all insolvent's property though not mentioned in schedule.

Approved in Newlove v. Mercantile Trust Co., 156 Cal. 665, 105 Pac. 975, holding failure of voluntary insolvent to include in his inventory certain real property owned by him did not affect jurisdiction of court over the insolvency proceedings.

Rights of an Intervener are not Affected by Nonsuit of plaintiff on defendant's motion.

Approved in Gage v. Cameron, 212 Ill. 172, 72 N. E. 214, holding where grantee of deed assumed payment of certain claims, all persons

whose demands are within the assumption clause of the deed could intervene in a suit to enforce them.

Precise Ground on Which Motion is Made should be brought to the attention of court and opposing counsel.

Approved in Borror v. Carrier, 34 Ind. App. 372, 73 N. E. 130, upholding refusal to modify judgment and decree by striking out specific portions thereof, where no reason for modification was stated in the motion.

48 Cal. 208–211, **GRAY v. COREY.**

Where Teams Were Purchased by One who owned the land and barn where they had previously been worked and kept and they continued to be so employed after the purchase, there was not such delivery and change of possession as is required by statute of frauds.

Approved in Kennedy v. Conroy (Cal.), 44 Pac. 796, where stepfather delivered to stepson, then living with him on his ranch, a lease of the ranch, reserving two rooms in house for himself, and gave him for value a bill of sale of sheep and hogs on ranch, such bill of sale was void under Civil Code, section 3440, for want of change of possession.

48 Cal. 212–215, **O'HALE v. SACRAMENTO.**

Exceptions to Rule That an Employer is not liable for acts of independent contractor. See note, 14 L. R. A. 833.

Liability of Municipality for Defects or obstructions in streets. See note, 20 L. R. A. (n. s.) 552.

Liability for Acts of Independent Contractor where injuries result from nonperformance of absolute duties of employer. See note, 66 L. R. A. 132.

48 Cal. 215–221, **RUBIDOEX v. PARKS.**

Though Agent and Principal are not absolutely prohibited from dealing with each other in respect to the subject matter of the agency, utmost good faith is required, and burden is on agent to show fairness and honesty.

Approved in Curry v. King, 6 Cal. App. 576, 92 Pac. 665, holding evidence showed purchase of principal's property by agent through third persons to be fraudulent; Tafft v. Presidio & Ferries R. R. Co. (Cal.), 22 Pac. 488, where an attorney in fact of stockholder presents the certificates of stock with power of attorney from owner giving him full authority to deal with the stock, and requests a new certificate in his own name, corporation is not bound to inquire into his motive or purpose; Van Dusen v. Bigelow, 13 N. D. 283, 100 N. W. 725, 67 L. R. A. 288, discussing rule where agent having charge of house and lot belonging to his principal, purchased for himself his principal's farm lands as to which he had given advice.

48 Cal. 221–222, **KRAUSE v. SACRAMENTO.**

Liability for Acts of Independent Contractor where injuries result from nonperformance of absolute duties of employer. See note, 66 L. R. A. 132.

48 Cal. 229–234, **HOWARD v. CONTINENTAL INS. CO.**

Where Annual Premiums on Policy are payable in installments, failure to pay any installment works a forfeiture.

Approved in Thompson v. Fidelity Mut. etc. Ins. Co., 116 Tenn. 576, 115 Am. St. Rep. 823, 92 S. W. 1103, 6 L. R. A. (n. s.) 1039, provision in policy giving insurer right upon death to collect all payments due on policy for current year does not extend to insured corresponding right to insurance for whole current year.

48 Cal. 236–239, PEOPLE v. AH WEE.

Defendant cannot Complain of Court's Failure to give an instruction which he has not requested.

Approved in Mickle v. United States, 6 Ind. Ter. 562, 98 S. W. 350, applying rule where not an objection was made to the instructions of court nor an exception saved.

Admissibility of Evidence Given Through Interpreter. See note, 17 L. R. A. 814.

48 Cal. 239–250, SPRAGUE v. EDWARDS.

The Legal Effect of a Deed will be determined from the instrument itself construed in the light of surrounding circumstances.

Approved in Gray v. Maier & Zobelein Brewery, 2 Cal. App. 657, 84 Pac. 282, holding provision of lease giving option to renew to "the party of the first part," who was the lessor, was so obviously a clerical error as to charge purchasers from lessor with notice of equities in favor of tenant's right of renewal.

48 Cal. 250–253, PEOPLE v. INDIAN PETER.

Power of Public Prosecutor to dismiss prosecution. See note, 35 L. R. A. 706.

Effect of Agreement for Immunity of accomplice testifying for prosecution. See note, 24 L. R. A. (n. s.) 440.

48 Cal. 253–257, PEOPLE v. BROWN.

Challenge to Jury Should be in Writing and point out grounds relied on.

Approved in Strong v. State, 63 Neb. 444, 88 N. W. 773, general objection, made orally, when case is called for trial with jury in the box, is not entitled to consideration.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 486.

48 Cal. 257–258, PEOPLE v. O'NEIL.

An Indictment must Allege That the Offense was committed within the county in which it is found.

Distinguished in People v. Thompson, 7 Cal. App. 618, 95 Pac. 387, where information is properly entitled containing name of superior court of proper county, an allegation therein that the offense was committed "at said county of ———," sufficiently shows venue.

Number and Agreement of Jurors necessary to valid verdict. See note, 43 L. R. A. 49, 62.

48 Cal. 277–279, PEOPLE v. COLLINS.

If Evidence is Admissible for One Purpose Only and counsel fails to ask an instruction, limiting it to that purpose, he cannot afterward complain that it was not admissible for other purposes.

Approved in People v. Rollins, 14 Cal. App. 138, 111 Pac. 124, applying rule where letters admitted in evidence were competent to

prove an admission against interest by showing his conduct when same were read to him; Ball v. United States, 147 Fed. 41, 78 C. C. A. 126, holding failure of trial court to charge that evidence of a prior conviction of accused was admissible only as tending to affect his credibility as a witness was not error in absence of request therefor; State v. Greene, 33 Utah, 499, 94 Pac. 988, applying rule where defendant objected to deed, which was admissible for a certain purpose, being admitted in evidence at all.

48 Cal. 279–323, 17 Am. Rep. 425, EX PARTE WALL.

The Power to Make Laws must be exercised by the legislature.

Approved in In re Sharp, 15 Idaho, 136, 96 Pac. 568, 18 L. R. A. (n. s.) 886, constitution grants to legislature discretion to regulate matter of appeals from probate orders and judgments, and no power exists in courts to discharge this duty for them.

Legislature cannot Refer a Law to the People to decide by popular vote whether it shall go into effect.

Approved in Galindo v. Walter, 8 Cal. App. 236, 96 Pac. 505, holding municipal charter of San Jose containing no referendum provision, common council could not delegate legislative power to electors; Wright v. Cunningham, 115 Tenn. 462, 91 S. W. 297, acts of 1905, page 670, chapter 316, amending stock law and providing act shall be effective only in such counties as may adopt it by majority vote, is unconstitutional.

Distinguished in Picton v. County of Cass, 13 N. D. 247, 100 N. W. 712, act to enable boards of county commissioners to institute proceedings to enforce payment of taxes does not confer legislative power upon such boards; In re Jones, 4 Okl. Cr. 78, 109 Pac. 572, upholding power of legislature to delegate to a municipal corporation power to declare what shall constitute a nuisance; State v. Frear, 142 Wis. 356, 125 N. W. 974, upholding primary election law which by its terms was to go into effect upon ratification by the people; dissenting opinion in Rouse v. Thompson, 228 Ill. 551, 81 N. E. 1118, majority holding primary election law delegates legislative power by granting the right to party committees to designate and establish delegate districts.

Denied in Fouts v. Hood River, 46 Or. 502, 81 Pac. 373, 1 L. R. A. (n. s.) 483, and In re O'Brien, 29 Mont. 545, 75 Pac. 200, both holding local option law, which is to take effect upon happening of a contingency, viz., favorable vote of the people, is not unconstitutional.

Overruled in In re Pfahler, 150 Cal. 90, 88 Pac. 278, 11 L. R. A. (n. s.) 1092, holding provision in freeholder's municipal charter for procedure, known as "initiative and referendum," not in violation of state or federal constitutions.

Constitutionality of Local Option Laws. See notes, 114 Am. St. Rep. 319, 325; 1 L. R. A. (n. s.) 484.

Power of Legislature to Make Statute Contingent on approval by people. See note, 23 L. R. A. 113.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 455.

48 Cal. 323–331, 17 Am. Rep. 436, PEOPLE v. CAGE.

Discharge of Jury Before End of Term by unnecessary adjournment and without calling them into court is equivalent to acquittal of defendant.

Approved in Allen v. State, 52 Fla. 4, 120 Am. St. Rep. 188, 41 So. 594, discharge of jury on arbitrary motion of state's attorney without legal reason therefor after it had been sworn in amounted to an acquittal; Gillespie v. State, 168 Ind. 316, 80 N. E. 835, where, after jury had been drawn, accepted and sworn and an adjournment taken, on motion of state, submission was set aside and further proceedings had for examination of juror, accused was entitled to discharge on ground of former jeopardy; Schrieber v. Clapp, 13 Okl. 219, 74 Pac. 317, action of court in discharging jury, dismissing case and discharging defendant after a number of witnesses have been examined, though without authority, acts as bar to another prosecution.

Distinguished in The King v. Davis, 4 Haw. 220, holding under constitutional provision the discharge of jury after seventeen hours' deliberation without consent of defendant did not amount to an acquittal.

Former Jeopardy by Reason of Discharge of Jury in prisoner's absence. See note, 44 L. R. A. 696.

Acquittal of Defendant by Discharge of Jury at previous trial without a verdict may be proved under plea of not guilty.

Distinguished in People v. Bennett (Cal.), 50 Pac. 712, holding under subsequent statute double jeopardy must be pleaded.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 71.

Time Allowable for Jury to Deliberate before mistrial ordered in criminal case. See note, 11 L. R. A. (n. s.) 179.

48 Cal. 331–334, PEOPLE v. HUNCKELER.

Defendant is Placed in Jeopardy when placed on trial before competent court and jury is impaneled and sworn.

Approved in State v. Varnado, 124 La. 712, 50 So. 661, where jury was discharged without verdict rendered, owing to illness of judge who was not likely to be well for several days, discharge was from necessity, and there was no jeopardy.

Identity of Offenses on plea of former jeopardy. See note, 92 Am. St. Rep. 144.

48 Cal. 335–339, PEOPLE v. MANNING.

Venue must be Proved Beyond Reasonable Doubt, but need not be testified to in so many words.

Approved in People v. Bradford, 1 Cal. App. 44, 81 Pac. 713, holding venue sufficiently proved though no witness testified in terms that the offense was committed in the county; State v. Meyer, 135 Iowa, 511, 124 Am. St. Rep. 291, 113 N. W. 324, testimony as to town in which act was committed justified jury's finding that it was in a certain county; dissenting opinion in Union Pacific R. R. Co. v. State, 88 Neb. 551, 130 N. W. 279, majority holding venue in criminal case, in absence of direct evidence, must be shown by facts and circumstances presumptively showing it beyond reasonable doubt.

Party Objecting to Evidence must Specify Ground of objection, and waives all objections not specified.

Approved in Starkweather v. Dawson, 14 Cal. App. 671, 112 Pac. 738, applying rule in election contest where certain ballots were admitted in evidence without objection that they were not rejected ballots or indorsed as required by law; Oxier v. United States, 1 Ind.

Ter. 97, 38 S. W. 334, questions asked of witness on cross-examination as to whether he had ever been arrested were allowable.

48 Cal. 339–345, **CASSIDY v. CARR.**

Confirmation of Mexican Grant Estops Grantee from claiming more than the amount allotted by survey.

Distinguished in United Land Assn. v. Knight (Cal.), 23 Pac. 270, holding in ejectment that boundary lines given in the decree would prevail over those given in the survey and granting clause of the patent.

48 Cal. 346–349, **ROPER v. McFADDEN.**

Supplemental Complaint is a Further Complaint consisting of facts arising since filing of original complaint.

Approved in Bush v. Pioneer Mining Co., 179 Fed. 80, 102 C. C. A. 372, amended complaint in ejectment which alleged no fact occurring after filing of original complaint was not supplemental.

Title Acquired After Commencement of Action as defense in ejectment. See note, 115 Am. St. Rep. 540.

48 Cal. 349–355, **HESS v. BOLINGER.**

Objection That Evidence was Inadmissible under pleadings cannot be raised for first time on appeal.

Approved in Grunsky v. Field, 1 Cal. App. 626, 82 Pac. 980, party who has waived new trial in court below cannot be heard in appellate court upon error which should have been corrected by new trial.

48 Cal. 355–358, **HOWELL v. SCOGGINS.**

In Action for Assault and Battery, jury cannot take into consideration plaintiff's expenses in prosecuting suit in estimating damages.

Approved in Spooner v. Cady (Cal.), 44 Pac. 1019, in action for conversion of personal property, money paid by plaintiff to her attorney cannot be considered in estimating damages.

48 Cal. 358–361, **SWAIN v. DUANE.**

Deed to Wife for Valid Consideration paid by husband, which conveys property to grantee as her separate property, constitutes property separate estate of wife.

Reaffirmed in Mitchell v. Moses, 16 Cal. App. 600, 117 Pac. 687.

48 Cal. 361–364, **DENNIS v. WOOD.**

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 407.

48 Cal. 366–368, **BRUMMAGIM v. AMBROSE.**

Decree of Probate Court Ordering Resale of property sold at administrator's sale for nonpayment of purchase money estops purchaser as to all matters which might have been litigated there.

Approved in Estate of Welch, 3 Cof. Prob. 305, applying rule to order for family allowance.

Conclusiveness of Probate as Res Judicata. See note, 21 L. R. A. 683.

48 Cal. 369–382, **PATTERSON v. DONNER.**

Grantor of Property upon an Unlawful Condition subsequent cannot recover it at law or in equity.

Approved in Ripperdan v. Weldy, 149 Cal. 676, 87 Pac. 280, holding grantor of property who had received and retained consideration could not recover the property on ground that part of the consideration was an invalid covenant in restraint of alienation by grantee.

Stipulation in Mortgage Allowing Counsel Fees upon foreclosure does not entitle plaintiff to such fees unless he pays them.

Distinguished in Hewett v. Dean (Cal.), 25 Pac. 756, holding in foreclosure suit where note allowed attorneys' fees, an allegation "that the sum of $300 is a reasonable attorney's fee for the foreclosure of said mortgage" was sufficient without alleging plaintiff had actually incurred that expense.

Agreement to Procure Witnesses to Testify to a certain state of facts is immoral and against public policy.

Approved in Neece v. Joseph, 95 Ark. 555, 129 S. W. 798, holding void contract to procure evidence of given state of facts to enable party to win pending suit; Sheppey v. Stevens, 185 Fed. 156, agreement by which two heirs at law were to use their best efforts to affect conduct of third person so as to save his estate, and make their compensation dependent upon legacies to be given them by will of such third person, was void.

Validity of Contracts to Furnish Evidence. See notes, 97 Am. St. Rep. 145; 19 L. R. A. 372.

48 Cal. 382, PEOPLE v. ROACH.

Venue must be Proved as Charged, in indictment.

Reaffirmed in People v. Meseros, 16 Cal. App. 278, 116 Pac. 679.

48 Cal. 386–394, HILLS v. SHERWOOD.

Creditor of a Deceased Person Whose Claim has been established may maintain an action in equity to reach property fraudulently conveyed by deceased in his lifetime.

Distinguished in Beswick v. Dorris, 174 Fed. 507, holding creditor must make application to court under Code of Civil Procedure, sections 1589, 1590, before he can sue on behalf of all creditors of deceased to recover property fraudulently conveyed.

Judgment at Law is not a Bar to relief in equity.

Approved in McMahon v. Whelan, 44 Or. 406, 75 Pac. 716, adjudication in justice's court in forcible entry and detainer, and also judgment on appeal therefrom in circuit court, did not estop party from pursuing his equitable remedy to enforce specific performance of verbal contract for lease; Moore v. Snowball, 98 Tex. 26, 107 Am. St. Rep. 596, 81 S. W. 9, 66 L. R. A. 745, where, in trespass to try title, defendant, who had purchased under execution sale, had judgment, and plaintiff brought second suit alleging sale was void for irregularity, matter in second action could not have been litigated in first.

48 Cal. 395–397, COLUMBET v. PACHECO.

Long Acquiescence in Location of Fence as a division line estops parties from controverting correctness of location.

Approved in Loustalot v. McKeel, 151 Cal. 642, 108 Pac. 710, and Adams v. Child, 28 Nev. 185, 88 Pac. 1088, both reaffirming rule.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 685.

Distinguished in Smith v. Robarts (Cal.), 9 Pac. 105, holding where coterminous owners are in possession of land under a mutual mistake as to the division line, such possession is not adverse.

Adverse Possession Due to Ignorance or mistake as to boundary. See note, 21 L. R. A. 834.

48 Cal. 398–405, SAN FRANCISCO & NORTHERN PACIFIC R. R. CO. v. BEE.

Contracts Between Corporations having common directors or officers. See note, 33 L. R. A. 794.

Effect of Consolidation, Merger or Absorption of corporation, on unsecured liabilities, in absence of statutory or contract provision. See note, 11 L. R. A. (n. s.) 1127.

48 Cal. 409–426, ROBINSON v. WESTERN PACIFIC R. R. CO.

Person Run Down by Railroad Train in street has right to presume that employees of railroad would use the degree of care persons of ordinary prudence would use under such circumstances.

Approved in Wistrom v. Redlick Bros., 6 Cal. App. 674, 92 Pac. 1049, holding, where injury was caused by defendant's delivery wagon running into bicycle rider in street, defendant was liable; Stoy v. Louisville etc. R. R. Co., 160 Ind. 149, 150, 66 N. E. 617, one passing over sidetrack at regular crossing, who was killed by engine backing against freight-cars standing on sidetrack, was not negligent in failing to look at engine before crossing; Pittsburgh etc. R. Co. v. McNeil, 34 Ind. App. 316, 69 N. E. 473, applying rule in action for injuries to boy seven years old by backing train of cars on him as he was crossing street, where city ordinance required watchman to be kept on rear end of such train to avoid accidents; Meeks v. Ohio R. Ry. Co., 52 W. Va. 103, 43 S. E. 120, applying rule in action for injuries where railroad company suddenly and without warning backed freight train against person lawfully using public crossing; dissenting opinion in Hutson v. Southern California Ry. Co., 150 Cal. 707, 89 Pac. 1096, majority holding person approaching railroad crossing is not authorized to assume that the persons operating a train will not be negligent, and a charge assuming the contrary is erroneous.

Where Plaintiff was Injured by Train in Street, it was no defense that his own act contributed to the injury, but it must appear that by his fault he so contributed.

Approved in dissenting opinion in Shade v. Bay Counties Power Co., 152 Cal. 16, 92 Pac. 64, majority holding upon facts that deceased was negligent as a matter of law in trying to remove an electric wire that was down across a road.

A Foot-passenger is not Debarred the use of the street because a train of cars is being operated on a portion of the street.

Approved in Hoagland v. Canfield, 160 Fed. 163, holding where plaintiff was injured by a truck in attempting to cross street, charge in accordance with rule as to plaintiff's right in street was correct.

Liability of Railroad to Person Injured while crossing tracks near standing train. See notes, 127 Am. St. Rep. 467; 11 L. R. A. (n. s.) 967.

If Neglect of Ordinary Care by Plaintiff concurs as proximate cause of injury, defendant is not liable.

Approved in Tobin v. Omnibus Cable Co. (Cal.), 34 Pac. 126, and Crowley v. Strouse (Cal.), 33 Pac. 457, both holding instruction in accordance with rule not error; Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, holding where plaintiff went on to railroad track and lay down and went to sleep, facts showed contributory negligence as matter of law and railroad not liable for injuries.

Where Train of Cars is Stopped at Street Crossing, railroad should provide lookout to signal backing of train.

Approved in Colorado etc. Ry. Co. v. Chiles, 50 Colo. 199, 114 Pac. 664, where railroad backs standing train over crossing, it should employ reasonable means to warn travelers.

Erroneous Instruction Which is not Prejudicial is not ground for new trial.

Approved in Bechtel v. Chase, 156 Cal. 712, 106 Pac. 83, and Greene v. Murdock, 1 Cal. App. 139, 81 Pac. 994, both holding erroneous instructions not prejudicial where no other verdict or judgment could have been rendered.

Verdict of Ten Thousand Dollars for Injury which necessitates amputation of arm held not excessive.

Approved in Scally v. W. T. Garratt & Co., 11 Cal. App. 147, 104 Pac. 329, holding verdict of seven thousand five hundred dollars for permanent injury to hand and arm of boy not excessive; Larson v. Haglin, 103 Minn. 263, 114 N. W. 960, verdict of ten thousand five hundred dollars not excessive for fracture of right arm necessitating amputation, and scalp wound.

Contributory Negligence is a Matter of Defense to be alleged and proved by defendant.

Approved in Ruppel v. United Railroads, 10 Cal. App. 324, 101 Pac. 805, holding where street-car of defendant ran into wagon of deceased, fact that the latter suddenly turned his horse toward the track into a position of danger would not be conclusive of contributory negligence; Matthews v. Bull (Cal.), 47 Pac. 774, holding complaint for personal injuries need not show want of negligence on part of plaintiff.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 541.

48 Cal. 433–436, BALDWIN v. BORNHEIMER.

If a Person not Named in Complaint appears and answers as defendant, and complaint is not amended, appellate court will direct such amendment as of date prior to judgment.

Approved in Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 654, 95 Pac. 670, where true name of defendant does not appear in complaint, but latter answers and there is judgment for plaintiff, appellate court may order the complaint amended by insertion of such defendant's name as of a date prior to judgment.

48 Cal. 439–452, DAMBMANN v. WHITE.

In Action by Assignee in Bankruptcy to Recover Assets, he may prove bankruptcy and his appointment as assignee under a general allegation in complaint that he owns the goods.

Approved in Daggett v. Gray (Cal.), 40 Pac. 960, but holding receiver who sues for conversion must allege that insolvent was owner or entitled to possession.

In Action by Assignee in Bankruptcy, copy of assignment is evidence of assignee's title without proof of appointment.

Approved in Jones v. Meyer Bros., 25 Tex. Civ. App. 238, 61 S. W. 555, one intervening as trustee in bankruptcy has right to recover without producing transfer to him.

Administration of Federal Laws in state courts. See note, 48 L. R. A. 36.

48 Cal. 452–455, PARNELL v. HANCOCK.

Appeal Bond Suspends Enforcement of judgment while appeal is pending.

Approved in Giles v. De Cow, 35 Colo. 138, 83 Pac. 639, where enforcement of original judgment was suspended by order making writ of error a supersedeas, proceedings in action on appeal bond should have been suspended till final determination of writ of error.

48 Cal. 455–459, BULL v. SHAW.

Title Acquired by Pre-emptor of Public Lands inures to benefit of mortgage executed by him before final proof and payment.

Approved in Stewart v. Powers (Cal.), 33 Pac. 490, reaffirming rule.

48 Cal. 462–464, WHITNEY v. DURKIN.

Declarations as Part of Res Gestae. See note, 19 L. R. A. 752.

48 Cal. 467–472, BUHNE v. CHISM.

Plaintiff in Ejectment can Recover Only in the legal title.

Approved in Roberts v. Word, 3 Cal. App. 103, 84 Pac. 431, holding plaintiff in ejectment must show both legal title and right to possession.

48 Cal. 478–482, QUALE v. MOON.

Mechanic's Lien Law of 1868 is not in Violation of constitutional provision that laws shall be uniform in operation.

Approved in State v. Gregory, 170 Mo. 604, 71 S. W. 171, upholding constitutionality of Revised Statutes of 1899, section 4226, in prosecution of contractor, who purchased materials ostensibly for use on one building and fraudulently used them on another building; Pyramid Land etc. Co. v. Pierce, 30 Nev. 246, 95 Pac. 213, upholding statute allowing recovery of attorneys' fees in action for damages for unlawfully grazing stock on plaintiff's land.

48 Cal. 482–490, HOWARD v. THROCKMORTON.

Contract to Convey Property in Consideration of personal services may be specifically enforced after services are in fact rendered.

Approved in Turley v. Thomas, 31 Nev. 203, 205, 135 Am. St. Rep. 667, 101 Pac. 577, 578, applying rule to contract for delivery of corporate stock in payment for personal services unenforceable specifically at time it was made.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 170, 184.

48 Cal. 490–493, POLACK v. TRUSTEES.

Legislature has Power to Vacate a Street in a city and may delegate that power to the municipal authorities of the city.

Approved in Marietta Chair Co. v. Henderson, 121 Ga. 403, 104 Am. St. Rep. 156, 49 S. E. 314, reaffirming rule; Mahoney v. Board of Education, 12 Cal. App. 296, 107 Pac. 585, holding where state dedicated land in San Francisco for school purposes, it had power to authorize city board of education to lease such land when not needed for school purposes; Henry v. Seattle, 42 Wash. 424, 85 Pac. 26, second plat of tide lands made by local board of tide land appraisers, when approved by the legislature, vacated former plat.

Discontinuance or Vacation of Highway by acts of authorities. See note, 26 L. R. A. 822.

Legislature may Vacate portion of street even though abutting owners on another portion be injured thereby.

Approved in Ridgway v. City of Osceola, 139 Iowa, 594, 117 N. W. 975, whether or not discontinuance of street in such manner as to prevent free access to property caused substantial damage is a question of fact; Cram v. Laconia, 71 N. H. 48, 51 Atl. 639, 57 L. R. A. 282, where discontinuance left undisturbed highway in front of abutter's premises, but resulted in diversion of travel and depreciation of owner's property, no cause of action for damages accrued.

Injury to Abutter by Vacating Street, or changing grade. See note, 14 L. R. A. 371.

Effect of Abandonment of Highway. See note, 26 L. R. A. 664.

48 Cal. 493–535, SAN FRANCISCO v. SPRING VALLEY WATER WORKS.

Private Corporations must be Formed under general laws, and the legislature cannot confer on them any powers or privileges by special act.

Approved in San Joaquin etc. Irr. Co. v. Merced Co., 2 Cal. App. 598, 599, 84 Pac. 287, 288, holding a canal corporation organized under act of May 14, 1862, authorizing incorporation of canal companies, having principal place of business in one county and operating part of its canal for distributing water in another county, has a special franchise which is properly assessed in latter county.

When State Grants to Private Corporation an easement in a street, it acts in its sovereign capacity.

Approved in dissenting opinion in Little Rock Ry. etc. Co. v. North Little Rock, 76 Ark. 64, 88 S. W. 832, majority holding franchise to construct street railway, granted by city after an election to determine advisability of annexation to another city and while injunction against declaring result of such election was pending, was void.

Whether an Act is General or Special is to be determined by its substance, not its form.

Approved in State v. Lawrence, 79 Kan. 258, 100 Pac. 494, upholding act of legislature authorizing city where state university is located to issue bonds in aid of university and levy and collect taxes to pay same.

Even if Property Rights have Grown Up under an erroneous decision, such decision should not stand.

Approved in dissenting opinion in Walling v. Brown, 9 Idaho, 750, 76 Pac. 322, majority declining to reopen questions, where rights have become settled and beneficial results to be obtained would not greatly exceed evil effects likely to flow therefrom.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 91.

48 Cal. 535–537, **ALTSCHUL v. DOYLE.**

The Fact That Between Trial and Determination of Motion for new trial a change in incumbency of bench occurred makes no difference in rule that new trial will not be granted where there is substantial conflict in evidence.

Reaffirmed in Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486.

Where New Trial Asked for on Several Grounds is granted and record does not show upon which ground, such order will not be reversed if it could have been granted on any one of them.

Approved in Austin v. Gagan (Cal.), 30 Pac. 790, reaffirming rule.

48 Cal. 537–540, **DOYLE v. FRANKLIN.**

All Intendments Consistent With the Record on appeal must be taken in support of the judgment.

Approved in Grunsky v. Field, 1 Cal. App. 625, 82 Pac. 979, holding stipulation that cause be submitted to the court for decision upon record of former trial, without expressing any reservations of rulings and exceptions taken at former trial, did not require them to be reviewed on appeal.

48 Cal. 540–544, **JAFFE v. SKAE.**

Decision of Supreme Court on Appeal becomes the law of the case and governs subsequent proceedings therein.

Approved in People v. Bennett (Cal.), 50 Pac. 704, holding supreme court could not on second appeal in same case review its former decision.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

48 Cal. 546–548, **LANDER v. BEERS.**

Where Testimony is in Form of Depositions, appellate court is not bound by rule which forbids disturbing judgment when there is conflict in the evidence.

Overruled in Crisman v. Lauterman, 149 Cal. 655, 117 Am. St. Rep. 167, 87 Pac. 92, holding when a case is tried on an agreed statement of facts consisting merely of evidential facts, the trial court should make findings thereon which are entitled to same weight as any other findings upon evidence.

Where Father, in Order to Defraud Creditors, purchases property in daughter's name, equity will, at suit of judgment creditor, declare deed fraudulent.

Reaffirmed in Clifton v. Herrick, 16 Cal. App. 488, 117 Pac. 624.

48 Cal. 549, **PEOPLE v. RILEY.**

If Court Imposes Longer Term of Imprisonment than is allowed by statute, appellate court will reverse judgment and direct court below to proceed to judgment on verdict.

Approved in People v. Oliver, 7 Cal. App. 602, 95 Pac. 173, but holding a sentence for less than the minimum time provided for by statute would not be corrected to the detriment of defendant on his appeal.

Effect of Excessive Sentence. See note, 45 L. R. A. 156.

48 Cal. 551–552, **PEOPLE v. BARNES.**

Under Indictment for Burglary in Breaking and entering a room with intent to steal, it cannot be proved that defendant entered a different room and at a different time from that alleged.

Approved in People v. Henry, 129 Mich. 102, 88 N. W. 77, holding in prosecution for breaking and entering a saloon with intent to commit larceny where breaking was admitted but intent denied, former convictions for larceny could not be proved to show intent.

Evidence of Other Crimes in criminal cases. See note, 62 L. R. A. 197.

48 Cal. 557–559, **PEOPLE v. McCARTY.**

Informal Verdict Which can be Clearly Understood, as general verdict of guilty or not guilty, is sufficient.

Approved in State v. Schweitzer, 18 Idaho, 613, 111 Pac. 131, in prosecution for selling lard by short weight, verdict of jury finding defendant "guilty of selling by short weights as charged in the complaint" was sufficiently definite.

48 Cal. 563–565, **TEMPLETON v. COBURN.**

Right to Erect Wharves. See note, 40 L. R. A. 644.

48 Cal. 565–567, **PENNINGTON v. BAEHR.**

Printed Fac-simile Signature on Coupon of Bonds, when intended to take place of handwriting, is sufficient.

Approved in Hewel v. Hogin, 3 Cal. App. 254, 84 Pac. 1006, following rule; Ardery v. Smith, 35 Ind. App. 98, 73 N. E. 841, where attorney in fact had a right to sign remonstrance against liquor license, he could do so by using a typewriter; Loughren v. Bonniwell, 125 Iowa, 521, 106 Am. St. Rep. 319, 101 N. W. 288, subscription by justice to an original notice, with stamp bearing fac-simile of his signature, was sufficient.

Signing by Proxy. See note, 22 L. R. A. 301.

48 Cal. 572–580, **VALLEJO LAND ASSN. v. VIERA.**

Mortgage of Land Purporting to Convey the Fee carries title subsequently acquired.

Approved in Trope v. Kerns (Cal.), 20 Pac. 84, reaffirming rule; Jones v. Chalfant (Cal.), 31 Pac. 258, holding patent inures to benefit of mortgagee of mortgage previously given.

Conveyance Recorded Before Grantor obtained title, as notice. See note, 23 L. R. A. 563.

48 Cal. 581–586, **DE LAURENCEL v. DE BOOM.**

Legatee Who Promises Testator to Devote Legacy to a certain lawful purpose becomes a trustee.

Approved in Winder v. Scholey, 83 Ohio St. 217, 93 N. E. 1100, where testator bequeathed property to three members of a lodge on promise of one that they would transfer it to lodge, equity will declare them trustees ex maleficio.

Heir, Devisee or Legatee as trustee ex maleficio. See note, 106 Am. St. Rep. 98.

Gifts by Will as Affected by Promises made testator, and by secret trusts. See note, 20 L. R. A. 468.

48 Cal. 592–601, GARRISON v. McGOWAN.

One Seeking Relief from Judgment Rendered against him on unauthorized appearance of attorney, must show clear merits.

Approved in Chambers v. Gallup, 30 Tex. Civ. App. 426, 70 S. W. 1010, where defendant, who filed answer but defaulted in appearance for trial, claimed filing of answer by attorney was without authority, action to vacate same without affidavit of merits should be dismissed.

Right of Disbarred or Suspended Attorney or unlicensed person to transact legal business for another. See note, 24 L. R. A. (n. s.) 755.

Presumption of Attorney's Authority to Appear for party whom he assumes to represent. See note, 126 Am. St. Rep. 39, 41.

Effect of Judgment Obtained upon Unauthorized Appearance by attorney. See note, 21 L. R. A. 848, 853.

48 Cal. 601–610, THOMPSON v. TRUE.

Judgment upon Reference of Contest between pre-emptor and applicant to purchase from state is conclusive between parties as to state's title.

Distinguished in Dollenmayer v. Pryor, 150 Cal. 4, 87 Pac. 617, holding one could not institute such contest who had no proprietary interest or right in the land and order referring such contest to superior court would be void.

48 Cal. 610–614, TIDBALL v. HALLEY.

Conditional Execution of Contract under parol agreement that it shall not take effect until others sign. See note, 45 L. R. A. 338.

48 Cal. 614–619, ABBEY HOMESTEAD ASSN. v. WILLARD.

Court may Permit Plaintiff to Introduce further evidence after motion for nonsuit is made.

Approved in San Pedro Lumber Co. v. Schroeter, 156 Cal. 160, 103 Pac. 889, holding court did not err in allowing plaintiff to reopen the case for further testimony after motion for nonsuit for variance; Lowe v. San Francisco etc. Ry. Co., 154 Cal. 576, 98 Pac. 679, holding if after motion for nonsuit is erroneously overruled defendant supplies the defect by evidence he introduces, the error is waived.

When Plaintiff in Ejectment Rests on Proof of Lease to defendant and defendant then proves an adverse possession, plaintiff may, in rebuttal, prove deraignment of his title.

Approved in Lux v. Haggin (Cal.), 4 Pac. 925, holding in action to determine right of defendant to water flowing over plaintiff's land, where defendant showed a prior appropriation and rested, plaintiff should have been allowed to prove purchase from state before such appropriation.

Right of Tenant to Acquire Title not inconsistent with landlord's at commencement of tenancy. See note, 53 L. R. A. 946.

When Statement or Bill of Exceptions is Settled, it will be presumed to contain all the evidence material to the points specified.

Approved in Couson v. Wilson, 2 Cal. App. 184, 83 Pac. 264, holding finding cannot be sustained by a presumption that there was other evidence not set forth in the bill of exceptions.

48 Cal. 627–631, ESTATE OF HOLBERT.

Claim of Executor for Expenses and Fees incurred through neglect to carry out terms of will cannot be allowed.

Approved in Roach's Estate, 50 Or. 202, 92 Pac. 127, denying extra compensation, attorney's fees, etc., where executor never applied for advice or direction as to loaning money of estate and for over eight years made no report as to his dealings with property of estate.

48 Cal. 634–637, WINANS v. HASSEY.

Receipt is Only Prima Facie Evidence of Payment, and may be explained by parol testimony.

Approved in Brown v. Crown Gold Milling Co., 150 Cal. 389, 89 Pac. 92, reaffirming rule.

Form of Judgment and Procedure in Case of Liability to make payment in coin. See note, 29 L. R. A. 597.

48 Cal. 638, KELLER v. RUIZ DE OCANA.

Complaint in Ejectment Alleging That Plaintiff owns the land and that defendant is in possession adversely to plaintiff and withholding the same is sufficient.

Approved in Merryman v. Kirby, 13 Cal. App. 346, 109 Pac. 636, holding allegations of complaint in ejectment sufficient.

48 Cal. 639–643, PICO v. CYAS.

Necessity of Relation of Lessor and Lessee to create unlawful detainer. See note, 120 Am. St. Rep. 35.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324.

48 Cal. 643–645, ESTATE OF PFUELB.

Word "Relation" in Statute Providing That Devise to relation shall not lapse by devisee's death before testator, if devisee leaves lineal descendants, includes only blood relatives.

Approved in Estate of De Bernede, 4 Cof. Prob. 492, 493, holding Civil Code, section 1310, applies to relations who are legatees; Estate of Crane, 2 Cof. Prob. 537, 551, where testator bequeaths half of residue of estate to sister and she dies before his death, leaving sons who die prior to testator, widows of sons cannot share in bequest.

Who are Related by Affinity. See notes, 79 Am. St. Rep. 205; 2 Cof. Prob. 552.

Miscellaneous.—Cited in Estate of De Bernede, 4 Cof. Prob. 487, to point that Civil Code, section 1310, is continuation of Statute of 1850, page 179, section 20.

48 Cal. 646–648, MACY v. DAVILA.

Change in Incumbency of Bench between trial and hearing of motion for new trial makes no difference in rule that appellate court will not disturb order made on such motion if there is substantial conflict in evidence.

Reaffirmed in Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 49 CALIFORNIA.

49 Cal. 9–12, PEOPLE v. RODERIGAS.

In Section 66, Penal Code, to "Procure Female to have illicit carnal intercourse with any man" is offense of procurer, and does not include seduction within its meaning.

Approved in Miller v. United States, 136 Fed. 582, 69 C. C. A. 355, holding indictment charging that defendants did knowingly and willfully procure the presentation to commissioner of pensions of false and fraudulent paper writing," is insufficient to charge crime under Revised Statutes, section 4746, as amended July 7, 1898.

Previous Chaste Character of Female must be alleged and proved in prosecution for enticing female into house of ill-fame for purpose of prostitution.

Approved in Harvey v. Territory, 11 Okl. 159, 65 Pac. 838, applying rule in prosecution for seduction.

49 Cal. 13–15, PEOPLE v. WILSON.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 739, 740, 741.

49 Cal. 18–28, ESTATE OF BAUBICHON.

In Absence of Contract, Property left in this state by foreigner dying here and leaving children must be distributed according to law of this state.

Approved in Estate of Renton, 3 Cof. Prob. 125, following rule.

49 Cal. 29–31, WILCOX v. OAKLAND.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 75.

49 Cal. 33–34, RYAN v. MOONEY.

Court may Vacate Judgment Obtained by default of attorney when case was not printed on trial calendar but placed on calendar on motion of opposing counsel.

Approved in Riddle v. Quinn, 32 Utah, 350, 90 Pac. 895, vacating judgment obtained by violation of rule requiring notice of placing cause on term calendar.

49 Cal. 38–41, SLOAN v. DIGGINS.

Admission of Contract Set Out in Complaint by failure to deny genuineness and due execution by affidavit is admission that contract is what it purports on its face to be, and was duly executed and delivered by parties.

Approved in Petersen v. Taylor (Cal.), 34 Pac. 725, holding failure of plaintiff to deny by affidavit release set up by defendant and annexed to answer admits it to be what it is on its face.

Distinguished in Tonopah Lumber Co. v. Riley, 30 Nev. 318, 95 Pac. 1002, holding plaintiff not bound to deny by affidavit written instrument set up in answer which did not appear on its face to have been signed or executed by either of the parties.

49 Cal. 41–42, PEOPLE v. BEAUCHAMP.

Prisoner must be Personally Present in Court when verdict in felony case is read.

Approved in State v. Way, 76 Kan. 937, 93 Pac. 162, 14 L. R. A. (n. s.) 603, voluntary absence of prisoner while at liberty on bail did not vitiate verdict rendered in his absence.

Right of Accused to Waive Presence at receipt of verdict upon trial for felony. See note, 14 L. R. A. (n. s.) 604.

49 Cal. 42–47, MARTIN v. MATFIELD.

Upon Appeal from Order Denying New Trial appellate court cannot consider either sufficiency of complaint or findings to support judgment.

Approved in Schroeder v. Mauzy, 16 Cal. App. 448, 118 Pac. 461, Crescent Feather Co. v. United Upholsterers, 153 Cal. 434, 95 Pac. 872, Jenson v. Will & Finck Co., 150 Cal. 413, 89 Pac. 120, Swift v. Occidental M. & P. Co. (Cal.), 70 Pac. 471, and Caldwell v. Wells, 16 Idaho, 462, 463, 101 Pac. 813, 814, all following rule; Hayford v. Wallace (Cal.), 46 Pac. 302, holding assignment of error that findings do not support judgment cannot be taken advantage of on motion for new trial; Williams v. Alaska Commercial Co., 2 Alaska, 52, holding insufficient, specifications for motion for new trial that "verdict is against the law."

49 Cal. 47–49, BRYANT v. WILCOX.

Assurances as to Payment by Indorser of Note held to be waiver of demand, notice and protest.

Approved in Torbert v. Montague, 38 Colo. 328, 87 Pac. 1146, holding presentment for payment and waiver of dishonor waived by acts of indorser.

49 Cal. 50–56, KREICHBAUM v. MELTON.

Cross-Complaint must State All Facts necessary to entitle defendant to affirmative relief.

Reaffirmed in Bacon v. Rice, 14 Idaho, 113, 93 Pac. 512.

49 Cal. 57–58, PEOPLE v. BEAVER.

Mere Possession of Property Recently Stolen is a circumstance to determine guilt but not sufficient to convict.

Approved in People v. Elster (Cal.), 3 Pac. 885, following rule.

Possession of Recently Stolen Property as evidence of burglary. See note, 12 L. R. A. (n. s.) 214.

49 Cal. 67–70, PEOPLE v. SOTO.

The Word "Cow" as Used in Penal Code concerning larceny includes a heifer.

Approved in Miller v. Territory, 9 Ariz. 125, 80 Pac. 322, holding "mare" includes "colt" in statute making stealing mare grand larceny; State v. Minnick, 54 Or. 92, 102 Pac. 607, holding in indictment for stealing heifers, allegation that taking was felonious charges simple larceny.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 810.

49 Cal. 74–76, VOLL v. BUTLER.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 384.

49 Cal. 76–87, ESTATE OF DELANEY.

When Power to Sell is Given to Executrix, it is in her representative capacity and is naked power not coupled with an interest.

Approved in Estate of Campbell, 149 Cal. 716, 717, 87 Pac. 574, 575, following rule.

When Will Devises Real Estate to Executor in trust for purposes mentioned in will with power to sell, sales made by him as executor need not be confirmed by probate court.

Approved in Blair v. Hazzard, 158 Cal. 724, 112 Pac. 299, upholding deed of trustee to whom real estate was devised with power to sell; Wisker v. Rische, 167 Mo. 532, 67 S. W. 220, upholding sale by executor under power in will.

Distinguished in Smith v. Olmstead (Cal.), 22 Pac. 1144, holding when will gave authority to sell, executor could not sell shares of children not mentioned in will; Horton v. Jack (Cal.), 37 Pac. 655, holding fact that property was bequeathed to same person named as executrix did not give her power of sale.

Effect of Spouse's Election to take against, upon rest of, will. See note, 27 L. R. A. (n. s.) 602.

49 Cal. 87–90, PASTENE v. ADAMS.

In Action to Recover Damages Caused by fall of lumber improperly piled, fact that it remained so piled for a long time until negligence of stranger caused it to fall is no defense.

Approved in Spear v. United Railroads, 16 Cal. App. 660, 661, 117 Pac. 967, "last chance doctrine" is inapplicable as between two defendants whose concurrent negligence caused injury; Jefferys v. Nebraska Bridge etc. Co., 157 Fed. 934, holding where plaintiff, a railroad timber inspector, was injured by breaking of rope of defendant while inspecting timber defendant had just loaded under contract with railway, there is presumption of negligence on part of defendant.

Effect of Concurring Negligence of Third Person upon defendant's liability. See note, 17 L. R. A. 37.

Recovery may be had Against Two Defendants whose concurring acts of negligence have caused wrongful injury.

Approved in Merrill v. Los Angeles Gas etc. Co., 158 Cal. 505, 506, 139 Am. St. Rep. 134, 111 Pac. 537, reaffirming rule; Cordiner v. Los Angeles Traction Co., 5 Cal. App. 407, 91 Pac. 439, allowing recovery against two railroads for injuries due to collision caused

by their concurring negligence; dissenting opinion in Leeds v. New York Telephone Co., 178 N. Y. 126, 70 N. E. 221, majority holding where plaintiff's injury resulted from fall of chimney caused by wire negligently strung being struck by derrick boom, only the operator of the boom is liable.

Negligence in Piling Lumber Which Caused Injury by its fall, although fall was caused by act of stranger, is proximate cause of injury.

Approved in Hensler v. Stix, 113 Mo. App. 179, 88 S. W. 113, holding movement of elevator upward as distinguished from negligence of operator in moving when plaintiff's clothing was caught in door not proximate cause of injury.

49 Cal. 94–101, MARTIN v. PARSONS.

Equity will Set Aside Judgment on Ground sheriff's return of summons was false.

Approved in dissenting opinion in Smoot v. Judd, 184 Mo. 611, 83 S. W. 518, majority holding sheriff's return of summons conclusive on attack on judgment.

Disapproved in Smoot v. Judd, 184 Mo. 577, 83 S. W. 504, holding sheriff's return of summons conclusive on attack on judgment.

Injunctions Against Judgments for want of jurisdiction or invalidity. See note, 31 L. R. A. 205.

Injunctions Against Judgments obtained by fraud, accident, mistake, surprise and duress. See note, 30 L. R. A. 791.

49 Cal. 101–102, HARTMAN v. OLVERA.

Conditions Imposed on Setting Aside Default must be complied with to make order effective.

Approved in State v. District Court, 42 Mont. 504, 113 Pac. 474, where payment of costs in five days was imposed as condition of opening default, held not condition precedent to taking effect of order when costs were unascertained.

49 Cal. 103–105, FRINK v. ALSIP.

Wife Living With Husband on Rented Land cannot claim premises by adverse possession so as to set limitations in motion.

Distinguished in Union Oil Co. v. Stewart, 158 Cal. 155, 110 Pac. 315, wife deserted by husband may acquire title by adverse possession against husband.

49 Cal. 105–108, CLARK v. GRIDLEY.

If Appeal is not Taken Within Sixty Days from entry of judgment, appellate court will not review evidence to determine whether it will support judgment.

Approved in In re Rose's Estate (Cal.), 20 Pac. 712, holding appeal from decree settling account of administrator taken within statutory time from entry of decree, but not within sixty days after decision and filing of findings, is not in time to present question of insufficiency of evidence.

Admissibility in Evidence of Books of Account. See notes, 138 Am. St. Rep. 460; 23 L. R. A. (n. s.) 609

49 Cal. 109–111, MOORE v. JACKSON.

Party Occupying House With Consent of owner and making repairs thereon under parol agreement with owner to pay therefor and

to purchase property gives mechanic's lien on house, although purchase is never effected.

Approved in Eaman v. Bashford, 4 Ariz. 203, 37 Pac. 26, applying rule to holder of mine.

Distinguished in Gates v. Fredericks, 5 Ariz. 347, 52 Pac. 1119, charge for erecting saloon fixtures ordered by lessee on leased premises is not lien on realty.

Power of Lessee or Vendee to Subject owner's interest to mechanics' liens. See note, 23 L. R. A. (n. s.) 609.

49 Cal. 111–116, IN RE ESTATE HALLECK.

Contingency of Claim as Affecting Limitation of time for presentation. See note, 58 L. R. A. 86.

49 Cal. 126–128, BATES v. GAGE.

Findings of Jury on Special Issues in equity case are merely advisory to court, but if adopted by it are findings of court.

Approved in Sweetser v. Dobbins (Cal.), 3 Pac. 117, following rule; Avery Mfg. Co. v. Crumb, 14 N. D. 63, 103 N. W. 411, jury trial not matter of right in equity case.

49 Cal. 128–130, HOGAN v. CENTRAL PACIFIC RY. CO.

Master is not Liable for Damages sustained by negligence of fellow-servant while engaged in same employment, unless he was negligent in selecting the fellow-servant.

Approved in Brown etc. v. Central Pac. R. Co. (Cal.), 12 Pac. 513, following rule.

Duty of Master With Respect to Employment of his servants. See note, 48 L. R. A. 370.

Liability of Master for Injuries to servant by incompetency of fellow-servant. See note, 25 L. R. A. 711.

What Servants Deemed to be in Common Employment, apart from statutes, where no questions as to vice-principalship arise. See note, 50 L. R. A. 439.

49 Cal. 131–136, BRAGG v. SHAIN.

Surety for Contractor is Discharged from liability when owner, during progress of work, pays contractor more than the stipulated proportion due in that time.

Approved in Lawhon v. Toors, 73 Ark. 476, 84 S. W. 637, and Eager v. Seeds, 21 Okl. 533, 96 Pac. 650, both following rule; Barrett-Hicks Co. v. Glas, 9 Cal. App. 497, 99 Pac. 864, holding surety on contractor's bond exonerated by changes in contract without his consent; Indiana etc. Ins. Co. v. Bender, 32 Ind. App. 296, 69 N. E. 694, sureties on agent's bond released by his failure to turn over collections as per contract, where employer knew funds were being misappropriated by him; Kirschbaum v. Blair, 98 Va. 45, 34 S. E. 898, sureties on bond of salesmen released by advances to salesmen before contract was to take effect, when bond conditioned that advances should be made for expenses when warranted by accepted sales.

Distinguished in Litchgi v. Gottlieb, 134 Mo. App. 241, 113 S. W. 1136, surety on contractor's bond not released because owner made payments before contractor abandoned work, when contract provided no time for payment.

Release of Surety on Building Contractor's Bond by making payments not authorized by contract. See note, 5 L. R. A. (n. s.) 419.

49 Cal. 139–141, STOCKTON ETC. R. R. CO. v. GALGIANI.

Value of Land at Time of Taking is fact to be determined in taking land for public use.

Approved in California Southern R. R. Co. v. Cotton Land etc. Co. (Cal.), 2 Pac. 40, holding value at time of trial is measure of compensation for taking land for public use.

Damages in Eminent Domain Cases as affected by loss of profits. See note, 51 L. R. A. 321.

49 Cal. 141–146, MAGEE v. KAST.

Indebitatus Assumpsit is Sufficient in action for goods sold.

Approved in Castagnino v. Balletta (Cal.), 21 Pac. 1098, holding assumpsit lies to recover balance due on special contract to erect building.

49 Cal. 149, HOLLOWAY v. GALLIAC.

When Party Dies After Submission of Cause in supreme court, and cause is decided after death, court will order remittitur returned and enter decision as of date of submission.

Reaffirmed in Goldsborough v. Hewitt, 26 Okl. 860, 110 Pac. 906.

49 Cal. 157–158, McQUILLAN v. DONAHUE.

Section 632, Code of Civil Procedure, providing decision on trial must be given in writing and filed in twenty days, and unless decision is filed in that time action must be tried again, is merely directory.

Approved in Hall v. Justice's Court, 5 Cal. App. 137, 89 Pac. 871, holding section 911, subdivision 4, and section 912, Code of Civil Procedure, requiring entries on justice's docket, directory only; Bruegger v. Cartier, 20 N. D. 78, 126 N. W. 493, applying rule under Revised Codes of 1905, section 7039.

49 Cal. 163–166, QUINN v. SMITH.

Motion for New Trial Denied When Only Specifications of error were that judgment was against law and contrary to evidence.

Reaffirmed in Caldwell v. Wells, 16 Idaho, 463, 101 Pac. 813.

49 Cal. 166–170, PEOPLE v. COTTA.

Judgment of Court on Challenge of Juror for actual bias will not be reviewed on appeal unless exception is taken to its ruling in admitting or rejecting evidence.

Approved in People v. Brown (Cal.), 13 Pac. 223, no exception lies to ruling denying challenge of juror for actual bias.

Declarations of Accomplice in Presence of Defendant are admissible, when there is evidence to prove them in conspiracy.

Approved in People v. Bunkers, 2 Cal. App. 207, 84 Pac. 369, holding accomplice may testify as to declarations made by defendant when there is other evidence to show their relations.

Admissibility of Evidence wrongfully obtained. See note, 136 Am. St. Rep. 150.

Admissibility in Criminal Case of Testimony as to facts learned while spying or eavesdropping. See note, 17 L. R. A. (n. s.) 451.

Homicide in Carrying Out Unlawful Conspiracy. See note, 68 L. R. A. 220.

49 Cal. 171–173, PEOPLE v. ESTRADA.

Statements Made in Presence of Defendant in regard to commission of crime are admissible as evidence only to extent they are admitted by person charged either by express assent or silence.

Approved in People v. Ayhens, 16 Cal. App. 623, 117 Pac. 791, reaffirming rule; People v. Wong Loung, 159 Cal. 531, 114 Pac. 834, remarks of officers upon arrest of defendant not admissible against accused, where he did not assent thereto; People v. Rollins, 14 Cal. App. 138, 111 Pac. 124, holding conduct of defendant upon reading letters to him admissible to prove admission against interest.

Distinguished in People v. Louie Foo, 112 Cal. 24, 44 Pac. 455, holding inadmissible declaration of third party in presence of defendant; People v. Long, 7 Cal. App. 32, 93 Pac. 390, holding inadmissible accusation by prosecuting witness to third party in presence of defendant, as not being implied admission by defendant.

Uncontradicted Statement in Presence of accused as confession. See note, 25 L. R. A. (n. s.) 544, 549.

49 Cal. 174–185, PEOPLE v. WELCH.

Only Ground for Challenge to Panel is that officer who summoned jurors was biased.

Approved in State v. Ju Nun, 53 Or. 5, 97 Pac. 98, holding challenge to panel abolished.

Mere Irregularity in Formation and impanelment of grand jury, other than such as are grounds of challenge is not ground for setting aside indictment.

Approved in People v. Hatch, 13 Cal. App. 526, 109 Pac. 1099, refusing to set aside indictment on ground that district attorney excluded three grand jurors from participation in proceedings resulting in finding of indictment.

Opinion as to Guilt or Innocence of Prisoner held not to disqualify juror in absence of malice or ill-will.

Reaffirmed in Johnson v. State, 1 Okl. Cr. 347, 97 Pac. 1069.

Verdict of Murder in First Degree With Silence in regard to penalty carries death penalty.

Approved in People v. McNulty (Cal.), 28 Pac. 816, and People v. French (Cal.), 7 Pac. 824, both following rule.

Jury may Decide in Murder Case whether penalty shall be death or imprisonment for life.

Approved in People v. Luis, 158 Cal. 194, 110 Pac. 584, reaffirming rule; Territory of Hawaii v. Marshall, 13 Haw. 78, 79, holding sections 304–306, Penal Laws, not unconstitutional because libel is divided into two degrees and jury allowed to determine degree.

49 Cal. 185–188, RENTON v. CONLEY.

Under Lien Act of 1867-68, Lienor can only recover from owner balance due contractor on contract if owner has made payments to contractor in good faith before receiving notice of lien.

Approved in Nason v. John, 1 Cal. App. 540, 82 Pac. 566, holding complaint against owner on mechanic's lien must allege money owing from owner to contractor, or premature payment or other facts giving lien against property of owner.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561, 564.

49 Cal. 193–197, WILCOXSON v. MILLER.

Person Claiming Right to Redeem from Sheriff's Sale as judgment creditor must produce for sheriff copy of docket of judgment; sheriff's deed is void without such production.

Distinguished in White v. Costigan (Cal.), 63 Pac. 1077, holding one paying redemption money to sheriff in attempt to redeem takes assignment, and may have his equitable title perfected by conveyance from owner.

Lien of Judgment is not Conveyance, and deed made before judgment but not recorded is valid if recorded before recordation of sheriff's deed.

Approved in Zenda Mining & Milling Co. v. Tiffin, 11 Cal. App. 66, 104 Pac. 12, holding judgment lien ineffective as against prior equitable title of third party, although naked legal title was in judgment debtor; Huff v. Sweetser, 8 Cal. App. 695, 697, 97 Pac. 708, holding judgment lien subject to all prior liens, legal or equitable; Campbell v. Keys, 130 Mich. 133, 89 N. W. 722, holding execution levied after recording mortgage does not relate back to attachment levied and give execution precedence over mortgage although levied in ignorance of it.

Priority of Liens of Judgment or of prior unrecorded conveyance. See note, 16 L. R. A. 668, 672.

49 Cal. 198–202, JOHNSTON v. BUSH.

Dedication of Land as Homestead does not affect its title.

Approved in Campbell v. Moran, 71 Nev. 619, 99 N. W. 500, holding husband living with wife on her land on which homestead has been declared is not freeholder.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 46, 70.

49 Cal. 202–208, CAMARILLO v. FENTON.

Tenant cannot Refuse to Surrender Possession to landlord unless shown lease was induced by fraud or false representation that landlord owned premises.

Approved in Stover v. Davis, 57 W. Va. 202, 49 S. E. 1025, holding tenant estopped to dispute landlord's title in unlawful detainer suit, having entered under recognition of such title.

When Plaintiff in Ejectment Parts With Title pending suit, action may be continued in his name, or grantee may be substituted.

Approved in Burns v. Kennedy, 49 Or. 591, 90 Pac. 1103, continuing action in name of original plaintiff.

Effect of Partial Eviction upon liability for rent. See note, 17 L. R. A. 275.

49 Cal. 213–218, CHANT v. REYNOLDS.

Landlord is not Bound by Judgment in Ejectment against tenant unless he had notice of action and opportunity to defend.

Approved in Lochner v. Garborina, 3 Ind. Ter. 669, 64 S. W. 571, landlord not bound by judgment in ejectment against lessee although witness at trial, when not aware his own land was affected by suit.

Effect of Judgment Against Tenant as res judicata. See note, 112 Am. St. Rep. 26, 27, 41.

Effect of Judgment in Ejectment against tenant upon landlord not a party, or vice versa. See note, 26 L. R. A. (n. s.) 597.

49 Cal. 224–225, FALK v. WATERMAN.

In Computing Damages in Action for Trespass plaintiff's attorney's fees cannot be included.

Approved in Spooner v. Cady (Cal.), 44 Pac. 1019, holding attorney's fees cannot be allowed as damages in action of conversion.

Expense of Litigation as Element, or as limit, of punitive or exemplary damages. See note, 4 L. R. A. (n. s.) 907.

49 Cal. 226–229, PEOPLE v. LIGHTNER.

Obtaining Time to Plead After Arraignment waives defects in details of arraignment.

Approved in State v. De Lea, 36 Mont. 534, 93 Pac. 815, following rule; People v. Weeks, 165 Mich. 366, 130 N. W. 699, presence of accused in court through trial of felony case on merits, represented by counsel who failed to call attention to omission of arraignment and plea, is waiver of right thereto.

49 Cal. 229–232, PEOPLE v. HAGAR.

Report of Board of Commissioners to Assess Tax on swamp land is not even prima facie evidence of regularity of their proceedings, but assessment may be collaterally attacked in action to recover tax.

Approved in Swamp Land Reclamation Dist. No. 407 v. Wilcox (Cal.), 14 Pac. 845, holding swamp land commissioners are not required to report compliance with section 3456, Political Code, but may be presumed to have performed official duty in making assessments.

49 Cal. 233–235, MILLER v. SHARP.

Reopening of Case for Further Evidence after submission is in discretion of trial court.

Approved in Hohn v. Pauly, 11 Cal. App. 733, 106 Pac. 269, following rule.

49 Cal. 236–239, SKYES v. LAWLOR.

Drivers of Vehicles are Bound to Exercise greatest care in passing along crowded thoroughfares to avoid injury to pedestrians.

Approved in King v. Green, 7 Cal. App. 476, 94 Pac. 778, holding driver of automobile liable for injury to pedestrian.

Parent may Recover Expense of Nursing and healing child of such age that services are of no value, from one who negligently injures it.

Approved in Adams Hotel Co. v. Cobb, 3 Ind. Ter. 59, 53 S. W. 481, allowing recovery for medical expense caused by sickness of wife and children due to nuisance caused by defendant.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 540.

49 Cal. 242–248, DANIELS v. HENDERSON.

Judgment That Party Holding Sheriff's Deed on foreclosure is not entitled to writ of assistance as against one not party to foreclosure

does not estop such party from proving he is entitled to possession in action brought by adverse party for rents while former held possession under writ.

Approved in dissenting opinion in Anderson v. Thompson, 3 Ariz. 69, 20 Pac. 805, majority upholding writ of assistance against purchaser from mortgagor pending suit, who had been made party to action.

49 Cal. 250–252, HABLER v. COLE.

When New Trial, Asked on Ground of Newly Discovered Evidence, is refused, appellant must clearly show abuse of discretion.

Approved in State v. Jones, 32 Mont. 455, 80 Pac. 1099, and In re Colbert's Estate, 31 Mont. 487, 107 Am. St. Rep. 439, 80 Pac. 251, both following rule.

49 Cal. 253–258, FLEMING v. WESTERN PACIFIC R. R. CO.

When Facts of Defendant's Negligence in Action for damages for wrongful injury are established by uncontested evidence, question of negligence is one of law only.

Approved in Brounton v. Southern Pac. Co., 2 Cal. App. 177, 83 Pac. 267, sustaining nonsuit when undisputed evidence showed no negligence of defendant; Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, holding when plaintiff was injured while lying sleeping upon railroad, he is guilty of such negligence as to preclude recovery; Shade v. Bay Counties Power Co., 152 Cal. 11, 16, 92 Pac. 62, 64, holding undisputed evidence showed contributory negligence of defendant in handling electric wires.

It is Duty of Person Driving Team and about to cross railroad to reduce speed and listen for approaching train.

Approved in Bilton v. Southern Pacific Co., 148 Cal. 449, 83 Pac. 443, following rule.

49 Cal. 266–269, GATES v. LANE.

Justice of Peace may Recall Execution on void judgment, even if docketed with county clerk and execution issued by clerk.

Disapproved in Carr v. Pennsylvania R. R. Co., 108 Mo. App. 391, 83 S. W. 982, justice of peace has no jurisdiction to quash execution.

Staying of Executions otherwise than by statutory proceedings. See note, 127 Am. St. Rep. 708.

Injunctions Against Judgments for want of jurisdiction or invalidity. See note, 31 L. R. A. 201, 209.

Equitable Jurisdiction in Regard to Injunctions against judgments. See note, 32 L. R. A. 328.

49 Cal. 269–272, MAHON v. SAN RAFAEL ETC. ROAD CO.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 573.

Injunction or Ejectment as Proper Remedy where highway illegally opened. See note, 25 L. R. A. (n. s.), 512, 513.

49 Cal. 285–288, HIMMELMANN v. CAHN.

Notice Inviting Proposals for Street Improvement in San Francisco must be posted five days, including first and last day.

Approved in Greenwood v. Hassett (Cal.), 61 Pac. 173, holding requirement that notice of intention to improve streets be posted two days at council chamber before being posted along line of street is satisfied where notice is posted on door of council chamber on the 6th and along street on the 8th.

49 Cal. 290–292, 19 Am. Rep. 645, WILBUR v. LYNDE.

Law Does not Permit One Who Acts in fiduciary capacity to deal with himself in his individual capacity.

Approved in Union Trust Co. v. Nevada etc. R. Co., 20 Fed. 86, discussing right of directors of corporation to audit and allow claims to themselves; Burnes v. Burnes, 137 Fed. 790, 70 C. C. A. 357, holding voidable transfer of stock from corporation to trustee for majority of its directors and others by controlling votes of that majority.

49 Cal. 293–294, NOONAN v. HOOD.

Where Judgment is Reported by Referee payable in gold coin and there is nothing in record to warrant it, appellate court will direct judgment to be modified, but without costs to appellant, if he failed to ask court below to make modification.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, modifying judgment on appeal without costs to either party when findings for plaintiff were not in harmony with complaint, in action to quiet title.

49 Cal. 294–297, FISCHER v. BERGSON.

Declaration of Grantor Made After Conveyance cannot be received in disparagement of his deed.

Approved in Bollinger v. Bollinger, 154 Cal. 705, 99 Pac. 200, following rule; Bedell v. Scoggins (Cal.), 40 Pac. 956, holding inadmissible declarations of decedent not against interest, relative to transaction with defendant, in action by her administrator; Bauers v. Boll, 46 Or. 66, 78 Pac. 759, holding declarations of deceased who had probably attempted to assert adverse user of easement inadmissible in action to restrain adverse user of water.

49 Cal. 301–302, CURTISS v. SPRAGUE.

When Defendant Sets Up Counterclaim barred by limitation, plaintiff is considered to have pleaded the statute by way of replication.

Approved in Tracy v. Wheeler, 15 N. D. 256, 107 N. W. 71, 6 L. R. A. (n. s.) 516, reaffirming rule; Peck v. Noee, 154 Cal. 354, 97 Pac. 866, where answer alleges exemption of stockholder's liability under foreign laws, plaintiff, without pleading same, may show affirmative matter in avoidance; Baker v. Baker, 9 Cal. App. 740, 100 Pac. 894, holding in action to quiet title when defendant pleaded in answer deed of plaintiff to him in escrow to be delivered on death of plaintiff, issue of such deed may be tried without replication by plaintiff.

49 Cal. 302–306, MITCHUM v. STANTON.

Elements of Damages Recoverable on replevin bond. See note, 30 L. R. A. (n. s.) 368.

49 Cal. 313–314, FREEBORN v. NORCROSS.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 42.

49 Cal. 314–323, FRINK v. LE ROY.

Mortgagor cannot Maintain Ejectment against mortgagee in possession until debt is paid.

Approved in Kelso v. Norton, 65 Kan. 790, 93 Am. St. Rep. 308, 70 Pac. 900, and Felino v. Newcomb Lumber Co., 64 Neb. 338, 97 Am. St. Rep. 646, 89 N. W. 756, both following rule.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 555.

49 Cal. 323–325, CUNNINGHAM v. SAN JOAQUIN COUNTY.

Sheriff or Constable is Entitled to Mileage, under statute of 1870, both for distance traveled in going to make arrest and for that traveled bringing prisoner from place of arrest to magistrate.

Approved in Monahan v. San Diego County (Cal.), 29 Pac. 417, following rule.

Distinguished in Yavapai County v. O'Neill, 3 Ariz. 381, 29 Pac. 434, officer not entitled to mileage both ways for removing prisoner.

Power of Officials to Act, as determined by place of performance. See note, 33 L. R. A. 92.

49 Cal. 336–339, PHELPS v. MAXWELL'S ETC. MIN. CO.

Claim of Mechanic's Lien must give name of owner or reputed owner.

Approved in Gordon Hardware Co. v. San Francisco etc. R. R. Co. (Cal.), 22 Pac. 407, holding void claim of lien giving names of several persons to whom materials were furnished without designation as to what was furnished each severally.

Power of Lessee or Vendee to Subject Owner's Interest to mechanics' liens. See note, 23 L. R. A. (n. s.) 618.

49 Cal. 342–346, PEOPLE v. BARRIC.

Confession Made upon Statement that it would be better for prisoner to make full disclosure is not admissible on trial as being voluntary.

Approved in State v. Jay, 116 Iowa, 266, 89 N. W. 1071, following rule; People v. Loper, 159 Cal. 17, 112 Pac. 724, rejecting confession as being involuntary though made several days after threats were made to induce it; People v. Luis, 158 Cal. 190, 110 Pac. 582, admitting extrajudicial confession to third person, when no officer was present, on advice it would be better to confess; People v. Siemsen, 153 Cal. 394, 95 Pac. 866, holding whether confession is free and voluntary is preliminary question addressed to trial court.

As to When Confession Voluntary. See note, 18 L. R. A. (n. s.) 850.

In Criminal Case, Corporate Existence may be shown by proof that company is de facto corporation.

Approved in Tollifson v. People, 49 Colo. 223, 112 Pac. 796, following rule.

Presumption as to Incorporation. See note, 22 L. R. A. 278.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 75.

49 Cal. 346–347, GALLARDO v. REED.

When Demurrer to Complaint is Sustained without leave to amend, the case is finally disposed of, and it is duty of clerk without directions to enter appropriate judgment.

Approved in Le Breton v. Stanley Contracting Co., 15 Cal. App. 434, 114 Pac. 1030, following rule; Litch v. Kerns, 8 Cal. App. 749, 97 Pac. 898, holding order sustaining demurrer to complaint not appealable, and cannot be reviewed unless judgment is entered thereon.

49 Cal. 347–350, CHRISTIAN COLLEGE v. HENDLEY.

When Subscription is Taken to Found College by finance committee, complaint by college corporation to collect subscription should allege that right of action passed by operation of law to plaintiff.

Approved in Los Angeles National Bank v. Vance, 9 Cal. App. 61, 98 Pac. 60, holding where mutual subscription is made to secure location of federal building, bank to which they were made payable is only party authorized to collect.

49 Cal. 354–355, McDONALD v. FETT.

Surety on Attachment Bond is not Liable as trespasser for seizure of property attached by sheriff.

Approved in Jordan v. Henderson, 39 Tex. Civ. App. 92, 86 S. W. 962, holding sureties not liable when attachment was levied after return day of writ without their advice or direction.

49 Cal. 356–358, CADIERQUE v. DURAN.

Parties, in Contest of Right to Purchase State Lands, who are applicants must state in pleadings all facts on which they rely as showing their right to purchase.

Approved in Moran v. Bonynge, 157 Cal. 297, 107 Pac. 314, following rule.

Distinguished in Dollenmayer v. Pryor, 150 Cal. 4, 87 Pac. 617, holding party seeking to contest right to purchase state lands must have right, title, or interest therein.

Party Who has Only Filed Application to Purchase state land has no right capable of transfer.

Approved in Polk v. Sleeper, 158 Cal. 634, 112 Pac. 180, right of such applicant not so vested that it could not be defeated by repeal of statute providing for sale of land.

49 Cal. 369–374, HAWES v. STEBBINS.

Conveyance Which Creates Estate in freehold to commence in future is void.

Overruled in Barry v. All Persons, 158 Cal. 436, 111 Pac. 250, and conveyance may be limited to take effect in future; Ripperdan v. Weldy, 149 Cal. 674, 87 Pac. 279, both holding estates may be granted to commence in futuro.

49 Cal. 374–382, BRONSON v. CARUTHERS.

Recital in Judgment That All Owners and claimants of property were served cannot be collaterally attacked.

Distinguished in White v. White, 66 W. Va. 82, 135 Am. St. Rep. 1013, 66 S. E. 4, holding judgment reciting appearance of defendants in general terms without naming them concluded only those actually served.

Production at Trial by His Attorneys of deed to plaintiff is prima facie evidence of delivery to him.

Approved in Tucker v. Helgren, 102 Minn. 385, 113 N. W. 913, holding such production prima facie evidence of signing by grantor and delivery to plaintiff.

Where Three Witnesses are Contradicted by only one, who is a party and whose testimony conflicts with his sworn answer, there is no such conflict of evidence as to justify finding in favor of party.

Approved in Village of Ilo v. Ramey, 18 Idaho, 648, 112 Pac. 128, opinion of one witness against positive statement of three held not to create conflict in testimony.

49 Cal. 384–386, PEOPLE v. JACOBS.

When Witness Does not Testify as Expected, Party calling him cannot prove that witness made statements to others, which, if testified to on trial, would have tended to make out his case.

Approved in Bollinger v. Bollinger, 154 Cal. 706, 99 Pac. 201, holding where witness for respondent, called to prove declaration of appellant, denied that he had heard such declarations, respondent cannot prove by other witnesses, over appellant's objection, independent statements of such witness as to what appellant had said; Estate of Dolbeer, 153 Cal. 661, 96 Pac. 270, holding where party is surprised by affirmative hostile testimony from his own witness, he may prove declarations of such witness of contrary tenor; Culpepper v. State, 4 Okl. Cr. 121, 111 Pac. 687, substantive fact cannot be proved by hearsay statement introduced under guise of impeaching witness.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 60, 62.

Right to Impeach One's Own Witness. See note, 21 L. R. A. 423, 428.

49 Cal. 388–392, PEOPLE v. SWENSON.

Failure to Demur to Indictment Waives Right to move for arrest of judgment on ground circumstances of offense are not sufficiently set forth.

Approved in Beard v. State, 79 Ark. 298, 95 S. W. 997, following rule; State v. Johnson, 17 N. D. 558, 118 N. W. 232, sufficiency of allegations of information construed less strictly when raised on motion in arrest of judgment than when raised by demurrer; Shivers v. Territory, 13 Okl. 475, 74 Pac. 902, objection that indictment was not properly found waived by failure to move to set aside before plea.

49 Cal. 392–394, NEEDHAM v. THRESHER.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 161.

49 Cal. 402–407, EX PARTE AH FOOK.

Section 70, Amendments of Political Code, makes it duty of commissioner of immigration to satisfy himself whether passengers from foreign country are within one of classes specified in section.

Approved in In re McCue, 7 Cal. App. 766, 96 Pac. 111, under subdivision 5, section 537, Penal Code, court has power to determine whether one charged as vagrant comes within class of lewd and dissolute persons.

Due Process of Law Means Such Exertion of powers of government as settled maxims of law permit and sanction, and under such

safeguards for protection of individual rights as those maxims prescribe for class of cases to which one in question belongs.

Approved in Reed v. Reed, 70 Neb. 784, 98 N. W. 76, holding requirement that husband pay alimony ordered as condition to further prosecution of his divorce action is not taking property without due process of law.

49 Cal. 407–413, PEOPLE ex rel. PARKINSON v. BISSELL.

Expiration of Term of Officer Appointed by Governor with consent of Senate does not create such vacancy as to authorize governor to appoint successor without consent of Senate.

Approved in State v. Hays, 91 Miss. 766, 45 So. 730, election of unqualified person to office allows incumbent to hold over and no vacancy exists; State v. Acton, 31 Mont. 39, 77 Pac. 300, tie vote for candidates did not create vacancy in office.

49 Cal. 413–414, HANCOCK v. BOWMAN.

Judgment is not Void Because Attorney's Name signed to complaint is printed.

Approved in Ardery v. Smith, 35 Ind. App. 97, 73 N. E. 841, upholding printed signature of attorney to remonstrance in behalf of voters against liquor license; Longhren v. Bonniwell, 125 Iowa, 521, 106 Am. St. Rep. 319, 101 N. W. 288, holding stencil signature of justice of peace to original notice sufficient.

49 Cal. 414–421, PEOPLE v. STOCKTON ETC. R. R. CO.

The "Tax List or Assessment-roll" which must be certified by the assessor is the only record of his final judgment as to value of property.

Approved in Allen v. McKay & Co. (Cal.), 70 Pac. 10, holding unsigned memorandum on blank form of assessor does not constitute assessment.

Statement of Property of Corporation furnished assessor by its agent is binding on corporation.

Approved in Inland Lumber etc. Co. v. Thompson, 11 Idaho, 514, 515, 114 Am. St. Rep. 274, 83 Pac. 934, 935, individual estopped to deny ownership of property included in list furnished assessor.

49 Cal. 421–425, LANE v. McELHANY.

Sheriff is Entitled to Allowance for expenses incurred in levying execution.

Approved in Alexander v. Wilson (Cal.), 79 Pac. 275, holding sheriff entitled to necessary expenses in keeping attached property until after judgment.

49 Cal. 433–435, EX PARTE WHITE.

Law Allowing Fugitives Escaping from another state to be arrested in this state and returned to state having jurisdiction of offense is valid.

Approved in Dennison v. Christian, 72 Neb. 707, 117 Am. St. Rep. 817, 101 N. W. 1046, upholding law requiring extradition of fugitives.

Extradition Proceedings. See note, 112 Am. St. Rep. 111, 124.

Right to Detain Fugitive to await extradition papers. See note, 26 L. R. A. 33.

Papers Necessary to Obtain Surrender of fugitives from another state. See note, 28 L. R. A. 802.

49 Cal. 435–437, EX PARTE CUBRETH.

Right to Detain Fugitive to await extradition papers. See note, 26 L. R. A. 33.

Papers Necessary to Obtain Surrender of fugitives from another state. See note, 28 L. R. A. 802.

49 Cal. 452–453, PEOPLE v. ALIBEZ.

Indictment Charging Defendant with murder of three persons charges three offenses.

Distinguished in Scott v. State, 46 Tex. Cr. 311, 81 S. W. 950, indictment charging assault to murder two persons not duplicitous.

49 Cal. 455, PEOPLE v. CLARK.

Notice of Appeal in Criminal Case must be filed and served on attorney of adverse party.

Approved in People v. Brown, 148 Cal. 744, 84 Pac. 205, and People v. Finerty, 8 Cal. App. 467, 97 Pac. 74, both dismissing appeal for failure to serve notice on respondent's attorney; People v. Swearinger (Cal.), 38 Pac. 973, dismissing appeal for failure of record to show service of notice of appeal required by section 1240, Penal Code; State v. Preston, 30 Nev. 305, 95 Pac. 919, holding notice that defendant "intends to appeal" is insufficient where statute requires notice that he "appeals."

49 Cal. 465–467, EX PARTE HARKER.

Legislature may Prescribe Rules of Procedure for courts, but cannot impair constitutional power of court.

Approved in Bacon v. Bacon, 150 Cal. 484, 89 Pac. 320, holding section 1666, Code of Civil Procedure, cannot devest superior court of its constitutional equity jurisdiction.

Writ of Ne Exeat. See note, 118 Am. St. Rep. 989.

49 Cal. 469–473, CORY v. HYDE.

Code of Civil Procedure, Section 1597, only empowers probate court to direct specific performance of contracts of intestate to convey land when such contract is in writing.

Approved in Wadleigh v. Phelps, 149 Cal. 644, 87 Pac. 100, following rule; Bullerdick v. Hermsmeyer, 32 Mont. 551, 81 Pac. 336, refusing to compel administrator to convey water rights under parol contract between decedent and wife.

49 Cal. 478–485, PEOPLE v. NALLY.

Legislature may Pass Law to Become Effective only in event a majority of a certain designated class of persons shall declare in favor of it.

Approved in Wheeler v. Herbert, 152 Cal. 234, 92 Pac. 357, holding valid act to change county boundary should qualified voters of over ninety days' residence in territory to be transferred vote therefor; In re Pfahler, 150 Cal. 90, 88 Pac. 278, 11 L. R. A. (n. s.) 1092, holding electors of duly organized subdivision of state may be authorized to directly participate in exercise of legislative power of such subdivision; Attorney General v. Springwells Tp. Board, 143 Mich. 531,

107 N. W. 90, upholding law to annex territory to city upon approval of majority of electors of district affected; State v. District Court, 30 Nev. 232, 94 Pac. 73, upholding statute conferring on district court authority to determine whether majority of qualified electors and taxpayers have signed application for incorporation as town.

Constitutionality of Local Option Laws. See note, 114 Am. St. Rep. 320.

49 Cal. 485–490, PEOPLE v. BELL.

Evidence of Good Character of Accused must be taken into account by jury for purpose of determining whether it creates reasonable doubt as to his guilt.

Approved in People v. Lee (Cal.), 8 Pac. 687, holding consideration of evidence of good character not confined to cases where guilt of accused is doubtful.

Evidence of Good Character to create doubt of guilt. See notes, 103 Am. St. Rep. 905; 20 L. R. A. 617.

Presumption and Burden of Proof as to sanity. See note, 36 L. R. A. 727, 728.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 739.

49 Cal. 490–496, ESTATE OF DURHAM.

Where Legal Title of Estate is Devised to executor, provisions requiring order of sale and confirmation do not apply.

Approved in Wisker v. Rische, 167 Mo. 532, 67 S. W. 220, upholding deed of executor, made without order of court, under power in will.

Distinguished in Smith v. Olmstead (Cal.), 22 Pac. 1144, holding power of sale in will does not authorize sale of interests of children not mentioned in will.

49 Cal. 497–506, McCAULEY v. HARVEY.

Grounds for Removal of Executors and administrators. See note, 138 Am. St. Rep. 528.

49 Cal. 510–511, GALLARDO v. ATLANTIC AND PACIFIC TEL. CO.

Affidavit That Affiant Left Copy of Notice at attorney's office does not prove service.

Approved in Peter v. Kalez, 11 Idaho, 560, 83 Pac. 528, proof of service of notice of motion for new trial on attorney's stenographer is insufficient where it is not shown attorney was absent from office at time of service.

49 Cal. 517–522, COLEMAN v. SAN RAFAEL TURNPIKE ROAD CO.

Actual Possession of Part of Land subject of action to quiet title with constructive possession of remainder is sufficient to maintain action.

Distinguished in Badger Gold Min. etc. Co. v. Stockton etc. Min. Co., 139 Fed. 840, holding surreptitious running of drift from one mining claim underneath surface of another does not constitute such possession of latter as will sustain suit in equity to quiet title against one in open adverse possession of surface and workings therefrom.

Bond Conditioned to Convey Land to be held in trust for stockholders of corporation and their successors with power of trustees of corporation to sell makes corporation real beneficiary.

Distinguished in Hossack v. Ottawa Develop. Assn., 244 Ill. 294, 91 N. E. 446, upholding trust deed giving corporation certain powers of advice as to syndicate fund.

49 Cal. 523–525, KELLY v. MACK.

Possession is Prima Facie Evidence of ownership.

Approved in Churchill v. More, 4 Cal. App. 224, 88 Pac. 292, holding possession of well casing by one oil corporation which succeeded to rights of another and continued its operations is prima facie proof of its title thereto.

In Motion for New Trial, Specification that cause of action set forth in complaint is not sustained by evidence is not sufficient.

Approved in Bernier v. Anderson, 8 Idaho, 684, 70 Pac. 1029, upholding specification designating particular fact in issue and alleging evidence insufficient to justify fact.

49 Cal. 525–540, UMBARGER v. CHABOYA.

Where Land Conveyed is Described as being bounded by land of adjacent owner, true boundary line must be taken and not line as understood to exist when deed was given.

Approved in Hall v. Davis, 122 Ga. 254, 50 S. E. 107, following rule; Bell v. Redd, 133 Ga. 8, 65 S. E. 92, determining boundary of lot.

49 Cal. 541–546, IN RE ESTATE OF WEBB.

Beneficial Trust is Presumed to have been accepted by beneficiary.

Approved in Lewis v. Curnutt, 130 Iowa, 437, 106 N. W. 920, following rule.

If Insured Writes to Father That Insurance is for his benefit but makes no assignment of policy, it is only an executory agreement to create trust in future, and is unenforceable.

Distinguished in Clifton v. Herrick, 16 Cal. App. 488, 117 Pac. 624, where title taken in daughter's name upon secret trust for mother to defraud creditor, daughter cannot quiet title as against sheriff's deed under execution sale against mother.

Sufficiency of Declaration to Establish Voluntary Trust where title retained by settler. See note, 12 L. R. A. (n. s.) 547, 553.

Assignment of Life Insurance Policies. See note, 87 Am. St. Rep. 492, 494.

49 Cal. 546–550, MATTER OF MARKET STREET.

Contractor has No Claim Against Lot Owners for street work done under abortive contract.

Approved in Citizens' Bank v. City of Spencer, 126 Iowa, 106, 101 N. W. 645, contract for city sewer which would raise assessment beyond legal limit held void and contractor held to have notice of limitation of city's power.

Miscellaneous.—Cited in Connolly v. San Francisco (Cal.), 33 Pac. 1111, referring historically to principal case.

49 Cal. 550–551, ESTATE OF WRIGHT.

Executor has No Such Interest in estate as to enable him to appeal from order of distribution.

Approved in Stewart v. Smith, 6 Cal. App. 158, 91 Pac. 669, holding executor not necessary party to action to enforce specific performance

of contract to dispose of property by will; Lamar v. Lamar, 118 Ga. 690, 45 S. E. 501, executor may appeal when order deprived him of his commissions.

Distinguished in Bruning v. Golden, 159 Ind. 208, 64 N. E. 660, special administrator may sue surviving partner for accounting.

49 Cal. 552–556, COVENY v. HALE.

Court in Finding Facts may Find Either ultimate facts or such probative facts as enables court to declare ultimate facts necessarily resulting therefrom.

Approved in dissenting opinion in Duane v. Neumann (Cal.), 2 Pac. 410, majority reversing for failure of trial court to find upon all material issues raised in pleadings.

What Special Verdict must Contain. See note, 24 L. R. A. (n. s.) 24, 26.

Specification, on Motion for New Trial, that judgment is contrary to evidence does not allow inquiry as to whether findings are justified by evidence.

Approved in Crooks v. Harmon, 29 Utah, 308, 81 Pac. 96, following rule.

49 Cal. 557–559, EX PARTE HURL.

City Ordinance Requiring License Payment every ninety days does not violate constitutional provision relating to equal taxation.

Approved in Los Angeles v. Los Angeles Indep. Gas Co., 152 Cal. 768, 93 Pac. 1007, holding license tax to carry on particular trade within city is not tax on property under article XIII, section 1, of Constitution.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 251.

Limit of Amount of License Fees. See note, 30 L. R. A. 418, 425, 432.

Amount of Liquor License Fee as characterizing statute of ordinance imposing it as prohibitory or regulative. See note, 14 L. R. A. (n. s.) 794.

Grading License Tax According to Volume of Business, or capital employed. See note, 17 L. R. A. (n. s.) 898.

49 Cal. 560–563, PEOPLE v. VASQUEZ.

No Exception is Allowed to Denial of challenge of juror for actual bias.

Approved in People v. Brown (Cal.), 13 Pac. 223, following rule.

When Evidence has Been Introduced Tending to Prove a matter, instruction by court to that effect is not an expression of court as to its opinion as to weight or effect of evidence, nor as to what fact has been proven.

Approved in People v. Elster (Cal.), 3 Pac. 888, holding it improper to give instruction that jury will be justified in finding defendant guilty if there were no evidence to warrant the inference.

Where Several are Associated for Commission of crime, each is responsible for acts of others which are natural or probable consequences of execution of design.

Approved in Conrad v. State, 75 Ohio St. 75, 78 N. E. 961, 6 L. R. A. (n. s.) 1154, and Andrews v. People, 33 Colo. 202, 108 Am. St. Rep.

76, 79 Pac. 1035, both upholding conviction for murder when committed by defendant's associate in perpetration of robbery; Rhea v. State, 63 Neb. 481, 88 N. W. 795, upholding conviction for murder in first degree committed while engaged in perpetration of robbery.

Unintentional Homicide in Commission of unlawful act. See note, 90 Am. St. Rep. 579.

Homicide in Carrying Out Unlawful Conspiracy. See note, 68 L. R. A. 198.

49 Cal. 563–566, FOX v. SAN MATEO COUNTY.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 63.

49 Cal. 577–580, PEOPLE v. CLEVELAND.

Admissions Made by Prisoner, tending strongly to connect him with larceny for which he is on trial, are sufficient corroboration of testimony of accomplice introduced by prosecution to sustain conviction.

Approved in People v. Spadoni, 11 Cal. App. 219, 104 Pac. 589, and People v. Bunkers, 2 Cal. App. 206, 84 Pac. 368, both following rule.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 171.

Where Instructions in Criminal Case are substantially correct, although some may not accurately state the law, and could not have misled the jury to prejudice of defendant, judgment will not be disturbed.

Approved in State v. Bond, 12 Idaho, 443, 86 Pac. 48, following rule; Hayden v. Consolidated Min. etc. Co., 3 Cal. App. 139, 84 Pac. 423, holding where instructions, though somewhat repugnant, when read together, could not have misled jury, verdict will not be disturbed; State v. Dodds, 54 W. Va. 296, 46 S. E. 231, upholding instructions in murder case.

49 Cal. 581–584, PEOPLE v. GETTY.

Possession of Property Recently Stolen linked with other facts and circumstances tending to implicate accused with commission of burglary may warrant jury in finding accused connected with the burglary.

Distinguished in People v. Elster (Cal.), 3 Pac. 885, holding it incumbent on prosecution to show falsity of defendant's statement as to how he came into possession of property recently stolen.

Possession of Stolen Property as evidence of guilt. See notes, 101 Am. St. Rep. 497, 506; 12 L. R. A. (n. s.) 210.

Discovery at Time of Opening Store in morning that it had been forcibly entered and property taken held to sustain finding of entry and taking at night.

Reaffirmed in State v. Richards, 29 Utah, 314, 81 Pac. 143.

49 Cal. 586–590, CLARK v. CLARK.

Oral Lease for Fixed Term may be Enforced when there is entry and payment of rent in advance.

Distinguished in Watkins v. Balch, 41 Wash. 313, 83 Pac. 322, 3 L. R. A. (n. s.) 852, one who enters under oral lease for period of years is tenant from period to period in which rent is reserved.

Possession Under Agreement for lease not executed. See note, 20 L. R. A. 38.

49 Cal. 590–595, HALETT v. PATRICK.

Failure of Duly Appointed Guardian of insane person to qualify does not deprive court of jurisdiction to appoint another without new notice.

Approved in In re Tilton, 15 Cal. App. 251, 114 Pac. 597, holding citation to insane person unnecessary to authorize court on removal of guardian to appoint another.

49 Cal. 596–597, WHITAKER v. HAYNES.

Act of February 9, 1866, Allowing Prevailing Party in certain actions tried in San Francisco to include five per cent on amount recovered in his judgment is valid and not repealed by codes.

Approved in Doyle v. Eschen, 5 Cal. App. 63, 89 Pac. 840, holding act not repealed by fee law of 1895.

49 Cal. 598–599, BAKER v. HOPE.

Court will Take Judicial Notice of fact that "fence pole" is a heavy club.

Approved in Hoagland v. Canfield, 160 Fed. 160, holding court will take judicial notice that gin and beer are intoxicants; Chicago etc. Ry. Co. v. Moore, 166 Fed. 667, 92 C. C. A. 357, holding in matters of ordinary observation and experience, jurors are not dependent on opinions of experts, even though they would be assisted by them.

Facts of Which Courts will take judicial notice. See note, 124 Am. St. Rep. 24.

49 Cal. 599–604, ESTATE OF COBB.

Probate Court cannot Hear Petition for probate of will without proof of service of notice upon the heirs.

Reaffirmed in Floto v. Floto, 213 Ill. 442, 72 N. E. 1094.

Questions of Construction of Instrument Testamentary in character cannot be raised for purpose of preventing probate.

Approved in In re Hobbins' Estate, 41 Mont. 50, 108 Pac. 9, following rule; Taylor v. Hinton, 23 Okl. 358, 100 Pac. 539, in proceeding to probate will only issue is factum of will, or question of devisavit vel non.

49 Cal. 607–610, WRIGHT v. CARPENTER.

View by Jury of Land in Question in ejectment is only for purpose of enabling them to apply evidence.

Approved in Zanesville Marietta etc. R. R. v. Bolen, 76 Ohio St. 392, 81 N. E. 686, 11 L. R. A. (n. s.) 1107, applying rule in condemnation proceeding.

View by Jury. See note, 42 L. R. A. 386.

Finding of Fact cannot be Predicated upon view of land by jury in case of ejectment to determine whether it is swamp or dry.

Overruled in Hatton v. Gregg, 4 Cal. App. 539, 88 Pac. 593, holding court which viewed land in question in action to quiet title could use view as evidence to determine formation of land.

49 Cal. 610–612, PEOPLE v. WEST.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 489, 490.

49 Cal. 612–618, TRISCONY v. ORR.

Pleadings, in All Matters of Doubt, are to be most strongly construed against pleader.

Approved in Fox v. Hale etc. Silver Min. Co. (Cal.), 53 Pac. 36, holding, in charging fraud, facts constituting fraud must be stated with sufficient distinctness to enable adverse party to come prepared with evidence on questions of fraud which will be raised.

Complaint Averring Property was Fraudulently and unlawfully taken avers mere conclusions of law.

Approved in State v. Hackley, Hume & Joyce, 124 La. 866, 50 So. 776, allegation in action to set aside sale of state land for fraud that defendants were holders in bad faith is mere conclusion of law.

49 Cal. 618–620, CLARK v. JONES.

Cotenants in Mines. See note, 91 Am. St. Rep. 872.

49 Cal. 620–623, MENTON v. ADAMS.

Sale of Property to One Creditor to Pay Him in full and balance to others is fraudulent as to other creditors.

Approved in Salemonson v. Thompson, 13 N. D. 198, 101 N. W. 325, holding void sale to debtor as in fraud of creditors although made for consideration.

Participation in Fraudulent Intent of Debtor which will invalidate transfer to pay or secure debt as to other creditors. See note, 31 L. R. A. 623.

49 Cal. 623–629, MEEK v. McCLURE.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 92.

Miscellaneous.—Cited in Decker v. Perry (Cal.), 35 Pac. 1019, denying recovery of alleged unlawful assessment where complaint does not show time for sale for nonpayment had run when plaintiff paid.

49 Cal. 629–632, PEOPLE v. SHEPARDSON.

Evidence of Previous Good Character of Accused is relevant to question of guilt or innocence and is to be considered by jury in connection with other facts of case.

Approved in dissenting opinion in United States v. Chung Sing, 4 Ariz. 222, 36 Pac. 207, majority holding in prosecution for selling whisky to Indians, defendant's good reputation in home community could not be shown.

Evidence of Good Character to create doubt of guilt. See note, 103 Am. St. Rep. 891.

49 Cal. 632–638, PEOPLE v. PARTON.

Confession Receivable in Evidence only after proof of being voluntary is restricted to acknowledgment of guilt, and cannot apply to facts tending to establish guilt.

Approved in State v. Force, 69 Neb. 172, 95 N. W. 45, reaffirming rule; Reid v. State, 168 Ala. 122, 53 So. 255, applying rule in bigamy; Shelton v. State, 144 Ala. 112, 42 So. 32, and Owens v. State, 120 Ga. 299, 48 S. E. 23, both holding admission of incidental facts not to warrant charge on confession; State v. Campbell, 73 Kan. 701, 85 Pac. 789, 9 L. R. A. (n. s.) 533, holding statements before grand jury as to facts of transaction not to be admission of guilt; State v. Moore,

36 Utah, 525, 105 Pac. 294, holding statement of fact of marriage made to sheriff to be admission of marriage only and not confession of adultery.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 771.

49 Cal. 638–642, LOS ANGELES v. LOS ANGELES CITY WATER-WORKS CO.

Exemption from Taxation or assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 328.

Taxation of Municipal Waterworks. See note, 60 L. R. A. 851.

49 Cal. 643–652, PEOPLE v. GEIGER.

Declaration of Co-conspirator, Where Conspiracy is proved, are admissible against one accused of conspiracy to commit crime.

Approved in People v. Bunkers, 2 Cal. App. 207, 84 Pac. 369, following rule.

When Party Charged With Crime Declines, upon being told of his right, to interpose challenge to panel of grand jury about to be formed, or to individual juror, he waives right to interpose challenge after being indicted.

Approved in Fooshee v. State, 3 Okl. Cr. 674, 108 Pac. 557, holding competency of grand juror could not be questioned after indictment was found.

49 Cal. 652–653, PEOPLE v. AH DAT.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 660; 56 L. R. A. 396.

49 Cal. 654–655, PEOPLE v. BOWEN.

In Trial for Rape, Evidence of Misconduct with other females is inadmissible.

Reaffirmed in State v. Williams, 36 Utah, 281, 103 Pac. 253.

49 Cal. 658–661, HOWE v. WHITE.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 97.

49 Cal. 665–669, SCHWALM v. HOLMES.

Validity of Contract Giving Exclusive Local Right to handle goods. See note, 9 L. R. A. (n. s.) 502.

49 Cal. 671–672, TAYLOR v. CLARK.

Before Parol Evidence of Contents of lost deed can be given, unsuccessful search for it in place where it was last known to have been must be shown.

Approved in State v. Denny, 17 N. D. 529, 117 N. W. 873, parol evidence of contents of letter held improperly admitted when foundation for admission was not laid.

49 Cal. 680–683, EX PARTE MARKS.

Discretion of Court to Admit Prisoner to bail, after conviction, is not arbitrary but should be measured by legal rules.

Approved in Ex parte Hatch, 15 Cal. App. 187, 114 Pac. 410, following rule; dissenting opinion in Bates v. Gregory (Cal.), 22 Pac.

687, majority holding mandamus did not lie to compel city of Sacramento to issue bonds as provided in act of March 22, 1864, in liquidation of bonds outlawed since that act.

49 Cal. 684–685, PEOPLE ex rel. BELLMER v. STATE BOARD OF EDUCATION.

State Board of Education cannot Change Text-books without giving six months' notice of proposed change.

Approved in McNees v. School Township of East River, 133 Iowa, 126, 110 N. W. 328, holding void adoption and purchase of text-books made by board of directors without notice.

Adoption of Text-books for Public Schools. See note, 36 L. R. A. 279.

49 Cal. 686, DOUGHERTY v. HENARIE.

When Counsel Fail to State All Points on which they rely in their briefs, such points reserved cannot be urged on petition for rehearing.

Approved in Buhman v. Nickels, 1 Cal. App. 371, 82 Pac. 87, Wundenberg v. Campbell, 9 Haw. 212, and Powell v. Nevada etc. Ry. Co., 26 Nev. 343, 82 Pac. 97, all following rule.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 50 CALIFORNIA.

50 Cal. 3–7, SKAGGS v. EMERSON.

Effect of Partial Eviction upon liability for rent. See note, 17 L. R. A. 275.

50 Cal. 7–9, McQUILKEN v. CENTRAL PACIFIC R. R. CO.

In Action for Injuries sustained by passenger through negligence of employees of railroad company, contributory negligence is matter of defense.

Approved in Nichols v. Baltimore etc. R. Co., 33 Ind. App. 241, 71 N. E. 172, no presumption of contributory negligence in case of person injured at railroad crossing.

Presumption of Due Care by Person found killed. See note, 16 L. R. A. 267.

50 Cal. 23–26, GALLAGHER v. MARS.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 237.

Creation of Trusts in Land by Parol. See notes, 115 Am. St. Rep. 779; 5 Cof. Prob. 249.

50 Cal. 26–30, SEMPLE v. COOK.

In Ejectment, Under General Denial, defendant may prove any facts showing that plaintiff had no right of entry or possession at time action was commenced.

Approved in Jacob v. Carter (Cal.), 36 Pac. 382, reaffirming rule.

A Judgment will not be Reversed on the findings alone, unless they show affirmatively that no such judgment could properly have been rendered.

Approved in Forsythe v. Los Angeles Ry. Co., 149 Cal. 575, 87 Pac. 27, reaffirming rule.

50 Cal. 31–38, MOODY v. PALMER.

Land Described in Deed as bounded by public highway or street will be considered as bounded by center thereof, unless a different intent clearly appears.

Approved in Drake v. Russian River Land Co., 10 Cal. App. 663, 103 Pac. 170, holding rule applicable to unnavigable stream; Wegge v. Madler, 129 Wis. 417, 116 Am. St. Rep. 953, 109 N. W. 226, holding that "northwest corner" of lot referred to intersection of south and east lines of streets, not to intersection of center lines of streets.

50 Cal. 38–39, **SIMMONS v. KELLER.**

Action may be Dismissed when plaintiff neglects to bring it to trial for more than two years after answer.

Approved in People's Home Savings Bank v. Sherman, 150 Cal. 795, 90 Pac. 134, action properly dismissed in view of three years' delay in pressing motion to transfer case to proper county and more than year in bringing case to trial.

50 Cal. 40–43, **ESTATE OF PAGE.**

Entry of Judgment Nunc Pro Tunc. See note, 20 L. R. A. 149.

50 Cal. 43–57, 19 Am. Rep. 647, **PRESTON v. HILL.**

Attorney, Merely by Virtue of his retainer, has no power to compromise action.

Approved in Fleishman v. Meyer, 46 Or. 275, 80 Pac. 213, holding compromise of claim by attorneys invalid where no action pending.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 165.

50 Cal. 57–60, **MARKS v. SAYWARD.**

Findings Outside of Issues will not be regarded.

Reaffirmed in Deaner v. O'Hara, 36 Colo. 478, 85 Pac. 1124.

50 Cal. 61–63, **KIEL v. REAY.**

Special Verdict must Cover all material issues.

Approved in Coburn Cattle Co. v. Small, 35 Mont. 293, 88 Pac. 955, reaffirming rule; Sonnesyn v. Akin, 14 N. D. 262, 104 N. W. 1031, special verdict silent as to amount of damages is insufficient; Ward v. Gradin, 15 N. D. 657, 109 N. W. 60, defect in special verdict cannot be supplied from evidence.

What Special Verdict must Contain. See note, 24 L. R. A. (n. s.) 17.

Miscellaneous.—Cited in Daneri v. Gazzola, 2 Cal. App. 354, 83 Pac. 457, to point that in order to maintain action, plaintiff must be legal owner of note with right to possession.

50 Cal. 64–68, **McLAUGHLIN v. POWELL.**

Where Plaintiff Relies on Patent, which excepts all mineral lands, defendant may prove that land in suit is mineral.

Approved in United Land Assn. v. Knight (Cal.), 23 Pac. 271, holding patent of private land claim invalid in so far as it included land not covered by decree of confirmation.

Patent to Railroad Which Excepts from the transfer "all mineral lands, should any be found to exist in the tracts described," does not convey lands which are mineral.

Reaffirmed in Van Ness v. Rooney, 160 Cal. 140, 141, 116 Pac. 395, 396.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 802.

50 Cal. 68–70, HIMMELMANN v. SATERLEE.

Where Board of Supervisors did not acquire jurisdiction to order work on sidewalks, contract is void unless such work can be separated from that done on roadway.

Approved in Haag v. Ward, 186 Mo. 349, 85 S. W. 397, where it is shown that unauthorized work enters into tax bill, burden shifts upon plaintiff to purge it of such illegal part.

50 Cal. 90–94, NORTH PACIFIC R. R. CO. v. REYNOLDS.

In Eminent Domain Proceeding damages resulting to remainder of land not taken are not special.

Approved in Yellowstone Park R. R. Co. v. Bridger Coal Co., 34 Mont. 557, 115 Am. St. Rep. 546, 87 Pac. 966, reaffirming rule.

50 Cal. 95–96, PEOPLE v. CURTIS.

In Trial for Perjury Committed before committing magistrate, prosecution may prove what accused swore to by parol evidence.

Approved in State v. Woolridge, 45 Or. 399, 78 Pac. 336, in trial for perjury in making deposition, parol evidence of testimony given is admissible.

Admissibility, on Trial for Murder, of Testimony of accused at coroner's inquest. See note, 70 L. R. A. 46.

50 Cal. 97–100, PERKINS v. GRIDLEY.

In Absence of Order Fixing Day for report of sale and notice thereof by clerk, probate court has no power to confirm sale.

Distinguished in Eaves v. Mullen, 25 Okl. 703, 107 Pac. 442, sale not open to collateral attack because notice of hearing given for less than statutory period.

50 Cal. 101–103, HOUGHTON v. LEE.

Money Derived from Insurance on homestead is not subject to garnishment by husband's creditor.

Approved in Langley v. Finnall, 2 Cal. App. 232, 83 Pac. 291, money due for insurance on exempt household goods and wearing apparel, lost by fire, is exempt.

50 Cal. 105–108, WINGATE v. FERRIS.

Court may Set Aside General Verdict in equity case and find facts itself.

Reaffirmed in Sweetser v. Dobbins (Cal.), 3 Pac. 117.

50 Cal. 112–115, BARRANTE v. GARRATT.

Findings of Ultimate Facts control findings of probative facts.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, finding of defendant's chain of title not necessarily inconsistent with plaintiff's ownership; Vasey v. Campbell, 4 Cal. App. 454, 88 Pac. 509, finding of ownership controls finding that articles were commonly used for unlawful purpose; Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, findings of ownership and right to possession are findings of ultimate facts.

Damages for Conversion may be Either Value of property with interest or highest value between conversion and verdict, without interest.

Approved in Lynch v. McGhan, 7 Cal. App. 134, 93 Pac. 1044, where interest is allowed, value of use cannot be recovered.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 29.

50 Cal. 115–116, KING v. MONTGOMERY.

Liability for Malicious Prosecution of Civil Action. See note, 93 Am. St. Rep. 473.

50 Cal. 129–132, BROWN v. KENTFIELD.

Right to Construct Log Booms. See note, 39 L. R. A. 493.

50 Cal. 132–137, JAMISON v. KING.

Inadequacy or Failure of Consideration are not in themselves sufficient to show that transfer by insolvent is fraudulent.

Distinguished in Wolters v. Rossi (Cal.), 57 Pac. 74, 75, transfer of property by insolvent to his wife, without consideration, is prima facie fraudulent.

If Averments are in the Alternative, complaint is ambiguous.

Approved in Estate of Goodspeed, 2 Cof. Prob. 151, pleading that charges conspiracy should give names of conspirators; Ilfeld v. Zeigler, 40 Colo. 407, 91 Pac. 827, answer fatally defective because facts stated hypothetically; Anderson v. Minneapolis St. P. & Ste. M. Ry. Co., 103 Minn. 229, 114 N. W. 1125, 14 L. R. A. (n. s.) 886, where complaint alleges in alternative two states of fact, one constituting cause of action and the other not, demurrer will lie.

50 Cal. 137–140, PEOPLE v. KEITH.

Evidence of Part of Conversation, standing alone, would be inadmissible.

Questioned in People v. Luis, 158 Cal. 194, 110 Pac. 583, admitting testimony of interpreters as to confession, though they could not remember everything that was said.

50 Cal. 145–153, WHITMORE v. SAN FRANCISCO SAVINGS UNION.

Power of Sale in Mortgage or Deed of Trust as conferring an interest preventing its revocation by death of mortgagor. See note, 70 L. R. A. 136.

50 Cal. 160–162, CALIFORNIA QUICKSILVER MINING CO. v. REDINGTON.

A Person Who has Been Ousted from possession of real property by writ of restitution and who seeks to be restored on ground that he was not party to action, must make out clear case.

Approved in Baum v. Roper, 1 Cal. App. 439, 82 Pac. 392, party who entered into possession pendente lite must show clearly that he did not do so in collusion with defendants.

50 Cal. 162–166, BROWN v. OLMSTED.

Express Agreement must be Shown to establish fact that bill of exchange was taken in payment of pre-existing debt.

Approved in dissenting opinion in Stuart v. Hauser, 9 Idaho, 79, 72 Pac. 728, majority holding liability on drafts discharged by compromise agreement.

50 Cal. 176–184, HENRY v. SOUTHERN PACIFIC R. R. CO.

Railroad is Liable for Fire negligently communicated by sparks from locomotive to land of third person, whereby crop on plaintiff's land was burned.

Approved in Butcher v. Vaca Valley & C. L. R. Co. (Cal.), 5 Pac. 360, where complaint alleged that fire was kindled on plaintiff's land, proof that it was kindled on land of another immaterial variance.

Liability of Setting Fires Which Spread to property of others. See note, 21 L. R. A. 260.

In Action for Damages caused by fire communicated by sparks from defendant's locomotive, evidence of prior and subsequent fires produced by same engine is admissible.

Approved in Butcher v. Vaca Valley etc. R. R. Co. (Cal.), 5 Pac. 361, reaffirming rule; Continental Ins. Co. v. Chicago & Northwestern Ry. Co., 97 Minn. 473, 107 N. W. 551, 5 L. R. A. (n. s.) 99, evidence of unusual emission of sparks, in addition to statutory presumption of negligence, sufficient to leave case with jury; Alabama etc. Ry. Co. v. Aetna Ins. Co. & Schlenker, 82 Miss. 783, 35 So. 306, admitting evidence of emission of sparks from other engines before and after passing of engines claimed to have caused fire.

Weather Conditions as Independent, intervening, efficient cause. See note, 20 L. R. A. (n. s.) 95.

50 Cal. 185–186, KENT v. WEST.

Contest on Merits After Special Appearance, as waiver of objections to jurisdiction over person. See note, 16 L. R. A. (n. s.) 178.

50 Cal. 190–195, HOPKINS v. WESTERN PACIFIC R. R. CO.

In Action for Placing Obstruction in front of plaintiff's residence, evidence that land would sell for less on account of such nuisance is inadmissible.

Approved in Coats v. Atchison etc. Ry. Co., 1 Cal. App. 444, 82 Pac. 642, abutting land owner deprived of access to property over street is entitled to damages for all detriment proximately so caused; Meek v. De Latour, 2 Cal. App. 265, 83 Pac. 302, plaintiff not entitled to depreciation in value of property caused by neighboring cream of tartar works.

50 Cal. 203–205, CAMPBELL v. ADAMS.

Judgment in Ejectment is not Void where party sued under fictitious name answers in true name and judgment is rendered against him under such name.

Approved in Haynes v. Backman (Cal.), 31 Pac. 746, where complaint names one corporation as defendant, judgment against another is not void when answer shows identity of two.

To Enter Judgment Against Defendant not named in complaint without amending, latter is ground for reversal.

Reaffirmed in San Francisco v. Burr (Cal.), 36 Pac. 771.

50 Cal. 206, HIBBING v. HYDE.

In Action for Malicious Prosecution, plaintiff must prove that prosecution terminated in acquittal.

Approved in Dowdall v. Carpy (Cal.), 61 Pac. 950, complaint for malicious prosecution alleging that judgment had been reversed and cause remanded for new trial, insufficient.

As to When Action Sufficiently at an End to support suit for malicious prosecution. See note, 2 L. R. A. (n. s.) 930.

50 Cal. 211-217, HESTRES v. BRENNAN.

Power of the Secretary of the Interior to review decisions of the commissioner of the general land office is supervisory rather than appellate.

Approved in dissenting opinion in Chicago, Ind. etc. R. Co. v. Railroad Com. of Ind., 38 Ind. App. 466, 78 N. E. 347, majority holding that appellate court has jurisdiction over appeal from order of railroad commission fixing rates.

50 Cal. 218-222, BURKE v. WELLS, FARGO & CO.

What Necessary to Earn Reward for Arrest. See note, 7 L. R. A. (n. s.) 216.

50 Cal. 222-233, TRENOR v. CENTRAL PACIFIC R. R. CO.

Decision upon Challenge of Juror for actual bias will be interfered with only in the clearest case.

Approved in Bemis v. Omaha, 81 Neb. 361, 116 N. W. 35, court may consider not only answers of juror but his appearance and general demeanor.

When Contract Made With Two Persons is sued upon by one, defendant cannot take advantage of misjoinder unless he pleads it.

Reaffirmed in Russ v. Tuttle, 158 Cal. 231, 110 Pac. 814.

Authority to Employ Medical Services for employee or other person. See note, 20 L. R. A. 697.

50 Cal. 233-235, PEOPLE v. AMANACUS.

Proof That Witness has Been Convicted of a felony justifies admission of evidence of his good character for truth, honesty and integrity.

Distinguished in Title Insurance etc. Co. v. Ingersoll, 153 Cal. 8, 94 Pac. 96, such evidence inadmissible where character of witness in no way impeached; First Nat. Bank of Bartlesville v. Blakeman, 19 Okl. 113, 91 Pac. 871, where testimony of defendant not impeached, evidence of his general reputation for veracity is inadmissible.

50 Cal. 242-243, TATE v. CITY OF SACRAMENTO.

Evidence Held Insufficient to show dedication as public street.

Approved in People v. Reed (Cal.), 20 Pac. 709, mere platting of street insufficient where owner fenced same prior to acceptance by city.

50 Cal. 244-247, DUNNE v. MASTICK.

Legislature has Power to Impose on debtors obligation of paying interest after passage of act on debts already due.

Approved in State v. Western Union Tel. Co., 111 Minn. 38, 126 N. W. 403, state may provide that taxes which have already become delinquent shall bear interest from time delinquency commenced.

50 Cal. 250-254, HUSSMAN v. WILKE.

If Defendant in Ejectment entered into possession by plaintiff's permission, he is estopped, while remaining in possession, from denying plaintiff's title.

Approved in Millett v. Lagomarsino (Cal.), 38 Pac. 309, rule applicable where plaintiff's grantor entered in 1873 under three years' lease and held until 1892, but gave no notice of adverse possession.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 93.

The Rule That Written Instruments cannot be contradicted by parol testimony is confined to controversies between the parties to such instruments or their privies.

Approved in Good & Co. v. Central Coal & Coke Co., 7 Ind. Ter. 283, 104 S. W. 619, reaffirming rule; Smith v. Goethe, 159 Cal. 632, 115 Pac. 225, but holding testimony insufficient to raise substantial conflict with recitals of writing; Greve v. Echo Oil Co., 8 Cal. App. 279, 96 Pac. 906, parol evidence admissible in action by assignee to show that his initials were incorrectly written by mistake in instruments of assignment; Central Coal & Coke Co. v. Good, 4 Ind. Ter. 79, 64 S. W. 679, but holding contract so clear and unambiguous that rejection of evidence contradicting its terms was harmless error; Good v. Central Coal etc. Co., 170 Fed. 422, 95 C. C. A. 586, parol evidence of meaning of contract between defendant and third person, admissible.

50 Cal. 254–257, CROOKS v. TULLY.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 802, 804.

50 Cal. 258–265, LAWRENCE v. BOLLOU.

Foreign Corporation With Managing Agent within this state may claim benefit of statute of limitations.

Approved in Colonial etc. Mortgage Co. v. Northwest Thresher Co., 14 N. D. 153, 116 Am. St. Rep. 612, 103 N. W. 917, 70 L. R. A. 814, reaffirming rule; Sidway v. Missouri Land & Livestock Co., 187 Mo. 673, 86 S. W. 156, such corporation is not nonresident within statute providing for suspension of limitations; Volivar v. Richmond Cedar Works, 152 N. C. 657, 68 S. E. 201, appointment of local agent by foreign corporation puts statute of limitations in force.

Distinguished in Black v. Vermont Marble Co., 1 Cal. App. 721, 82 Pac. 1061, under statute, corporation which has not designated agent upon whom process shall be served cannot claim benefit of statute of limitations.

Right of Foreign Corporation to plead statute of limitations. See note, 18 L. R. A. 524.

Who may Plead Statute of Limitations. See note, 104 Am. St. Rep. 749.

Jurisdiction Over Foreign Corporations. See note, 85 Am. St. Rep. 914.

50 Cal. 265–276, HOADLEY v. SAN FRANCISCO.

Where City Dedicates Public Squares on pueblo lands, the dedication is ratified by legislature and Congress relinquishes title of United States to city, act of Congress confirms dedication.

Approved in People v. Holladay (Cal.), 5 Pac. 799, but holding that there was no dedication for the act to feed.

If Land is Granted to a City in trust for the public use, private parties cannot acquire it by adverse possession.

Approved in People v. Kerber, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 879, holding rule applicable to tide lands constituting part of water-front in navigable bay; Kern Island etc. Co. v. Bakersfield, 151 Cal. 407, 90 Pac. 1053, user for eleven years of ditch unlawfully constructed in public highway creates no prescriptive right; Donahue v. Stockton Gas etc. Co., 6 Cal. App. 281, 92 Pac. 198, quaere, whether action to abate nuisance was barred by statute; Foley v. County Court of Doddridge, 54 W. Va. 28, 46 S. E. 252, title by adverse possession cannot be acquired of land owned by county and used as site for courthouse and other public buildings.

Distinguished in Packard v. Johnson (Cal.), 4 Pac. 638, state may dispose of swamp lands subject to legislation as to their reclamation.

Right to Acquire Title by Adverse Possession to lands devoted to public use. See note, 87 Am. St. Rep. 779.

If Squares in City are Dedicated to public use, use vests, not in city or inhabitants, but in public.

Distinguished in Merritt v. Barto, 158 Cal. 389, 111 Pac. 263, holding rule inapplicable where there had been no valid dedication.

Maxim, "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 177.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 453.

Miscellaneous.—Cited in Bowden v. San Francisco, 199 U. S. 601, 26 Sup. Ct. 748, 50 L. Ed. 328.

50 Cal. 282–284, PEOPLE ex rel. PACIFIC MAIL S. S. CO. v. SAN FRANCISCO.

Where Ships are Taxable. See note, 37 L. R. A. 520.

50 Cal. 284–285, SAN MATEO WATERWORKS v. SHARPSTEIN.

Order Permitting Plaintiff in Eminent Domain to enter into possession pendente lite, upon giving security for compensation and damage, cannot be made.

Distinguished in Portneuf Irr. Co. v. Budge, 16 Idaho, 122, 123, 100 Pac. 1048, plaintiff in eminent domain may enter into possession upon tendering amount of damage assessed by three commissioners appointed by court.

50 Cal. 289–293, FRANKLIN v. MERIDA.

If Court Renders Judgment during plaintiff's lifetime, the clerk may enter it after his death.

Approved in Hall v. Justice's Court, 5 Cal. App. 138, 89 Pac. 871, failure of justice of peace to enter default in proper time does not devest him of jurisdiction.

Entry of Judgment Nunc Pro Tunc. See note, 20 L. R. A. 144.

50 Cal. 298–299, LOS ANGELES v. SIGNORET.

Matters of Substance cannot be Incorporated in a complaint by reference to an exhibit.

Approved in Ahlers v. Smiley, 11 Cal. App. 346, 104 Pac. 998, reaffirming rule; Lucas v. Rea (Cal. App.), 101 Pac. 540, attaching notice of lien to complaint is not equivalent to allegation that recitals therein are true; Chesney v. Chesney, 33 Utah, 509, 94 Pac. 992, reference to deed and option agreement to reconvey, attached as exhibits, is insuffi-

cient to obviate necessity of alleging indebtedness; dissenting opinion in McNamara v. Hammerslag (Cal.), 2 Pac. 392, arguendo.

Distinguished in Santa Rosa Bank v. Paxton, 149 Cal. 199, 86 Pac. 194, an instrument upon which a cause of action is founded may be pleaded by attaching a copy thereof to complaint by proper reference.

50 Cal. 299–303, FORDE v. EXEMPT FIRE CO.

Action by Administrator to Recover Real Estate conveyed by decedent to defraud creditors may be commenced within three years after creditors recover judgment against estate.

Approved in Ziska v. Ziska, 20 Okl. 642, 95 Pac. 257, 23 L. R. A. (n. s.) 1, suit to set aside conveyance as fraudulent may be commenced within two years after recovery of judgment.

Relief from Fraudulent Conveyance after death of grantor. See note, 135 Am. St. Rep. 336.

50 Cal. 304–306, PEOPLE v. SIMPSON.

In a Criminal Case, When Evidence is circumstantial and conflicting, supreme court will not disturb verdict.

Approved in People v. Jones (Cal.), 8 Pac. 612, reaffirming rule.

If Tenant Commits Arson by burning landlord's house, it is sufficient to allege in indictment that landlord was owner of house.

Reaffirmed in State v. Gilligan, 23 R. I. 403, 50 Atl. 845.

Crime of Arson, and who may commit same. See note, 101 Am. St. Rep. 24.

Arson in Setting Fire to one's own building. See note, 32 L. R. A. 648.

50 Cal. 310–315, CHIPMAN v. HASTINGS.

Extent of Recovery in Ejectment by tenants in common against stranger. See note, 6 L. R. A. (n. s.) 713.

50 Cal. 315–317, LAIRD v. WATERFORD.

Right to Civil Action for Forcible entry and detainer. See note, 121 Am. St. Rep. 397.

50 Cal. 325–328, AGER v. DUNCAN.

Where Both Parties are in Pari Delicto, equity will not aid either party to illegal contract.

Approved in Carver v. San Joaquin Cigar Co., 16 Cal. App. 768, 118 Pac. 95, holding evidence that consideration of note was founded on attempt to defraud payee's creditors is incompetent, where not specially pleaded.

Distinguished in Colby v. Title Ins. & Trust Co., 160 Cal. 640, 117 Pac. 916, one induced through duress, menace, and undue influence to execute conveyances, consideration for which is compounding of felony, may sue for their cancellation.

50 Cal. 328–333, KING v. LAGRANGE.

Where Husband Devises Community Real Estate to wife and executor sells entire property, wife does not lose her right to undivided half therein even against bona fide purchaser.

Distinguished in In re Wickersham's Estate (Cal.), 70 Pac. 1079, under code, wife's interest in community property is adversely affected by sale thereof under power in her husband's will.

Widow's Election Between Will and Dower or community property. See note, 92 Am. St. Rep. 705.

The Essence of Either Election or ratification is that it is done with full knowledge of party's right.

Approved in Garrett v. Farwell Co., 199 Ill. 441, 65 N. E. 363, election of remedies made through fraud of defendant is not binding.

A Purpose to Attempt the Disposition by will of the wife's share in the community property is not to be readily inferred.

Approved in Estate of Vogt, 154 Cal. 510, 98 Pac. 266, but holding that such intention sufficiently appeared in case at bar.

50 Cal. 333–336, MAHON v. RICHARDSON.

Visible Monuments of Survey control description by subdivisions.

Approved in Kleven v. Gunderson, 95 Minn. 254, 104 N. W. 7, call for existing lake controls call for distance and inferential call for quantity.

Location of Boundaries. See note, 129 Am. St. Rep. 1011.

50 Cal. 337–339, 19 Am. Rep. 655, CHRISTY v. SULLIVAN.

Purchaser of County Warrants, void on their face, cannot recover price, in absence of fraud or misrepresentation.

Approved in O'Sullivan v. Griffith, 153 Cal. 506, 95 Pac. 875, holding rule applicable to conveyance of street railroad franchises.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 865.

50 Cal. 344–345, PATTERSON v. BOARD OF SUPERVISORS.

Granting or Continuing of Preliminary Injunction is often matter of discretion.

Approved in Flood v. Goldstein Co., 158 Cal. 249, 110 Pac. 917, preliminary injunction to restrain destruction of building held rightly dissolved where its continuance would benefit no one; Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 754, 115 Pac. 952, verified complaint alone, though stating ultimate and not evidentiary facts, will justify issuance of preliminary injunction.

50 Cal. 353–360, BAY VIEW ASSOCIATION v. WILLIAMS.

Minutes of Corporation Meetings are only prima facie evidence of corporate proceedings.

Approved in State v. Quertin, 106 Minn. 252, 130 Am. St. Rep. 610, 119 N. W. 45, parol evidence of what actually occurred is admissible.

50 Cal. 363–364, RAFFETTO v. FIORI.

An Action cannot be Maintained for a trespass committed on land, when the plaintiff is totally disseized and the defendant in adverse possession.

Approved in Flood v. Goldstein Co., 158 Cal. 250, 110 Pac. 917, preliminary injunction to restrain destruction of building held rightly dissolved where its continuance would benefit no one.

Distinguished in Dunker v. The Field & Tule Club, 6 Cal. App. 533, 92 Pac. 505, granting lessor of tule lands for hunting purposes injunction against persistent unlawful intrusion.

Necessity and Character of Title or possession to sustain action of trespass. See note, 30 L. R. A. (n. s.) 253.

50 Cal. 367–369, **HAM v. HENDERSON.**

An Administrator has a Special Property in personalty of estate which enables him to bring trover.

Approved in London, Paris & American Bank v. Aronstein, 117 Fed. 605, 54 C. C. A. 663, executor is entitled to have shares of stock belonging to decedent transferred to his own name as executor.

50 Cal. 376–383, **WADE v. DERAY.**

Partition Merely Severs the Unity of possession.

Approved in Manakur v. Moanauli, 8 Haw. 384, deed of partition does not estop one partitioner from claiming as heir of another.

Effect of Compulsory Partition. See note, 101 Am. St. Rep. 872.

Conclusiveness of Judgment in partition suit. See note, 124 Am. St. Rep. 714.

Effect of Deed in Partition, as distinguished from ordinary deeds. See note, 57 L. R. A. 333.

Where Deed Contains Repugnant descriptions, court will look into surrounding facts, and give effect to description which is most definite and certain and which will carry out evident intention of parties.

Approved in Shackelford v. Orris, 129 Ga. 794, 59 S. E. 774, allowing particular and definite description to control.

Repugnant Clauses in Deeds. See note, 111 Am. St. Rep. 777.

50 Cal. 383–385, **DEVILLE v. SOUTHERN PACIFIC R. R. CO.**

Act of Leaving Span of Horses unhitched in close proximity to railroad, at about time when train was due, is negligence.

Distinguished in Mitchell v. Union Terminal Ry. Co., 122 Iowa, 242, 97 N. W. 1114, driver loading wagon at curb not negligent in failing to keep constant lookout.

Negligence in Leaving Horse Unhitched in highway. See note, 10 L. R. A. (n. s.) 847.

50 Cal. 385–388, **SULZBERGER v. SULZBERGER.**

The Probate Court may Set Aside Property as a homestead for the family, though it has been specifically devised.

Approved in Estate of Green, 1 Cof. Prob. 453, reaffirming rule; Estate of Bump, 152 Cal. 278, 92 Pac. 644, husband cannot by will limit widow's right to family allowance; Estate of Kennedy, 157 Cal. 522, 108 Pac. 282, probate homestead and family allowance not subject to inheritance tax.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 38, 48.

Acceptance by Widow of Letters Testamentary and fact that she is residuary legatee do not show waiver of right to have homestead set apart from land disposed of by will.

Approved in Estate of Gray, 159 Cal. 160, 112 Pac. 890, will making bequest to husband and devising land to sister did not bar husband from taking both bequest and probate homestead in land.

Probate Homestead is to be Set Apart in pursuance of statute in force when order is made.

Approved in Estate of Hayes, 1 Cof. Prob. 554, reaffirming rule.

50 Cal. 388–411, 19 Am. Rep. 656, **PRYOR v. DOWNEY.**

The Jurisdiction of Probate Court to order sale of lands depends upon facts stated in petition of executor or administrator.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 217, 82 Pac. 620, where statute conferred authority to condemn lands for levee purposes upon state swamp land commissioners alone, petition filed by city for that purpose is ineffective.

Distinguished in Matter of Hughes, 159 Cal. 365, 113 Pac. 687, determination of superior court that petition for habeas corpus is sufficient is not reviewable on certiorari.

Cause for Which Decedent's Real Estate may be sold. See note, 79 Am. St. Rep. 86.

Legislature has No Power to Validate Judgment of probate court directing sale of realty, where court had no jurisdiction to render it.

Approved in Draper v. Clayton, 87 Neb. 449, 127 N. W. 372, holding void act purporting to validate proceedings had under void act.

Distinguished in McKennon v. State, 42 Tex. Cr. 373, 96 Am. St. Rep. 802, 60 S. W. 42, appeal validated by subsequent statute dispensing with necessity for notice of appeal.

50 Cal. 412–415, SHERWOOD v. MEADOW VALLEY MINING CO.

Title Acquired by Bona Fide Purchaser of stolen property. See note, 103 Am. St. Rep. 982.

50 Cal. 415–417, PEOPLE v. THRALL.

A Defendant cannot be Convicted on his extrajudicial statements or confessions alone.

Approved in People v. Frank, 2 Cal. App. 285, 83 Pac. 579, reaffirming rule; People v. Tomalty, 14 Cal. App. 236, 111 Pac. 518, but holding that under evidence in case refusal so to instruct was not prejudicial error; People v. Crill, 3 Cal. App. 516, 86 Pac. 614, but holding corpus delicti sufficiently proved.

Proof of Corpus Delicti. See note, 68 L. R. A. 56.

50 Cal. 417–420, WHITE v. SAN RAFAEL ETC. R. R. CO.

Where Contract to Build Railroad provides that contractor shall not deviate therefrom except on written order of engineer, contractor cannot recover for extra work done on verbal order of engineer.

Approved in Fullerton Lumber Co. v. Gates, 89 Mo. App. 207, reaffirming rule; Chicago Lumber etc. Co v. Garmer, 132 Iowa, 288, 109 N. W. 782, upholding provision of building contract that no alterations should be made in work except on written order of architect, stating amount to be paid; Bannon v. Jackson, 121 Tenn. 393, 130 Am. St. Rep. 778, 117 S. W. 507, owner not bound by oral order of architect for extra work, though architect made supervisor of building; Atlanta & Danville Ry. Co. v. Delaware Const. Co., 98 Va. 512, 37 S. E. 16, upholding stipulation in contract that compensation for extra work shall be agreed upon by engineer and contractors; Charleston Lumber Co. v. Friedman, 64 W. Va. 164, 61 S. E. 820, upholding provision in building contract that extension of time must be given in written certificate of architect.

50 Cal. 420–422, BLOOD v. FAIRBANKS.

Rule Which Prohibits Parties to an action on claim against an estate from being witnesses applies not only to parties having an adverse interest but to nominal parties.

Disapproved in Todd v. Martin (Cal.), 37 Pac. 874, administratrix defendant is competent witness for plaintiff.

50 Cal. 429–433, POWERS v. JACKSON.

Deed Which Refers to Plat in recorder's office for particular description incorporates such plat in its descriptive part.

Approved in Foss v. Johnstone, 158 Cal. 128, 110 Pac. 298, reference in patents to official plat and survey incorporates plat and field-notes of survey as part of description.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 678.

50 Cal. 433–435, MEREDITH v. SACRAMENTO COUNTY.

If an Office is Filled de Facto, mandamus does not lie to try the title to it.

Approved in City Council v. People, 19 Colo. App. 403, 75 Pac. 604, where, in election contest for office of alderman, council unseated contestee, who had received certificate of election, mandamus will not lie to compel council to restore him.

Distinguished in Potomac Oil Co. v. Dye, 10 Cal. App. 539, 102 Pac. 679, mandamus lies to compel officer of private corporation to deliver books and papers to his successor; Kline v. Kelvey, 57 W. Va. 30, 49 S. E. 896, mandamus lies against incumbent holding over to compel him to yield office to person appointed to succeed him.

50 Cal. 435–438, BERRY v. SAN FRANCISCO AND NORTH PACIFIC R. R. CO.

Recovery cannot be had for damage not directly resulting from trespass.

Approved in dissenting opinion in Desch v. Great Northern Ry. Co., 97 Minn. 508, 106 N. W. 957, 7 L. R. A. (n. s.) 93, majority allowing recovery for injury from fright and resulting illness.

Extent of Trespasser's Liability for consequential injuries. See note, 53 L. R. A. 631.

Liability of Owner for Trespass of Cattle. See note, 22 L. R. A. 64.

50 Cal. 438–441, POLHEMUS v. HEIMAN.

Verdict cannot be Impeached by affidavits of jurymen that they misunderstood its effect.

Approved in Ralton v. Sherwood Logging Co., 54 Wash. 257, 103 Pac. 30, rejecting affidavits of jurors that they disregarded court's instructions.

Distinguished in Wolfgram v. Schoepke, 123 Wis. 25, 100 N. W. 1056, admitting affidavits of jurors to show that answer was inserted in special verdict by mistake.

What Constitutes an Account Stated. See note, 27 L. R. A. 818.

Effect of Retaining Statement of Account to render it an account stated. See note, 29 L. R. A. (n. s.) 347.

50 Cal. 441–444, HATCH v. GALVIN.

Justice of Peace, by Transferring Case to court of another justice, devests himself of jurisdiction over case.

Approved in Chase v. Superior Court, 154 Cal. 793, 796, 99 Pac. 356, 358, applying rule to order of superior court transferring case to another county.

Distinguished in Presley v. Dean, 10 Idaho, 377, 79 Pac. 72, where defendant, granted change of venue conditioned upon payment of costs, refuses to pay same, it is duty of justice to try case.

50 Cal. 444–446, HIGGINS v. MAHONEY.

Miscellaneous.—Cited in Sheppard v. Sheppard, 15 Cal. App. 617, 115 Pac. 752, objection that bill of exceptions was not settled in time must be made in trial court.

50 Cal. 447–449, PEOPLE v. GRANICE.

The Consent of the Defendant cannot confer jurisdiction to try the defendant for any offense other than that charged in indictment.

Approved in Modern Loan Co. v. Police Court, 12 Cal. App. 585, 108 Pac. 58, sections 1408 and 1409, Penal Code, are void in so far as they authorize magistrate to determine ex parte title to property taken from third person.

Distinguished in People v. Noon, 1 Cal. App. 49, 81 Pac. 748, court does not lose jurisdiction to try defendant because page is accidentally lost from information.

50 Cal. 449–450, PEOPLE v. CLOONAN.

Corroboration of Accomplice need not be evidence tending to establish precise facts testified to by him.

Approved in People v. Garwood, 11 Cal. App. 667, 106 Pac. 114, holding testimony of accomplice sufficiently corroborated.

50 Cal. 450–454, HUDSON v. IRWIN.

If Deed Describes Land and then declares description is to be according to survey theretofore made, such survey is incorporated into deed.

Approved in Gudger v. White, 141 N. C. 517, 54 S. E. 390, deed held to have incorporated prior deed by reference.

50 Cal. 460–462, ROBINSON v. BLACK DIAMOND COAL CO.

Pollution of Stream by Mining. See note, 24 L. R. A. 64.

50 Cal. 462–465, GOLDSTEIN v. BLACK.

To Render One a Competent Witness to genuineness of signature, it is not enough that he has sometimes compared signatures to test their genuineness.

Distinguished in Norris v. Crandall (Cal.), 65 Pac. 571, opinion of lawyer as to value of lots admissible where he was engaged for more than twenty years as title examiner and attorney for leading loaning companies.

Competency of Expert Witnesses for comparison of handwriting. See note, 63 L. R. A. 938, 943.

Comparison of Handwriting. See note, 62 L. R. A. 836.

50 Cal. 465–468, REED v. YBARRA.

The Statute of Limitations begins to run on Mexican grant from issuance of patent and not from final approval of survey.

Approved in Adams v. Hopkins (Cal.), 69 Pac. 230, reaffirming rule.

50 Cal. 469–471, PEOPLE v. TURLEY.

It is not Error to Refuse to Instruct the jury as to manslaughter where the undisputed facts of the case do not warrant such an instruction.

Approved in People v. Elster (Cal.), 3 Pac. 888, instruction assuming that accused had failed to account for his possession of stolen property erroneous.

Insulting Words or Conduct as provocation to homicide. See note, 4 L. R. A. (n. s.) 154.

50 Cal. 478–480, **TOMPKINS v. CRANE.**

Declarations of Grantor, to be Admissible against grantee, must be in relation to property conveyed and made while declarant held title.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, semble, that general declarations of party that he had conveyed to his brother were inadmissible.

50 Cal. 480–482, **PEOPLE v. THOMPSON.**

Evidence Corroborative of Accomplice must do more than raise a suspicion of guilt.

Approved in People v. Larsen (Cal.), 34 Pac. 516, proof that defendant and accomplice had been seen together before robbery not sufficient corroboration; Cooper v. Territory, 19 Okl. 501, 91 Pac. 1034, reversing where corroborative evidence was "slight, uncertain and unsatisfactory."

Distinguished in People v. Spadoni, 11 Cal. App. 218, 104 Pac. 589, admissions of accused may be sufficient corroboration.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 165.

50 Cal. 485–492, **HARTMAN v. REED.**

If One Conveys Part of Mexican Grant in consideration of another's promise to prosecute claim before courts, the remedy for a breach of the agreement is an action for damages and not rescission.

Approved in Shaw v. Caldwell, 16 Cal. App. 6, 115 Pac. 943, agreement in bargain and sale deed of half interest in mine that grantee may work mine and that proceeds be divided, is not condition subsequent; Albert v. Albert, 12 Cal. App. 273, 107 Pac. 159, assignor in absolute assignment of certificate of purchase of state lands cannot rescind because assignee failed to perform oral agreement to pay note.

50 Cal. 496–498, **UTTENDORFFER v. SAEGERS.**

Necessity and Character of Title or possession to sustain action of trespass. See note, 30 L. R. A. (n. s.) 243, 265.

50 Cal. 505–506, **WILMINGTON CANAL ETC. CO. v. DOMINGUEZ.**

Construction and Operation of Canals. See note, 61 L. R. A. 848.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 73.

50 Cal. 506–507, **SAN FRANCISCO v. BRADER.**

Bail Bond is Obligation for direct payment of money.

Disapproved in Ancient Order of Hibernians v. Sparrow, 29 Mont. 135, 101 Am. St. Rep. 563, 74 Pac. 198, 64 L. R. A. 128, bond conditioned to be void if principal performed his contract is not contract for "direct payment" of money, authorizing attachment.

50 Cal. 508–509, **JONES v. SHAY.**

One Who Enters and Remains in Possession by permission of the owner is a tenant at will.

Approved in Hayden v. Collins, 1 Cal. App. 265, 81 Pac. 1123, where defendant entered under invalid agreement.

If Proof Does not Warrant Damages in action of forcible entry, the defendant should either move for a new trial on that ground or specify in his bill of exceptions in what particulars the evidence did not justify the decision.

Approved in Davis v. Lamb (Cal.), 35 Pac. 308, bill of exceptions must specify particulars in which evidence is claimed to be insufficient.

50 Cal. 511–520, HIBBERD v. SMITH.

Lien of Judgment Attached where judgment debtor executed deed before judgment docketed, which was not delivered until afterward.

Approved in Riverdale Mining Co. v. Wicks, 14 Cal. App. 536, 112 Pac. 900, lien did not attach to naked legal title of agent acquired simply for purpose of making sale.

Lien of Judgment in Foreclosure does not attach to real estate of defendant, other than that mortgaged, until after sale has been made and deficiency reported.

Approved in Howe v. Sears, 30 Utah, 349, 84 Pac. 1108, right of action on deficiency judgment accrued at date amount of deficiency was ascertained.

Execution not Issued in Name of people or directed to sheriff is amendable.

Approved in Kipp v. Burton, 29 Mont. 104, 101 Am. St. Rep. 544, 74 Pac. 88, 63 L. R. A. 325, writ of execution to which clerk has failed to affix seal of court is voidable only.

Docketing Judgments. See note, 87 Am. St. Rep. 669.

50 Cal. 522–523, HANCOCK v. WHITTEMORE.

Assessment for Street Improvement made after death of land owner is not claim against his estate which must be presented to administrator for allowance.

Approved in Miller & Lux v. Katz, 10 Cal. App. 578, 579, 580, 102 Pac. 947, claim for stockholder's liability need not be presented; Estate of Finch, 3 Cof. Prob. 297, claim for funeral expenses need not be presented.

50 Cal. 523–525, WATSON v. SAN FRANCISCO ETC. R. R. CO.

Supreme Court cannot Review evidence unless bill of exceptions specifies particulars in which it is alleged to be insufficient.

Approved in Davis v. Lamb (Cal.), 35 Pac. 308, reaffirming rule.

The Judgment must Conform to verdict where verdict is within issues.

Approved in McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 402, 84 Pac. 351, where judgment was against both defendants as joint tort-feasors, clerk had no right to enter judgment against one defendant alone.

Form of Judgment and Procedure in Case of liability to make payment in coin. See note, 29 L. R. A. 597.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 520.

50 Cal. 525–527, ANDERSON v. MAYERS.

Complaint and Amended Complaint held to be based upon same cause of action.

Approved in Malone v. Johnson (Cal.), 47 Pac. 580, holding that amended complaint did not attempt to state a different cause of action.

When a Complaint is Amended so as to state a new cause of action, the action is not commenced as to said new cause until the amended complaint is filed.

Approved in Brown v. Mann (Cal.), 9 Pac. 546, reaffirming rule; Perkins v. West Coast Lumber Co. (Cal.), 48 Pac. 983, where defendant's claim was not pleaded in original answer, limitations ran against it till set up in amended answer.

50 Cal. 528–530, SCHOEN v. HOUGHTON.

What Circumstances Sufficient to put purchaser of negotiable paper on inquiry. See note, 29 L. R. A. (n. s.) 379.

50 Cal. 532–533, THOMPSON v. SPENCER.

Where Town Authorities Grant Pueblo Lot and afterward execute deed, deed takes effect by relation as of date of grant.

Approved in Scott v. Stone (Scott v. Sloan), 72 Kan. 548, 84 Pac. 118, where deed and contract of sale deposited in escrow, deed, upon delivery, relates back to date of contract, so that grantee becomes entitled to rents accruing after that date; Krakow v. Wille, 125 Wis. 289, 103 N. W. 1123, where contract provides for delivery of deed after certain proportion of price has been paid, delivery of deed relates back to date of contract.

Effect of Quitclaim Deeds on after-acquired title. See note, 105 Am. St. Rep. 858.

50 Cal. 534–539, SAN BUENAVENTURA ETC. MFG. CO. v. VASSAULT.

A Notice of the Day, hour and place of the annual meeting of corporate stockholders must be given.

Approved in Canairo v. Serrao, 11 Haw. 28, directors had no power to change day of annual meeting as set forth in by-laws.

Distinguished in City of Benwood v. Wheeling Ry. Co., 53 W. Va. 471, 44 S. E. 274, notice of application to city council for franchise need not set forth day when application will be acted upon.

50 Cal. 539–543, MAWSON v. MAWSON.

Probate Homestead Vests in Surviving Wife if there are no minor children.

Approved in Estate of Hessler, 2 Cof. Prob. 359, reaffirming rule.

Setting Apart Homestead Vests Title in party to whom set apart.

Approved in Estate of Hayes, 1 Cof. Prob. 554, granting homestead to minor child after widow had died and other children had attained majority.

Probate Homestead Set Apart out of separate estate of deceased husband belongs to widow and minor children.

Disapproved in Estate of Leahy, 3 Cof. Prob. 369, pointing out that cited case has been overruled.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 59.

Miscellaneous.—Cited in Estate of Maxwell, 1 Cof. Prob. 128, and Estate of Tate, 1 Cof. Prob. 218, court must, upon proper application,

set apart homestead to widow, if none has been selected in lifetime of decedent.

50 Cal. 544–546, **ESTATE OF McCAULEY.**

Probate Court may Set Apart Homestead for use of widow when none has been selected during lifetime of husband.

Approved in Estate of Hessler, 2 Cof. Prob. 359, reaffirming rule; Estate of Maxwell, 1 Cof. Prob. 128, and Estate of Tate, 1 Cof. Prob. 218, court must, upon proper application, set apart homestead to widow, if none has been selected in lifetime of decedent.

50 Cal. 547–549, **MULL v. VAN TREES.**

An Outlawed Debt is Sufficient consideration for a note.

Approved in Hoover v. Wasson, 11 Cal. App. 595, 105 Pac. 948, outlawed note good consideration for conveyance.

50 Cal. 549–554, **CARPENTIER v. BRENHAM.**

No Relief can be Granted in equity, under the prayer for general relief, beyond what is authorized by the pleadings.

Approved in Oliver v. Blair (Cal.), 8 Pac. 613, and Cummings v. Cummings (Cal.), 17 Pac. 446, both reaffirming rule.

50 Cal. 556–558, **WRIGHT v. CARPENTER.**

View by Jury. See note, 42 L. R. A. 376, 386, 387.

50 Cal. 558–560, **HAWKINS v. HAWKINS.**

Where Two Persons Enter into a Contract which one of them reduces to writing, the other, who signs it without reading, cannot avoid liability though the contract differs from that orally agreed upon.

Approved in Raymond v. Glover (Cal.), 37 Pac. 775, vendee who signed mortgage payable to agent, under belief that it was payable to vendor, cannot escape liability where he had ample opportunity to examine it; Atchison etc. Ry. Co. v. Vanordstrand, 67 Kan. 392, 73 Pac. 115, one who signs release of claim for personal injuries not excused from reading it because he was "somewhat hurried," and cannot enforce parol agreement to furnish employment; Fritz v. Fritz, 94 Minn. 268, 102 N. W. 707, ignorance of English does not excuse failure to read contract; Johnston v. Covenant etc. Ins. Co., 93 Mo. App. 591, mere false representation to man able to read that writing embodies verbal understanding is not fraud.

Distinguished in Davis v. McGrew (Cal.), 8 Pac. 619, holding that complaint sufficiently charged conspiracy to defraud plaintiff by leasing him certain lands; Los Angeles etc. R. R. Co. v. New Liverpool Salt Co., 150 Cal. 25, 26, 87 Pac. 1030, mere failure of party to read instrument with sufficient attention to perceive error will not prevent its reformation; Bjorklund v. Seattle Electric Co., 35 Wash. 447, 77 Pac. 729, release of claim for personal injuries, obtained by fraud, is no defense.

Signing Contracts in Ignorance of their contents. See note, 138 Am. St. Rep. 813.

Ignorance or Carelessness as Affecting Right to equitable relief from contract by which one has been overreached. See note, 5 L. R. A. (n. s.) 800.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 884.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 599.

50 Cal. 574–578, FRONT STREET ETC. R. R. CO. v. BUTLER.

Recoupment of Damages may be allowed for failure to perform in time contract to build street railroad.

Approved in American Bridge Co. v. Camden Interstate Ry. Co., 135 Fed. 328, 68 C. C. A. 131, allowing recoupment for failure to build railroad bridges in time.

Payment of Money cannot be Made dependent on condition, which, by its terms, may not be performed until after date at which money is to be paid.

Distinguished in Walker v. Estate of Sawyer, 34 Ind. App. 243, 70 N. E. 541, holding payment to be condition precedent to receiving stipulated compensation.

Courts are Disinclined to Construe Stipulations in contract to do certain things within given time, in consideration of payment of money, as conditions precedent.

Approved in Kinney v. Federal Laundry Co., 75 N. J. L. 499, 68 Atl. 112, breach of promise to replace defective belting does not bar recovery of purchase price; Mitchell v. Rushing, 55 Tex. Civ. App. 287, 118 S. W. 585, covenant to convey part of unsold lots held independent of provision requiring reasonable diligence to sell all the lots; Crampton v. McLaughlin Realty Co., 51 Wash. 530, 99 Pac. 588, 21 L. R. A. (n. s.) 823, refusing to permit rescission for breach of covenant to grade in contract to convey land.

Distinguished in Garrison v. Cooke, 96 Tex. 232, 97 Am. St. Rep. 906, 72 S. W. 56, 61 L. R. A. 342, time of essence of contract to pay subscription for binding, equipping and operating railroad.

50 Cal. 585–589, BALDWIN v. MORGAN.

Judgment Against Person not Named in complaint will be reversed on appeal.

Approved in San Francisco v. Burr (Cal.), 36 Pac. 771, reversing where complaint was never amended by inserting true, in place of fictitious, names of defendants.

50 Cal. 589–591, GEORGE v. NORTH PACIFIC TRANSPORTATION CO.

Until Street Covered by Waters of Bay is filled in or planked, abutting land owner cannot recover for obstruction placed therein.

Distinguished in Cushing-Wetmore Co. v. Gray, 152 Cal. 123, 125 Am. St. Rep. 47, 92 Pac. 72, allowing recovery where sufficient width of street was open for use as roadway.

50 Cal. 592–595, SCHULTIE v. NORTH PACIFIC TRANSPORTATION CO.

Lease from Harbor Commissioners does not give right to obstruct street.

Approved in Coats v. Atchison etc. Ry. Co., 1 Cal. App. 443, 82 Pac. 641, railroad, though it may have license from municipal authorities, is liable for injuries to abutting land owner.

Obstruction in Street may be Abated as nuisance.

Approved in Bischof v. Merchants' Nat. Bank, 75 Neb. 843, 106 N. W. 998, 5 L. R. A. (n. s.) 486, easement of view from every part of public street pertains to abutting property.

50 Cal. 595–603, **CLARKE v. RANSOM.**

The Particular Form of an Instrument, intended to be testamentary, is immaterial.

Approved in Arendt v. Arendt, 80 Ark. 208, 96 S. W. 983, holding instrument in form of letter to be will; Webster etc. v. Lowe, 107 Ky. 297, 53 S. W. 1031, any paper, written and signed by testator, showing his intentions as to disposition of his property after his death, is a will; Clay v. Layton, 134 Mich. 342, 96 N. W. 467, parol evidence inadmissible to show that deed, unambiguous on its face, was intended as will; dissenting opinion in In re Noyes' Estate, 40 Mont. 244, 106 Pac. 350, majority holding letter to chief beneficiary under invalid will, simply narrating some of the provisions thereof, not to be testamentary.

As to What Constitutes a testamentary writing. See notes, 89 Am. St. Rep. 489, 490; 1 Cof. Prob. 434; 5 Cof. Prob. 11, 13.

Letter as Will. See note, 15 L. R. A. 636.

It is not Necessary That Second Will should state in terms that it is intended to alter former will.

Approved in Dougherty v. Holscheider, 40 Tex. Civ. App. 36, 88 S. W. 1115, will revoked by subsequent conditional holographic will, though latter failed because condition did not occur.

Revocation of Will by Subsequent Will, and revival of former by destruction of latter. See note, 37 L. R. A. 564.

What are Insane Delusions. See note, 37 L. R. A. 264.

50 Cal. 603–606, **SAN FRANCISCO v. SULLIVAN.**

A City may Maintain Ejectment to recover streets which it owns subject to right of user by public.

Approved in San Francisco v. Grote (Cal.), 47 Pac. 940, city cannot maintain ejectment to recover street dedicated by user, without showing ownership in fee.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 580.

50 Cal. 612–613, **BENJAMIN v. ELDRIDGE.**

Retrospective Operation of Statutes of Limitation. See note, 111 Am. St. Rep. 460.

50 Cal. 613–614, **WUNDERLIN v. CADOGAN.**

Deed Which Does not Contain Name of grantee is void.

Approved in Lund v. Thackery, 18 S. D. 117, 99 N. W. 857, agent not authorized by writing cannot insert name of grantee in deed already executed.

50 Cal. 615–616, **MILLER v. BRIGHAM.**

Allegation That Plaintiff is owner of chattels is sufficient.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, allegation that plaintiff is owner in fee is sufficient.

Where Plaintiff Alleges Title in Himself, allegation in answer that defendant is owner puts title in issue.

Approved in White v. Spreckels, 10 Cal. App. 294, 101 Pac. 923, and Byxbee v. Dewey (Cal.), 47 Pac. 53, both holding averment in answer contrary to allegation of complaint is equivalent to denial.

50 Cal. 616–618, VON SCHMIDT v. BOURN.

Sale by Special Administrator of stock pledged to decedent is not conversion by estate.

Approved in Reiter v. Rothschild (Cal.), 33 Pac. 851, claim need not be presented to executor for money held by testator as bailee.

50 Cal. 621–624, BRODER v. NATOMA ETC. MINING CO.

Right of Prior Appropriation of Water. See note, 30 L. R. A. 678.

50 Cal. 624–628, BYRNE v. JANSEN.

Mere Praise of Personal Property by owner does not amount to express warranty.

Approved in Brackett v. Martens, 4 Cal. App. 255, 87 Pac. 413, mere statement that trees were good trees, if taken care of, not warranty that they were merchantable.

50 Cal. 631–633, MERK v. GELZHAEUSER.

If Defendant in Action for slanderous words in which crime is imputed to plaintiff justifies on ground that they were true, he must prove plaintiff guilty of crime imputed to him, by testimony sufficient to convict him of crime in criminal trial.

Denied in Cooper v. Spring Valley Water Co., 16 Cal. App. 22, 116 Pac. 300, in action for damages for conversion of stock obtained by theft, plaintiff need not prove affirmative with same certainty that is required in criminal prosecution.

Degree of Proof Necessary in Defamation Suit to establish justification for charging criminal act. See note, 10 L. R. A. (n. s.) 1052.

50 Cal. 633–638, COOK v. NORMAN.

Liability of Community Property for Debts. See note, 19 L. R. A. 234.

50 Cal. 644–646, TRIPLETT v. MUNTER.

Before Officer can be Removed for charging illegal fees, court must find that such fees were knowingly, willfully or corruptly taken.

Approved in State v. Meek, 148 Iowa, 677, 127 N. W. 1025, 31 L. R. A. (n. s.) 566, conduct of county treasurer in receiving taxes without exacting penalty for delinquency held, under circumstances, not to be willful.

50 Cal. 650–651, HIMMELMANN v. FITZPATRICK.

Tender of Debt Secured by Mortgage, made after debt falls due, does not release mortgage.

Reaffirmed in Chielovich v. Krauss (Cal.), 9 Pac. 946.

Effect of Unaccepted Tender on Lien of mortgage or pledge. See note, 33 L. R. A. 232.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 51 CALIFORNIA.

51 Cal. 3–8, KEEMA v. DOHERTY.

Jurisdiction of Contest Over Right to purchase state lands depends upon order of reference.

Cited in Blakeley v. Kingsbury, 6 Cal. App. 710, 92 Pac. 131, arguendo.

51 Cal. 8–12, MAINA v. ELLIOTT.

Necessity of Immediate Payment on Tax Sale. See note, 33 L. R. A. 482.

51 Cal. 15–41, 21 Am. Rep. 677, PEOPLE v. LYNCH.

Legislature cannot Deprive City Council of all discretion in respect to local improvement.

Approved in Omnibus R. R. Co. v. Baldwin, 57 Cal. 177, special act purporting to grant street railway franchise in city, invalid; State v. Fox, 150 Ind. 132, 63 N. E. 21, 56 L. R. A. 893, holding void statute placing control of municipal fire departments in hands of appointees of governor; McDonald v. City of Louisville, 113 Ky. 437, 68 S. W. 415, act requiring city council to levy specified tax to create pension fund for fire department invalid; State v. Edwards, 42 Mont. 148, 111 Pac. 737, holding void statute authorizing board of city park commissioners to levy taxes; Ex parte Corliss, 16 N. D. 478, 114 N. W. 966, holding void law creating office of enforcement commissioner to perform functions of state's attorney in enforcing liquor law; Ex parte Anderson, 46 Tex. Cr. 381, 81 S. W. 976, city court has no jurisdiction to try one accused under state law.

Distinguished in dissenting opinion in Ex parte Corliss, 16 N. D. 529, 114 N. W. 988, majority holding void law creating office of enforcement commissioner to perform functions of state's attorney in enforcing liquor law; dissenting opinion in Ex parte Lewis, 45 Tex. Cr. 37, 108 Am. St. Rep. 929, 73 S. W. 823, majority holding void city charter providing for government by five commissioners, three to be appointed by governor.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 471, 473.

Surveys of Swamp Lands Made after act of 1866 by county surveyors at instance of applicants to purchase from state are mere private surveys.

Approved in Foss v. Johnstone, 158 Cal. 132, 110 Pac. 300, representation on official township plat of land as covered by waters of permanent pond is determination that it is not swamp land.

Where Lot of Land Within District declared to be benefited is not assessed and · ·ole expense is assessed against remaining lots, entire assessment is void.

Distinguished in Beck v. Holland, 29 Mont. 239, 74 Pac. 411, in absence of fraud or gross mistake, city council's determination as to what property is specially benefited is conclusive.

Legislature cannot Validate Assessment by municipal authorities void for want of uniformity and equality.

Distinguished in Whitlock v. Hawkins, 105 Va. 257, 53 S. E. 406, acts of assessors, appointed under invalid statute, could be confirmed by curative statute.

Assessments for Improvements by front-foot rule. See note, 28 L. R. A. (n. s.) 1130, 1138.

Miscellaneous.—Cited in Dowling v. Altschul (Cal.), 33 Pac. 496, decision of city council upholding assessment for paving cul-de-sac, which failed to assess land at end thereof, conclusive; Ex parte Cain, 20 Okl. 131, 1 Okl. 12, 93 Pac. 976, definitions of terms used in constitutions are, to a great extent, to be found in the common law.

51 Cal. 41–46, STANWAY v. RUBIO.

One Who has Received Certificate of location of school lands, and has paid for same may convey his interest by deed.

Distinguished in Polk v. Sleeper, 158 Cal. 634, 112 Pac. 181, one who has merely filed application to purchase state land has no right which descends to his heirs.

51 Cal. 52–55, HOWARD v. SAN FRANCISCO.

Municipal Corporation is not Liable for negligence of fireman.

Approved in Long v. Birmingham, 161 Ala. 432, 49 So. 882, city not liable for injuries to fireman caused by negligence in failing to provide safe equipment; dissenting opinion in Workman v. Mayor etc. of New York, 179 U. S. 576, 21 Sup. Ct. 212, 45 L. Ed. 326, majority holding city liable under maritime law for negligence of its servants in handling fire-boat.

Distinguished in Davoust v. City of Alameda, 149 Cal. 75, 84 Pac. 763, 5 L. R. A. (n. s.) 536, city is liable for negligent operation of its electric light plant.

Liability of Municipality for acts of firemen. See note, 15 L. R. A. 781.

As to What Municipal Corporations are Answerable for injuries due to defects in streets and other public places. See note, 108 Am. St. Rep. 168.

51 Cal. 55–64, MORRIS v. DE CELIS.

Adverse Possession of Land for statutory period vests occupant with absolute title.

Approved in Boe v. Arnold, 54 Or. 66, 102 Pac. 294, one who recognizes superior title of United States and seeks in good faith to

acquire that title may assert adverse possession against one claiming under prior grant.

Retrospective Operation of statutes of limitation. See note, 111 Am. St. Rep. 462.

51 Cal. 64–73, 21 Am. Rep. 697, NATIONAL GOLD BANK ETC. CO. v. McDONALD.

Where Customer of Bank Deposits Check drawn by another person on same bank, check may be returned if drawer has no funds.

Approved in Ocean Park Bank v. Rogers, 6 Cal. App. 680, 681, 683, 92 Pac. 879, 880, 881, reaffirming rule; Fanset v. Garden City State Bank, 24 S. D. 252, 123 N. W. 688, bank receiving for collection check drawn on bank in distant city is not liable for failure of its agent to remit proceeds.

Distinguished in Blake v. Hamilton Dime Savings Bank Co., 79 Ohio St. 195, 128 Am. St. Rep. 684, 87 N. E. 74, 20 L. R. A. (n. s.) 290, bank receiving deposit of certified check is bona fide holder.

Title of Bank to Money deposited with or collected by it. See notes, 86 Am. St. Rep. 783, 784; 7 L. R. A. (n. s.) 700.

Right of Bank to Recover Amount Paid on check or other paper, drawn upon or payable at it, under mistaken belief as to sufficiency of funds to meet it. See note, 23 L. R. A. (n. s.) 1093.

Entries in Bank-book as Contracts. See note, 24 L. R. A. 737.

51 Cal. 75–86, CHAMBERLIN v. VANCE.

False and Malicious Reiteration of libelous charges in answer may be considered in aggravation of damages.

Approved in Dauphiny v. Buhne, 153 Cal. 765, 126 Am. St. Rep. 136, 96 Pac. 883, reaffirming rule; Davis v. Hearst, 160 Cal. 181, 116 Pac. 547, fact that defendant in answer republishes libelous charge and at trial fails to prove its truth and did not in good faith expect to do so is only evidence of malice in fact to support punitive damages.

Where Counsel Makes Offer of Evidence, he must offer to prove all facts which, taken in connection with facts already proven, are necessary to render the offered evidence relevant.

Reaffirmed in Logan v. McMullen, 4 Cal. App. 158, 87 Pac. 286.

In Action for Slander, words substantially the same as those declared on, uttered by defendant after commencement of action, may be proved.

Approved in Paxton v. Woodward, 31 Mont. 212, 107 Am. St. Rep. 416, 78 Pac. 218, admitting statements of defendant, after institution of suit, that he would take away plaintiff's license as teacher; Bee Publishing Co. v. Shields, 68 Neb. 755, 94 N. W. 1031, in action for libel, similar statements made before and after one sued on are admissible to show malice.

Distinguished in Willard v. Norcross, 79 Vt. 548, 65 Atl. 756, in action against physician for malpractice, manifestations of ill-will toward plaintiff commencing five months later are inadmissible.

Justification in Slander and Libel. See note, 91 Am. St. Rep. 302.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 523.

Miscellaneous.—Cited in Lauder v. Jones, 13 N. D. 546, 101 N. W. 913, in action for slander, matters in justification or mitigation must be pleaded.

51 Cal. 101–108, BREUNER v. LIVERPOOL AND LONDON AND GLOBE INS. CO.

Finding may be One of Ultimate Fact, though placed among conclusions of law.

Reaffirmed in Dodson v. Crocker, 20 S. D. 313, 105 N. W. 929.

51 Cal. 108–110, MITCHELL v. HAGGENMEYER.

Legislature can Modify Rules of evidence at any time.

Approved in Frame v. Plumb, 138 Wis. 189, 118 N. W. 1001, witness may be rendered incompetent by statute passed after commencement of litigation.

51 Cal. 110–111, THOMPSON v. HANCOCK.

There is Nothing in Political Code which prohibits sale of sixteenth or thirty-sixth section to one who has contracted to convey to another a part of the land.

Approved in Bryan v. Graham, 5 Cal. App. 603, 91 Pac. 115, agreement to sell state lands uncovered by recession of lake, made after application and before issuance of certificate, is not forbidden.

51 Cal. 116–118, COLLIER v. STEINHART.

Liability of Master for Injuries to Servant by incompetency of fellow-servant. See note, 25 L. R. A. 715.

Duty of Master With Respect to Employment of his servants. See note, 48 L. R. A. 371.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 561, 567.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 43.

Miscellaneous.—Cited in Hardesty v. Largey Lumber Co., 34 Mont. 163, 86 Pac. 33, allowing recovery for injuries to servant from falling of improperly piled lumber.

51 Cal. 120–125, PEARSON v. PEARSON.

A Marriage, Valid by Law of the Place where it was contracted, is valid in the state, though it would have been invalid if contracted here.

Approved in Estate of Campbell, 12 Cal. App. 722, 108 Pac. 675, but holding slave marriage invalid under laws of Missouri.

Law Governing Validity of Marriage. See note, 57 L. R. A. 168.

Distinguished in Estate of Mackay, 3 Cof. Prob. 323, marriage, invalid under laws of this state, claimed to have been contracted elsewhere, must be proved by preponderance of evidence.

51 Cal. 125–128, O'FARREL v. HARNEY.

If There is Discrepancy Between Map and survey of town, survey must prevail.

Distinguished in Carlyle v. Sloan, 44 Or. 367, 75 Pac. 221, one buying city lot shown on plat to border on ocean is not bound by survey indicating otherwise.

51 Cal. 128–133, CUNNINGHAM v. CROWLEY.

If Certificate of Purchase of State Lands is improperly issued, subsequent applicant may raise contest in register's office as to right to purchase land.

Distinguished in Dollenmayer v. Pryor, 150 Cal. 4, 87 Pac. 617, one who claims no interest in land cannot, by mere protest, contest right of one holding certificate of purchase from state.

51 Cal. 138–140, HIDDEN v. DAVISSON.

In Taking Land for Public Highway, holder of legal title is the only necessary party.

Approved in Birmingham etc. R. R. Co. v. Louisville etc. R. R. Co., 152 Ala. 430, 44 So. 681, reaffirming rule; Hawaiian Commercial etc. Co. v. Wailuku Sugar Co., 11 Haw. 763, alleged equitable owner cannot restrain condemnation proceedings against holder of legal title on ground that latter will not properly protect interests of equitable claimant.

51 Cal. 140–142, GANEA v. SOUTHERN PACIFIC R. R. CO.

Fact That Plaintiff was Held to answer for offense is prima facie evidence of probable cause.

Approved in Johnson v. Southern Pacific Co., 157 Cal. 339, 107 Pac. 613, and Schultz v. Greenwood Cemetery, 190 N. Y. 281, 83 N. E. 43, both reaffirming rule; Holliday v. Holliday (Cal.), 53 Pac. 44, order requiring plaintiff to give undertaking to keep the peace is conclusive evidence of probable cause.

Acquittal or Discharge on Criminal Charge as evidence of want of probable cause. See note, 64 L. R. A. 488.

51 Cal. 142–145, MEYER v. METZLER.

Brick Wall That Projects Over Adjoining Lot so as to prevent raising of building is nuisance.

Approved in Huber v. Stark, 124 Wis. 362, 109 Am. St. Rep. 937, 102 N. W. 14, granting injunction against permitting water to flow from roof upon adjacent premises.

51 Cal. 145–146, FLAHERTY v. KELLY.

One District Court has No Jurisdiction to enjoin judgment rendered in another district court.

Approved in In re Burton, 5 Cof. Prob. 237, refusing to review orders in probate of superior court of another county.

51 Cal. 146–151, McCREA v. HARASZTHY.

Order Directing Publication of Notice of probate need not direct how often notice shall be published, if it requires the publication to be according to the statute.

Distinguished in Estate of McLaughlin, 1 Cof. Prob. 82, semble, that notice of probate in daily paper should be published as often as the paper is issued.

Ejectment by Executor or Administrator. See note, 136 Am. St. Rep. 82.

51 Cal. 151–153, MONDRAN v. GOUX.

Plaintiff must Recover, if at All, on cause of action set out in his complaint.

Approved in Eidinger v. Sigwart, 13 Cal. App. 674, 110 Pac. 524, where complaint is based upon quantum meruit, recovery cannot be had upon express contract.

51 Cal. 153–155, DUBBERS v. GOUX.

Court cannot Permit Person to be substituted as plaintiff on the ground that the person substituted was the real party in interest at the commencement of the action.

Approved in Willamette Tent etc. Co. v. West Coast Grocery Co., 2 Alaska, 6, reaffirming rule.

Distinguished in Merced Bank v. Price, 9 Cal. App. 189, 98 Pac. 389, where plaintiff and its pledgee were both interested in cause of action, on plaintiff's assigning to pledgee, latter was entitled to be substituted as plaintiff.

Disapproved in Franklin v. Conrad-Stanford Co., 137 Fed. 743, 70 C. C. A. 171, real party in interest may be substituted as plaintiff; Hackett v. Van Frank, 119 Mo. App. 657, 96 S. W. 250, where suit commenced in names of owners of all corporate stock, amendment substituting corporation as plaintiff should have been permitted.

Miscellaneous.—Cited in Sears v. Dunbar, 50 Or. 39, 91 Pac. 146, dismissing appeal from order substituting party plaintiff.

51 Cal. 158–164, HOLLINSHEAD v. SIMMS.

One Who Fraudulently Obtains Title to public land in which another has pre-emption right holds in trust for latter.

Approved in Pollard v. McKenney, 69 Neb. 749, 96 N. W. 681, wife who obtains conveyance of property from husband on promise to make certain disposition thereof among heirs will be held as constructive trustee; Tonopah & Goldfield R. R. Co. v. Fellanbaum, 32 Nev. 295, 107 Pac. 887, prior occupants entitled to relief against patent for lands in lieu of lands relinquished within forest reserve.

51 Cal. 166–169, GOODWIN v. NICKERSON.

Note will be Read in Connection with contract referring to it.

Approved in Myrick v. Purcell, 95 Minn. 134, 103 N. W. 903, payee has no right to sell notes in violation of contemporaneous written agreement.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 469, 474.

51 Cal. 175–178, HILL v. HASKIN.

Though a Material Fact is Stated only inferentially, the pleading is good after judgment.

Approved in Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 311, 90 Pac. 207, allegation of ownership of note and mortgage implies valid assignment thereof to plaintiff; Dillon v. Cross, 5 Cal. App. 768, 91 Pac. 440, that defendant agreed to keep money for plaintiff inferentially pleaded; Nevin v. Gary, 12 Cal. App. 5, 106 Pac. 423, reliance upon false representations inferentially alleged.

51 Cal. 180–181, BONNER v. QUACKENBUSH.

Court will not Review Evidence if there is no specification in the bill of exceptions of the particulars in which the evidence is alleged to be insufficient.

Approved in Davis v. Lamb (Cal.), 35 Pac. 308, reaffirming rule.

51 Cal. 181–184, KING v. CONNOLLY.

Notice to Quit When Holding is by tenancy at will. See note, 120 Am. St. Rep. 43.

51 Cal. 184–186, **CURRY v. ROUNDTREE.**

Where Three Defendants are Jointly Sued as partners, the court should not enter judgment against two of them only.

Distinguished in Cole v. Roebling Construction Co., 156 Cal. 450, 105 Pac. 258, court may render several judgment by default against one joint tort-feasor, and allow action to proceed against other.

51 Cal. 191–193, **TYLER v. HEALEY.**

Where Witness has Been Once Examined, it is within discretion of court to allow him to be recalled by same party for further examination.

Approved in Bevine v. Modern Nat. Reserve, 42 Mont. 334, 111 Pac. 1033, it is within discretion of court to permit plaintiff to reopen case after motion for nonsuit.

51 Cal. 194–197, **SWERY v. CENTRAL PACIFIC R. R. CO.**

In Action by Abutting Land Owner for obstructing street, evidence of market value of land is inadmissible.

Approved in Coats v. Atchison etc. Ry. Co., 1 Cal. App. 444, 82 Pac. 642, measure of damages in such case is compensation for all detriment proximately caused; Meek v. De Latour, 2 Cal. App. 265, 83 Pac. 302, such evidence inadmissible in action to abate nuisance, such as cream of tartar works, and for damages.

If Conveyance of City Lots bounds them on street, title to street itself does not pass.

Approved in Betcher v. Chicago etc. Ry. Co., 110 Minn. 236, 124 N. W. 1099, reaffirming rule.

Miscellaneous.—Cited in Coats v. Atchison etc. Ry. Co., 1 Cal. App. 443, 82 Pac. 641, permission of city to use street for railroad purposes does not affect question of damages to abutting land owner.

51 Cal. 198–202, **SPECT v. GREGG.**

Where Both Parties in Ejectment claim title from same person, conveyance from former owner to that person need not be proved.

Approved in Horswill v. Farnham, 16 S. D. 416, 92 N. W. 1083, reaffirming rule; Dondero v. O'Hara, 3 Cal. App. 640, 86 Pac. 988, where both parties claimed possession from common source, one showing prior possession had better title.

51 Cal. 205–210, **REYNOLDS v. HOSMER.**

Right of Prior Appropiation of Water. See note, 30 L. R. A. 673.

51 Cal. 210–212, **McDONALD v. MOUNTAIN VIEW HOMESTEAD ASSOCIATION.**

If Complaint Avers Making of Contract for sale of real estate, it is not necessary to allege that it was in writing.

Approved in Levy v. Ryland, 32 Nev. 469, 470, 109 Pac. 908, where complaint is silent as to whether contract was oral or written, defense of statute of frauds cannot be raised by demurrer.

51 Cal. 222–223, **PONCE v. McELVY.**

Complaint, Superseded by Amendment, is inadmissible in evidence against plaintiff.

Distinguished in Pollitz v. Wickersham, 150 Cal. 248, 88 Pac. 915, admissions in claim against estate of decedent, presented prior to one sued upon, admissible.

Disapproved in Lane v. Choctaw etc. R. R. Co., 19 Okl. 328, 91 Pac. 884, admission contained in superseded pleading is competent, but must be introduced in evidence.

51 Cal. 223–227, **WHEELOCK v. PACIFIC PNEUMATIC GAS CO.**

Unliquidated Damages may Constitute Valid counterclaim.

Approved in Penn-American Plate Glass Co. v. Harshaw, 46 Ind. App. 654, 90 N. E. 1050, reaffirming rule.

51 Cal. 229–235, **CENTRAL PACIFIC R. R. CO. v. HOWARD.**

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 342, 343.

51 Cal. 239–241, **CURTIS v. SPRAGUE.**

Where Indorser of Promissory Note promises, after maturity, to pay same, knowing that demand and notice have not been made, he dispenses with such demand and notice.

Approved in Stanley v. McElrath (Cal.), 22 Pac. 675, in action against maker of note for amount paid by indorser, it is no defense that indorser paid without proper demand and notice.

Necessity of New Consideration to support waiver of failure to give notice of dishonor, or subsequent promise by indorser. See note, 29 L. R. A. 310.

51 Cal. 242–243, **MASCAREL v. RAFFOUR.**

Miscellaneous.—Cited in Hildreth v. Williams (Cal.), 33 Pac. 1113, where stipulation for attorney's fee in note does not fix amount, reasonable sum will be allowed.

51 Cal. 243–254, 21 Am. Rep. 704, **PEOPLE v. HIBERNIA SAVINGS ETC. SOCIETY.**

Credits cannot be Taxed as Property, even if secured by mortgage.

Approved in State v. Fleming, 70 Neb. 536, 97 N. W. 1068, in making return of taxable property, taxpayer may deduct his debts from his credits; State v. Parmenter, 50 Wash. 177, 96 Pac. 1049, omission of credits from scheme of taxation does not violate requirement that all actual property shall be taxed.

Distinguished in Kingsley v. Merrill, 122 Wis. 199, 99 N. W. 1048, 67 L. R. A. 200, holding that credits may be taxed, in view of different constitutional provision.

Disapproved in Hackfeld v. Luce, 4 Haw. 175, 181, 182, debts secured by mortgage on real and personal property are subject to taxation, though mortgaged property is also taxed at its full value.

Power to Tax Mortgages. See note, 16 L. R. A. 60.

Taxation. See note, 132 Am. St. Rep. 527.

Taxation of Mortgage and Real Estate at full value as double taxation. See note, 23 L. R. A. (n. s.) 154.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 366.

Outstanding Accounts as "Property" or "credits" subject to taxation. See note, 29 L. R. A. (n. s.) 61.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

51 Cal. 255, **COUNTY OF MONTEREY v. McKEE.**

Attachment may be Issued upon official bond of county treasurer.

Disapproved in Ancient Order of Hibernians v. Sparrow, 29 Mont. 135, 101 Am. St. Rep. 563, 74 Pac. 198, 64 L. R. A. 128, attachment will not issue upon bond conditioned to be void if principal performed his contract.

51 Cal. 255-258, **McLEAN v. BLUE POINT GRAVEL MINING CO.**

An Employer is not Liable for Injury to an employee caused by the negligence of fellow-employee, even though the latter was superior of former.

Approved in Vestner v. Northern California Power Co., 158 Cal. 287, 110 Pac. 919, employer not liable for injury to employee because foreman ordered him to go where he was in danger from falling tree; Leishman v. Union Iron Works, 148 Cal. 282, 113 Am. St. Rep. 243, 83 Pac. 34, 3 L. R. A. (n. s.) 500, foreman of carpenter-shop fellow-servant of iron-molder; Hardesty v. Largy Lumber Co., 34 Mont. 163, 86 Pac. 33, allowing recovery to employee injured by fall of lumber improperly piled.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 516, 520, 560, 593.

Servant Charged With Duty to Warn other servants of danger as vice-principal. See note, 4 L. R. A. (n. s.) 1162.

Liability of Master for Injuries to servant by incompetency of fellow-servant. See note, 25 L. R. A. 711.

Delegability of Master's Duty to instruct or warn servants. See note, 26 L. R. A. (n. s.) 641.

Duty of Mine Owners to Prevent Injury to employees. See note, 87 Am. St. Rep. 561, 575.

51 Cal. 258-260, **MELTON v. LAMBARD.**

Cotenancy in Mines. See note, 91 Am. St. Rep. 889.

51 Cal. 260-262, **GIACCOMINI v. BULKELEY.**

Evidence of Probable Produce from Cattle is admissible on question of damages for destruction of grass on dairy farm.

Approved in Sacchi v. Bayside Lumber Co., 13 Cal. App. 85, 108 Pac. 890, allowing recovery for prospective profits from operating dairy.

Damages for Tort as Affected by loss of profits. See note, 52 L. R. A. 46.

Extent of Trespasser's Liability for consequential injuries. See note, 53 L. R. A. 629.

51 Cal. 262-264, **DOWD v. CLARKE.**

Judgment cannot Stand unless there are full findings on all material issues.

Approved in Dillon Implement Co. v. Cleaveland, 32 Utah, 5, 88 Pac. 671, reaffirming rule; Chung v. Stephenson, 50 Or. 248, 89 Pac. 806, failure to make finding may be reviewed on appeal though no exception taken.

51 Cal. 266-269, **SANBORN v. BELDEN.**

The Legislature cannot Authorize Placing Railroad Corporation in possession of land, pending eminent domain proceedings, upon its giving security to pay damages.

Approved in City of Waterbury v. Platt Bros. 76 Conn. 441, 56 Atl. 858, legislature not authorized to fix compensation to be paid annually during stated number of years.

Distinguished in Portneuf Irr. Co. Ltd. v. Budge, 16 Idaho, 122, 123, 100 Pac. 1048, party seeking to condemn may be let into possession upon tender of compensation fixed by three commissioners appointed by court.

When Title Passes in Condemnation Proceedings. See note, 16 L. R. A. (n. s.) 539.

51 Cal. 269–273, CONSOLIDATED CHANNEL CO. v. CENTRAL PACIFIC R. R. CO.

The Legislature cannot Authorize the Taking of private property for a purely private industry.

Approved in County of Sutter v. Nicols, 152 Cal. 694, 93 Pac. 874, 15 L. R. A. (n. s.) 616, private property cannot be lawfully taken or damaged in behalf of the hydraulic gold mining industry; Great Western Nat. Gas & Oil Co. v. Hawkins, 30 Ind. App. 575, 66 N. E. 771, natural gas company, in proceeding to condemn for pipe-line, must show that it is engaged in furnishing gas to public; Brown v. Gerald, 100 Me. 362, 109 Am. St. Rep. 526, 61 Atl. 790, 70 L. R. A. 472, private property cannot be taken for generating and supplying electric power.

Distinguished in Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 675, 87 Pac. 30, legislature may authorize condemnation for spur track; Los Angeles County v. Reyes (Cal.), 32 Pac. 234, legislature may authorize condemnation of lands for private road; Shasta Power Co. v. Walker, 149 Fed. 570, allowing condemnation of land for water ditch to furnish electricity to public.

Uses for Which Power of eminent domain cannot be exercised. See note, 102 Am. St. Rep. 829.

Exercise of Eminent Domain for mining road. See note, 1 L. R. A. (n. s.) 978.

Exercisability of Eminent Domain for production of gold. See note, 15 L. R. A. (n. s.) 616.

Existence of Public Use as question for courts. See note, 88 Am. St. Rep. 929, 936.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 53, 86, 156.

51 Cal. 275–277, McKEE v. MONTEREY COUNTY.

County Treasurer, Having Received Moneys, as such, must turn them over to his successor.

Approved in Board of Commrs. v. Dickey, 86 Minn. 339, 90 N. W. 779, clerk of district court cannot dispute right of county to fees received in excess of legal amounts.

51 Cal. 277–278, LADD v. TULLY.

A Finding "That All the Material Facts set forth in the complaint are true" is insufficient.

Approved in Holt Mfg. Co. v. Collins, 154 Cal. 276, 97 Pac. 520, reaffirming rule; Sharp v. Frank (Cal.), 41 Pac. 861, finding that deed was not executed with intent "improperly to hinder or delay creditors," too indefinite to support judgment.

51 Cal. 278-279, PEOPLE v. KINSEY.

Defendant Pleading not Guilty and former conviction or acquittal **is entitled to a verdict on each plea.**

Approved in People v. O'Leary (Cal.), 16 Pac. 885, State v. Kieffer, 17 S. D. 69, 95 N. W. 290, and State v. Creechley, 27 Utah, 145, 75 Pac. 385, all reaffirming rule; Ex parte King, 10 Cal. App. 283, 101 Pac. 311, but holding that point cannot be raised on habeas corpus; Storm v. Territory, 12 Ariz. 34, 94 Pac. 1102, but holding failure to instruct jury to find on plea of former acquittal harmless error where there was no evidence to support plea.

51 Cal. 280-281, EX PARTE AH PEEN.

Act of Police Magistrate in committing minor to industrial school does not amount to criminal prosecution.

Approved in Marlow v. Commonwealth, 142 Ky. 117, 133 S. W. 1141, juvenile court act not invalid because no jury trial provided for.

Restraint on Freedom as Impairment of child's constitutional rights. See note, 18 L. R. A. (n. s.) 887, 890.

51 Cal. 285-288, EX PARTE ROSENBLAT.

Right to Refuse Extradition Where Fugitive is in custody in asylum state. See note, 112 Am. St. Rep. 115.

Right to Detain Fugitive to await extradition papers. See note, 26 L. R. A. 34.

Extradition of Person Under Confinement in asylum state. See note, 24 L. R. A. (n. s.) 801.

Miscellaneous.—Cited in Opinion of the Justices, 201 Mass. 610, 89 N. E. 175, offender need not be delivered up for extradition where he has been held to answer for crime against laws of state of refuge.

51 Cal. 288-295, TITCOMB v. KIRK.

Acts of Congress Do not Authorize the excavation of a ditch across a mining claim located prior to the ditch.

Reaffirmed in Miocene Ditch Co. v. Jacobson, 2 Alaska, 573.

51 Cal. 295-298, GONZALES v. WASSON.

Where Provisions of Different Codes Conflict, they should be so construed, if possible, that effect will be given to each.

Approved in Estate of Bedell, 3 Cof. Prob. 82, reaffirming rule.

51 Cal. 298-301, COOPER v. SHEPARDSON.

If Sufficient Money is Paid to County Treasurer to redeem land sold for taxes, redemption is effected, even if receipt is not filed with recorder.

Approved in Roach v. State, 148 Ala. 428, 39 So. 688, where one pays necessary amount to probate judge, redemption is effected though certificate of redemption not issued until after redemption period.

Validity of Tax Sales Where Nonpayment is due to mistake or negligence of tax officers. See note, 20 L. R. A. 489.

51 Cal. 301-303, GOLDSTEIN v. KELLY.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 108.

51 Cal. 303–307, **BARNES v. JONES.**

The Headnotes in the Practice Act are entitled to more consideration in explaining doubtful language than the title of the entire act.

Approved in Dungan v. Superior Court, 149 Cal. 102, 84 Pac. 769, first filing of petiton for letters of administration constitutes first "application" therefor; Bettencourt v. Sheehy, 157 Cal. 702, 109 Pac. 91, marginal notes of code commissioners limit and define sections to which they refer; In re Wisner, 36 Mont. 308, 92 Pac. 960, headnotes in code are portions of code itself.

If Complaint for Cutting Down Trees on land of another does not allege that defendant cut them down knowingly, willfully or maliciously, treble damages cannot be recovered.

Approved in Menasha W. W. Co. v. Spokane etc. Ry. Co., 19 Idaho, 592, 594, 115 Pac. 24, 25, reaffirming rule.

51 Cal. 313–315, **FAY v. COBB.**

Sham Pleadings. See note, 113 Am. St. Rep. 643, 649.

51 Cal. 319–322, **PEOPLE v. FISHER.**

To Constitute Arson It is Sufficient that building burned was capable of affording shelter for human beings.

Approved in State v. Lintner, 19 S. D. 450, 104 N. W. 206, box-car may be subject of arson.

In Indictment for Arson in Second Degree it is not necessary to describe building burned as property of occupant.

Reaffirmed in State v. Gilligan, 23 R. I. 403, 50 Atl. 845.

51 Cal. 325–328, **PEOPLE v. CARRICK.**

State Officers have No Right to issue patent pending contest.

Approved in Blakeley v. Kingsbury, 6 Cal. App. 710, 93 Pac. 131, mandamus will not lie to compel issuance of patent, though there was a period before order of reference when petitioner might have obtained patent.

51 Cal. 328–341, **STOCKTON ETC. R. R. CO. v. STOCKTON.**

If Duty is to be Performed by an Officer upon the happening of an event, he cannot capriciously refuse to perform it on the plea that he is not satisfied that it has happened.

Approved in Inglin v. Hoppin, 156 Cal. 489, 105 Pac. 585, applying rule to action on petition for establishment of independent reclamation district; French v. Jones, 191 Mass. 530, 78 N. E. 121, 7 L. R. A. (n. s.) 525, superintendent of streets could not arbitrarily refuse to allow street railway company to remove its rails imbedded in street.

Distinguished in Van Vleck v. Board of Dental Examiners (Cal.), 48 Pac. 225, action of board in finding examination or diploma from dental college unsatisfactory is final.

51 Cal. 341–344, **GILSON QUARTZ MINING CO. v. GILSON.**

Corporation may Introduce Parol Evidence to contradict resolution as spread upon minutes.

Approved in Just v. Idaho Canal etc. Co., 16 Idaho, 660, 133 Am. St. Rep. 140, 102 Pac. 387, verity of minutes may be attacked by minority stockholders.

51 Cal. 345–351, 21 Am. Rep. 713, NEWHALL v. CENTRAL PACIFIC R. R. CO.

Rights and Liabilities of Assignees of bills of lading. See note, 105 Am. St. Rep. 365.

51 Cal. 362–364, ALLEN v. REED.

Where, Through Mutual Mistake, a fence is not built on the true boundary line, title to the intervening land is not acquired by adverse possession.

Approved in Smith v. Robarts (Cal.), 9 Pac. 106, reaffirming rule.

51 Cal. 365–367, FOULKE v. SAN DIEGO ETC. R. R. CO.

A Corporation Deriving Benefit from the performance of a contract not in writing is liable to the extent of the benefit received.

Approved in Bank of Yolo v. Weaver (Cal.), 31 Pac. 160, holding corporation liable for money borrowed; Hamilton v. Bates (Cal.), 36 Pac. 306, but holding corporation not shown to have received any benefit.

Distinguished in Pacific Mill Co. v. Inman, 50 Or. 28, 90 Pac. 1101, party to executory contract cannot by ratification of void act create liability in its favor against other party.

51 Cal. 369–370, BANK OF MENDOCINO v. CHALFANT.

Illegal Tax, Paid Under Protest, may be recovered.

Distinguished in Decker v. Perry (Cal.), 35 Pac. 1019, assessment paid to irrigation district cannot be recovered where no sale threatened.

Solvent Debts, Promissory Notes and mortgages are not liable to taxation.

Approved in State v. Fleming, 70 Neb. 536, 97 N. W. 1068, in making return of taxable property, taxpayer may deduct his debts from his credits.

51 Cal. 371–372, PEOPLE v. ARDAGA.

Conviction of Rape cannot be had on the uncorroborated and inherently improbable testimony of the prosecutrix.

Distinguished in People v. Moore, 155 Cal. 241, 100 Pac. 690, holding rule inapplicable where only question was as to defendant's intention; People v. Ah Lung, 2 Cal. App. 280, 83 Pac. 297, holding testimony of prosecutrix sufficiently corroborated; People v. Caulfield, 7 Cal. App. 657, 95 Pac. 666, testimony of prosecutrix sufficiently corroborated by her physical condition and the silence of defendant when charged with crime; Reeves v. Territory, 2 Okl. Cr. 359, 101 Pac. 1042, error for court to charge that conviction cannot be had on uncorroborated testimony of prosecutrix.

51 Cal. 372–374, PEOPLE v. AH SING.

What Constitutes Reasonable Doubt in criminal cases. See note, 17 L. R. A. 709.

51 Cal. 375–376, EX PARTE GRANICH.

Question Whether Order Holding Accused Person to answer on criminal charge is erroneous cannot be considered on habeas corpus.

Approved in Young v. Fain, 121 Ga. 741, 49 S. E. 732, errors in trial of peace warrant proceeding cannot be reviewed on habeas corpus.

51 Cal. 376–379, PEOPLE v. MURPHY.

Venue must be Proved as charged.

Approved in People v. Meseros, 16 Cal. App. 279, 116 Pac. 679, in prosecution for embezzling money by cashing checks in San Francisco which were intrusted to defendant in Alameda, venue is in San Francisco.

51 Cal. 379–381, KINSEY v. GREEN.

Miscellaneous.—Cited in Robinson v. Muir, 151 Cal. 125, 90 Pac. 524, ordering new trial, in action to quiet title as to specified pieces of property only.

51 Cal. 381–387, WATERLOO TURNPIKE ROAD CO. v. COLE.

Promise by Traveler to Pay Tolls is nudum pactum if he was under no obligation to pay them.

Approved in McKone v. Metropolitan Life Ins. Co., 131 Wis. 258, 110 N. W. 478, promise by insurance agent to make good subagent's defalcation, under mistaken belief that he was responsible therefor, is not binding.

51 Cal. 388–404, RUTLEDGE v. MURPHY.

A Pre-emptioner has No Title which may not be abrogated by the government at any time before final entry and payment.

Distinguished in Cooper v. Wilder (Cal.), 41 Pac. 27, timber culture claimant, who dies within two years after entry, has interest capable of devise.

51 Cal. 404–406, BARBER v. BURROWS.

Where Written Agreement, Intended to be Signed by several persons as parties thereto, is not signed by all, it binds no one.

Approved in Commonwealth v. Bartlett, 190 Mass. 152, 76 N. E. 608, no complaint lies for enticing away seaman, where shipping articles not signed by master.

51 Cal. 406–412, DEAN v. DAVIS.

An Act Providing for Inclusion of specified territory in levee district creates public corporation.

Approved in People v. Town of Ontario, 148 Cal. 633, 84 Pac. 208, supervisors need not give hearing on question whether proposition to annex territory to town shall be submitted to popular vote; People v. San Joaquin etc. Agricultural Assn., 151 Cal. 805, 91 Pac. 744, district agricultural association is public corporation; People v. Haggin, 57 Cal. 585, quaere, whether point that petition for formation of swamp land district was insufficiently published can be raised only by state; In re Madera Irrigation District, 92 Cal. 323, 27 Am. St. Rep. 106, 28 Pac. 274, 14 L. R. A. 755, act for forming irrigation districts need not provide hearing for land owners prior to organization of district; Whipple v. Tuxworth, 81 Ark. 401, 99 S. W. 90, holding improvement district in city to be corporation de facto; Mound City Land etc. Co. v. Miller, 170 Mo. 256, 94 Am. St. Rep. 727, 70 S. W. 726, 60 L. R. A. 190, upholding law providing for establishment of drainage districts.

Distinguished in Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 405, 105 Pac. 280, reclamation districts are not corporations as defined in section 284, Civil Code, nor do they come within constitutional prohibition against creating corporations by special act.

If Petition to Supervisors for Creation of levee district appears on face to be signed by owners of majority of acreage, and district is in fact exercising corporate powers, it cannot be shown collaterally that persons owning majority of acreage did not sign petition.

Approved in Wilcox v. Engebretsen, 160 Cal. 293, 116 Pac. 752, discussing conclusiveness of order of council changing street grade on question of sufficiency of petition therefor.

The Validity of a De Facto Corporation is not open to collateral attack.

Approved in Reclamation Dist. v. McPhee, 13 Cal. App. 388, 109 Pac. 1109, legality of reclamation district assessment does not depend upon de jure character of corporation; Purdin v. Washington etc. Assn., 41 Wash. 397, 83 Pac. 724, validity of irrigation district cannot be attacked in action to recover land sold for nonpayment of irrigation taxes.

Miscellaneous.—Cited in Potter v. Santa Barbara, 160 Cal. 355, 116 Pac. 1103, upholding Permanent Road Division Act of 1907.

51 Cal. 412–414, CONLAN v. QUIMBY.

Where Plaintiff Relies upon Fact that Secretary of the Interior awarded him land as pre-emptor, defendant may prove adverse possession at time of plaintiff's entry.

Approved in Gilson v. Robinson (Cal.), 7 Pac. 430, certificate of purchase for state lands is not conclusive against other applicant who is in adverse possession.

51 Cal. 415, SPEEGLE v. LEESE.

It is Duty of Court to Find upon each material issue, whether evidence is introduced upon issue or not.

Reaffirmed in Mitchell v. Jensen, 29 Utah, 360, 81 Pac. 168.

Miscellaneous.—Cited in Bryan v. Tormey (Cal.), 21 Pac. 726, to point that presumption may supply place of direct evidence.

51 Cal. 416, SAN BENITO v. WHITESIDES.

Action to Abate Nuisance caused by obstruction of public highway must be brought in name of road overseer.

Reaffirmed in Meservey v. Gulliford, 14 Idaho, 143, 93 Pac. 783.

Distinguished in Lincoln County v. Fish, 38 Wash. 107, 80 Pac. 435, under statute, county may sue to enjoin obstruction of highway.

Power to Grant Mandatory Injunctions. See note, 20 L. R. A. 165.

51 Cal. 418–420, McCULLOUGH v. BOARD OF EDUCATION.

What Use of Squares, Parks, or Commons is consistent with purpose of dedication. See note, 25 L. R. A. (n. s.) 983.

51 Cal. 420–423, PINK v. CATANICH.

Slander and Libel in Charging Woman with unchastity. See note, 24 L. R. A. (n. s.) 607.

Actionable Character of Epithets imputing immorality to woman. See note, 4 L. R. A. (n. s.) 562.

51 Cal. 423–424, WELLS v. CAHN.

Where Owner of Building Makes Payments in good faith to contractor, materialman can enforce lien only for balance, if any, due contractor.

Approved in Nason v. John, 1 Cal. App. 540, 82 Pac. 566, complaint of materialman must allege that something was due contractor.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

51 Cal. 425–429, DREW v. CENTRAL PACIFIC R. R. CO.

Right of Passenger to Stop Over. See note, 28 L. R. A. 773.

51 Cal. 429–430, MAHONEY v. AURRECOCHEA.

Courts will Take Judicial Notice of the time of harvest in the counties where they preside.

Distinguished in Hohn v. Pauly, 11 Cal. App. 733, 106 Pac. 269, refusing to take judicial notice of manner in which homes are constructed and used in mountain counties.

Facts of Which Courts will take judicial notice. See note, 124 Am. St. Rep. 27.

51 Cal. 435–439, ANGUISOLA v. ARNAZ.

Where the Testator Gives His Executor full power to sell his real estate, the executor does not hold such real estate in trust for the devisees.

Approved in Estate of Campbell, 149 Cal. 716, 87 Pac. 574, limitation for fixed period of power of executrix to sell is not suspension of power of alienation forbidden by code.

51 Cal. 442–446, WILLIAMS v. DWINELLE.

Miscellaneous.—Cited in Powhatan Coal etc. Co. v. Ritz, 60 W. Va. 409, 56 S. E. 263, 9 L. R. A. (n. s.) 1225, awarding prohibition as to part of injunction beyond jurisdiction of court.

51 Cal. 447–465, BRALY v. REESE.

Evidence Which is not Best Evidence must be objected to on that precise ground.

Approved in Yaeger v. Southern Cal. Ry. Co. (Cal.), 51 Pac. 192, applying rule to objection that document is not properly identified.

Who may not Purchase at Judicial, execution and other compulsory sales. See note, 136 Am. St. Rep. 803.

51 Cal. 468–470, PEOPLE v. SHAINWOLD.

The Order of Proof Rests in the discretion of the court.

Reaffirmed in Brady v. Ranch Mining Co., 7 Cal. App. 183, 94 Pac. 86.

In Indictment for Arson, statement of ownership of burned building is material only for purpose of identification.

Reaffirmed in People v. Laverty, 9 Cal. App. 759, 100 Pac. 901.

Fact That Sheriff, in Absence of Judge, adjourned court at too early an hour is not ground for new trial.

Approved in People v. Amer, 151 Cal. 306, 90 Pac. 699, misconduct of district attorney not ground for new trial.

51 Cal. 471–472, BANK OF MENDOCINO v. CHALFANT.

Outstanding Accounts as "Property" or "Credits" subject to taxation. See note, 29 L. R. A. (n. s.) 61.

51 Cal. 478–485, MAJORS v. COWELL.

One not Party to Action does not become bound by judgment therein by becoming party to appeal.

Reaffirmed in State v. King, 64 W. Va. 560, 63 S. E. 474.

51 Cal. 489–491, BROWN v. RICH.

Plaintiff cannot Unite Two or More Causes of action for penalties incurred by toll-gatherer.

Disapproved in Washington-Alaska Bank v. Stewart, 184 Fed. 675, permitting joinder of causes of action to recover usury paid at different times and on different loans.

51 Cal. 495–499, PEOPLE v. ATHERTON.

Instructions Should be Given only with reference to facts in evidence.

Approved in People v. Elster (Cal.), 8 Pac. 888, reversing where instruction assumed facts not in evidence.

51 Cal. 499–501, SANTA BARBARA v. STEARNS.

Miscellaneous.—Cited in Johnson v. Erickson, 14 N. D. 417, 105 N. W. 1105, though justice of the peace dismisses case instead of certifying it, district court has jurisdiction of appeal.

51 Cal. 501–503, HARTMAN v. OLVERA.

Where Garnishee Denies Indebtedness to judgment debtor, neither referee nor court has power to compel him to pay to sheriff amount of his alleged indebtedness.

Approved in Ex parte Pahia, 13 Haw. 581, contempt of court proceedings are not appropriate for trial of issue of title; Persing v. Reno Stock Brokerage Co., 30 Nev. 352, 96 Pac. 1057, judgment creditor may redeem mortgaged property of debtor in hands of mortgagee, and hold same under his levy for amount of mortgage as well as amount of judgment; Ryland v. Arkansas City Milling Co., 19 Okl. 442, 92 Pac. 163, court cannot order judgment debtor to apply in payment of judgment property, title to which is shown to be in third party.

Distinguished in Finch v. Finch, 12 Cal. App. 283, 107 Pac. 597, treating denial of indebtedness by garnishee as mere legal conclusion.

51 Cal. 505–507, BOSQUETT v. CRANE.

Judgment in Action for Trespass in which plaintiff relies upon certificates of purchase is not bar to action to determine which party has better right to purchase land from state.

Approved in Lord v. Thomas (Cal.), 36 Pac. 374, prior judgment is conclusive only as to matters actually and necessarily litigated.

51 Cal. 508–511, PEOPLE v. NATIONAL GOLD BANK OF D. O. MILLS & CO.

State Taxation of National Banks. See note, 45 L. R. A. 740.

51 Cal. 514–516, MISCH v. MAYHEW.

Time of Notice is Computed by including first day and excluding last.

Approved in Bank of Lemoore v. Fulgham, 151 Cal. 238, 90 Pac. 937, and Cosgriff v. Election Commissioners, 151 Cal. 410, 91 Pac. 99, both

reaffirming rule; Petition of Los Angeles Trust Co., 158 Cal. 608, 112 Pac. 58, applying rule to publication of order to show cause why corporation should not be permitted to change its name; Reclamation Dist. v. McPhee, 13 Cal. App. 385, 109 Pac. 1107, that notice of hearing may be published four weeks, the first publication must be at least four weeks prior to the hearing.

First and Last Days in Computation of Time. See note, 49 L. R. A. 245.

51 Cal. 516–520, FRISBIE v. MOORE.

Where Vendee Agreed to Pay purchase price on final confirmation of Mexican grant and grant was rejected, vendee was released from obligation.

Approved in Collins v. Amiss, 159 Ind. 596, 65 N. E. 907, complaint must allege performance of conditions precedent.

51 Cal. 523–524, GUTTENBERGER v. WOODS.

Where Plaintiff's Wall Projects over defendant's land, court will not enjoin defendant from using it as party-wall.

Reaffirmed in Bank of Escondido v. Thomas (Cal.), 41 Pac. 463.

Distinguished in Trulock v. Parse, 85 Ark. 152, 103 S. W. 167, 11 L. R. A. (n. s.) 924, that portion of wall beneath surface projects on land of adjacent owner does not permit latter to use portion above surface as party-wall.

Miscellaneous.—Cited in Spring Valley Water Co. v. San Francisco, 165 Fed. 712, to point that injunction pendente lite should preserve rights of both parties.

51 Cal. 524–526, HORN v. CORVARUBIAS.

A Sheriff, Seizing Property in the hands of a third person as the judgment debtor's, must prove not only the attachment, but the proceedings on which it was based.

Approved in Cheeseman v. Fenton, 13 Wyo. 448, 110 Am. St. Rep. 1010, 80 Pac. 826, reaffirming rule; McRae v. Lackmann, 8 Cal. App. 243, 96 Pac. 506, sheriff seizing mortgaged property in hands of mortgagee must show not only writ, but that levy was made at suit of creditor of mortgagor; Moriund v. Johnson, 140 Mo. App. 354, 124 S. W. 82, constable must show valid execution upon valid judgment before he can attack sale as fraudulent as to execution creditor.

51 Cal. 526–528, AMADOR COUNTY v. BUTTERFIELD.

Judgment cannot be Rendered on pleadings because defenses are inconsistent.

Approved in Casci v. Ozalli, 158 Cal. 283, 110 Pac. 933, where answer in action to quiet title denied plaintiff's ownership and possession, judgment on the pleadings was improper; The Snipsic Co. v. Smith, 7 Cal. App. 151, 93 Pac. 1035, admission made in affirmative defense cannot qualify specific denials; Thomas v. Ray, 48 Colo. 427, 110 Pac. 79, judgment on the pleadings is improper where material allegations denied, though special defense, separately stated, admits such allegations by failure to deny them.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 192, 204, 205.

51 Cal. 529–530, **FELTON v. JUSTICE.**

Trespasses will not be Enjoined where plaintiff is totally disseized and defendant in adverse possession of the land.

Approved in Flood v. Goldstein Co., 158 Cal. 250, 110 Pac. 917, destruction of building will not be enjoined at suit of lessee where it has been practically dismantled.

Distinguished in Dunker v. Field & Tule Club, 6 Cal. App. 529, 533, 92 Pac. 504, 505, lessee for years of tule lands for hunting purposes may enjoin persistent unlawful intrusion thereon for similar purposes.

51 Cal. 530–532, **CURRY v. WHITE.**

Power of Partner After Dissolution to interrupt statute of limitations as to firm debt. See note, 15 L. R. A. 660.

51 Cal. 532–533, **HAMMEL v. ZOBELEIN.**

Landlord cannot Maintain Action for unlawful detainer based upon occupancy by his tenant.

Reaffirmed in Chezum v. Campbell, 42 Wash. 567, 85 Pac. 51.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 373.

51 Cal. 541–543, **LEROUX v. MURDOCK.**

Where the Complaint is Verified, an answer which denies its allegations in conjunctive is insufficient.

Approved in Toomey v. Knobloch, 8 Cal. App. 588, 97 Pac. 530, denial, in conjunctive, of ownership of two lots raises no issue.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 389.

Miscellaneous.—Cited in Blodgett v. Scott, 11 Cal. App. 312, 104 Pac. 843, holding complaint in unlawful entry and forcible detainer sufficient.

51 Cal. 545–549, **PACKARD v. JOHNSON.**

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 617.

51 Cal. 549–550, **MELONE v. STATE.**

The Legislature may Devolve upon the Secretary of State duties foreign to his office, and pay him an additional salary therefor.

Disapproved in Warner v. Auditor General, 129 Mich. 651, 652, 89 N. W. 592, 593, legislature cannot give additional salaries to state treasurer, Secretary of State and commissioner of land office, as members of board of auditors.

51 Cal. 554–556, **WILLISTON v. PERKINS.**

If Builder of Vessel agrees to pay for work done on same when it is sold, he is entitled to only reasonable time within which to finish and sell it.

Approved in Earle v. Sunnyside Land Co., 150 Cal. 225, 88 Pac. 924, provision in trust deed for "minimum prices" does not give trustees arbitrary power to fix such prices as will render sales impossible; Castle v. Smith, 17 Haw. 36, promise to pay when deed procured is promise to pay within reasonable time; Rumsey v. Livers, 112 Md. 554, 77 Atl. 298, where subcontract provided for payments when payments were received by contractor, it was implied that contractor

would use due diligence to enforce payment; Wright v. Hull, 83 Ohio St. 398, 94 N. E. 816, promise to pay from moneys received from sale of certain lands is promise to pay within reasonable time; Thisler v. Stephenson, 54 Wash. 608, 103 Pac. 988, promise to pay note as soon as promisor can spare the money or within a reasonable time is absolute promise to pay within a reasonable time; Case v. Beyer, 142 Wis. 502, 125 N. W. 947, 950, one party cannot profit by failure of other to perform where tender of performance by first party was necessary.

Distinguished in Baca v. Anaya, 14 N. M. 388, 94 Pac. 1018, one may intervene in partition suit though not claiming under common title.

51 Cal. 559–561, **PORTER v. GARRISSINO.**

One cannot Intervene in Ejectment who claims title paramount to both plaintiff and defendant.

Approved in Reay v. Butler (Cal.), 7 Pac. 672, 673, reaffirming rule.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 566.

51 Cal. 562, **JUDSON v. PORTER.**

One District Court cannot Enjoin Prosecution of action pending in another district court.

Approved in In re Burton, 5 Cof. Prob. 237, refusing to review orders in probate of superior court of another county.

51 Cal. 563–566, **ESTATE OF SMITH.**

Order Refusing to Set Aside Order for sale of property of estate is not appealable.

Approved in Estate of Overton, 13 Cal. App. 118, 108 Pac. 1022, order discontinuing family allowance not appealable.

Petition for Sale of Real Estate must describe condition of land to be sold.

Distinguished in Plains Land & Imp. Co. v. Lynch, 36 Mont. 280, 129 Am. St. Rep. 645, 99 Pac. 849, statements in petition as to description, condition and value of land are not jurisdictional.

51 Cal. 566–567, **PEOPLE v. PLUMAS ETC. MIN. CO.**

Miscellaneous.—Cited in State v. Campbell, 3 Cal. App. 604, 86 Pac. 841, action brought by controller in Sacramento county for official moneys in hands of superintendent of state insane asylum is removable to county of defendant's residence for trial.

51 Cal. 568–570, **ESTATE OF PRITCHETT.**

Devisee is Entitled to Distribution on settlement of administrator's final account, though year has not expired.

Approved in Estate of Lynch, 1 Cof. Prob. 141, reaffirming rule; Estate of Tessier, 2 Cof. Prob. 368, it is duty of court and executor to close administration speedily; Ernst v. Freeman's Estate, 129 Mich. 274, 88 N. W. 637, administrator may proceed under order of distribution, though time for appeal has not elapsed. See note, 1 Cof. Prob. 141.

51 Cal. 573–575, **JEFFERSON v. WENDT.**

The Statute of Limitations does not commence to run against purchaser at sheriff's sale until delivery of deed.

Reaffirmed in Robinson v. Thornton (Cal.), 31 Pac. 936.

51 Cal. 577, REEN v. STATE.

The Legislature may Devolve upon the controller duties not pertaining to his office, and pay him an additional salary therefor.

Disapproved in Warner v. Auditor General, 129 Mich. 651, 652, 89 N. W. 592, 593, legislature cannot give state treasurer, Secretary of State and commissioner of land office additional salaries as members of state board of control.

51 Cal. 577–579, VENTURA COUNTY v. THOMPSON.

Right to Set Off Benefits Against Damages on condemnation. See note, 9 L. R. A. (n. s.) 829.

51 Cal. 582–583, MEYER v. ROTH.

Admissibility of Evidence given in former trial in civil case. See note, 91 Am. St. Rep. 196.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 362.

51 Cal. 583–586, MARKET ST. RY. CO. v. CENTRAL RY. CO.

That One Street Railroad Company is using a street without proper license is no concern of another street railroad company occupying the same street.

Approved in Santa Rosa etc. R. Co. v. Central St. Ry. Co. (Cal.), 38 Pac. 991, semble, that neither individual nor corporation can remove tracks from street, though laid without authority.

Use of Street by Street Railroad does not prevent crossing of its tracks by another street railroad.

Approved in South East etc. Ry. Co. v. Evansville etc. R. R. Co., 169 Ind. 344, 82 N. E. 767, 13 L. R. A. (n. s.) 916, owner of steam railroad not entitled to compensation for crossing of its road at public highway intersection by electric interurban road.

Right of Railroad to Compensation for laying street railway across track on street crossing. See note, 29 L. R. A. 486.

51 Cal. 586–588, LOUPE v. WOOD.

Liability of Landlord for Injury to tenant from defect in premises. See note, 34 L. R. A. 827.

51 Cal. 588–590, PEOPLE v. WALDEN.

It is Error to Charge Jury that existence of one fact raises a reasonable presumption of the existence of another.

Approved in People v. Elster (Cal.), 3 Pac. 888, reversing because instructions assumed facts not in evidence; Davis v. Hearst, 160 Cal. 177, 116 Pac. 545, discussing presumption of malice in libel case.

Distinguished in People v. Crowl (Cal.), 34 Pac. 861, not error to charge that it is presumed that an unlawful act was done with an unlawful intent.

51 Cal. 594–597, McKIERNAN v. HESSE.

Purchaser of Land from United States becomes owner of personal property affixed thereto by third person.

Approved in Hereford v. Pusch, 8 Ariz. 84, 68 Pac. 550, applying rule to fence; Helstrom v. Rodes, 30 Utah, 125, 83 Pac. 731, mere occupancy of public land with construction of improvements thereon vests no right in occupant.

Right of One Who Buys, or makes lawful entry on, public land, to crops and improvements placed thereon by another. See note, 70 L. R. A. 807.

51 Cal. 597–603, **PEOPLE v. CHIN MOOK SOW.**

A Witness, on Cross-examination, may be asked if he has not been convicted of felony.

Distinguished in People v. Elster (Cal.), 3 Pac. 889, error to compel witness to state whether he had been arrested for a felony; Schwantes v. State, 127 Wis. 183, 106 N. W. 246, in cross-examination of accused, questions should not be asked, based upon mere conjecture as to how crime might have been committed.

Cross-examination as Proper Mode of proving conviction of crime for purposes of impeachment. See note 30 L. R. A. (n. s.) 851.

Rule That Witness cannot be Contradicted as to immaterial matter brought out on cross-examination does not apply where question is as to matter party would have right to prove as independent fact.

Reaffirmed in Moody v. Purano, 4 Cal. App. 417, 88 Pac. 381.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 641, 646; 56 L. R. A. 420.

Dying Declarations as Evidence. See note, 56 L. R. A. 420.

Religious Belief as Qualification of Witness. See note, 42 L. R. A. 554, 556.

51 Cal. 605–607, **HAHN v. SOUTHERN PACIFIC R. R. CO.**

Whether Blowing Off of Steam from locomotive is negligence is question for jury.

Approved in Hickey v. Rio Grande Western Ry. Co., 29 Utah, 408, 82 Pac. 33, reaffirming rule; Vandalia R. Co. v. McMains, 42 Ind. App. 535, 85 N. E. 1039, that emission of steam was unnecessary may be inferred from circumstances.

Distinguished in Fares v. Rio Grande W. Ry. Co., 28 Utah, 144, 77 Pac. 234, railway company not liable for injury caused by operation of train frightening horses on road closely paralleling railway.

Civil Responsibility for Wrongful or negligent act of servant or agent toward one not sustaining contractual relation. See note, 27 L. R. A. 187.

51 Cal. 609–612, **VEACH v. ADAMS.**

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 125.

51 Cal. 618–620, **CHASE v. EVOY.**

Code of Civil Procedure, Section 1880, Which Prohibits parties to action on claim against estate from testifying does not prevent them from testifying on behalf of estate.

Approved in Todd v. Martin (Cal.), 37 Pac. 874, administratrix may testify on behalf of plaintiff.

51 Cal. 620–624, 21 Am. Rep. 718, **ARQUES v. WASSON.**

Lessee in Possession of Land may mortgage crop before it is planted.

Approved in Sporer v. McDermott, 69 Neb. 539, 96 N. W. 234, specifically enforcing agreement to execute, after they are growing, mortgage upon crops.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 455, 456.

Mortgage of Property to be Subsequently Acquired. See note, 109 Am. St. Rep. 520, 523.

51 Cal. 624–626, MATTER OF BOSTON MINING ETC. CO.

The Title cannot be Resorted to for the purpose of limiting plain language of statute, as provision in California Constitution relative to titles of acts is merely directory.

Approved in Clark v. Los Angeles, 160 Cal. 41, 116 Pac. 726, statement in Constitution, article I, section 22, that constitution is mandatory does not affect construction of section 19 of article XI; dissenting opinion in Estate of Clark, 148 Cal. 123, 113 Am. St. Rep. 197, 82 Pac. 766, 1 L. R. A. (n. s.) 996, 7 Ann. Cas. 306, majority limiting words "all wills" in section 322, Code of Civil Procedure, by words "foreign wills" in title.

Probate of Foreign Wills. See note, 113 Am. St. Rep. 209.

51 Cal. 626–628, MULCAHY v. GLAZIER.

Judgment will be Affirmed without findings where it does not affirmatively appear that they were waived.

Approved in Kritzer v. Tracy Engineering Co., 16 Cal. App. 290, 116 Pac. 701, reaffirming rule; Ladd v. Myers, 4 Cal. App. 353, 87 Pac. 1111, correction by court of clerical error in findings could not be prejudicial.

51 Cal. 628–629, PEOPLE v. FORBES.

Where the Record Contains an Insufficient Finding, the presumption that findings were waived will not be indulged.

Approved in Riley v. Loma Vista Ranch Co., 5 Cal. App. 27, 89 Pac. 850, no presumption where recitals in judgment show that no new trial was had.

Court must Find upon New Matter set up as defense.

Approved in Dillon Implement Co. v. Cleaveland, 32 Utah, 7, 88 Pac. 672, where court fails to find upon all material issues, judgment will be reversed and new trial granted.

51 Cal. 629–637, DONNER v. PALMER.

Judgment of Supreme Court becomes the law of case in all its stages while facts remain same.

Approved in Gaffey v. Mann, 5 Cal. App. 714, 91 Pac. 173, reaffirming rule; Oklahoma City Elec. Gas & Power Co. v. Baunhoff, 21 Okl. 508, 96 Pac. 760, same rule applies where former decision was by territorial supreme court.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

Parties are Bound by Stipulation as to facts.

Approved in Himmelein v. Supreme Council (Cal.), 33 Pac. 1131, 1132, defect in complaint cured by stipulation that certain pamphlets might be read in evidence.

51 Cal. 637–639, TREADWELL v. PATTERSON.

Delinquent Tax Sale for Excessive Amount is void, provided excess is not less than the smallest fractional coin.

Approved in Hotchkiss v. Hansberger, 15 Cal. App. 606, 115 Pac. 958, tax deed which shows on its face that land was sold for one

dollar and forty cents in excess of proper amount is void; Pimmer v. Hotchkiss, 14 Cal. App. 561, sale of land for delinquent taxes for fifty-two cents more than proper amount is void; Warden v. Broome, 9 Cal. App. 174, 98 Pac. 254, tax deed invalidated by erroneous statement of amount due in delinquent list as published; Cowling v. Muldrow, 71 Ark. 490, 76 S. W. 425, excess of one-quarter of a cent does not invalidate tax sale; dissenting opinion in Beggs v. Paine, 15 N. D. 464, 109 N. W. 334, majority upholding tax sale though illegal road tax included.

51 Cal. 640–643, **WILCOXSON v. SPRAGUE.**

A Clause in a Deed Repugnant to the general intention thereof is void.

Approved in Estate of Conroy, 6 Cal. App. 743, 93 Pac. 206, where administrator of estate was sole heir, words in conveyance describing him as administrator may be rejected as surplusage; Costello v. Graham, 9 Ariz. 263, 80 Pac. 337, conveyance of all right, title and interest is not qualified by words "being an undivided one-half"; Carllee v. Ellsberry, 82 Ark. 212, 118 Am. St. Rep. 60, 101 S. W. 407, 12 L. R. A. (n. s.) 956, where granting clause conveys property in fee simple proviso in habendum, that should grantee die without issue and before her husband, property was to revert to husband, is void; Hawkins v. Lumber Co., 139 N. C. 164, 51 S. E. 854, rejecting stipulation in deed of standing timber that time within which to begin removal was not limited; Dickson v. Wildman, 183 Fed. 403, granting clause conveying fee held to prevail over habendum referring to life estate only; Quinton v. Neville, 152 Fed. 884, 81 C. C. A. 673, agreement that lands should not be sold without consent of all parties must be understood as limited to a reasonable period of time; dissenting opinion in Smith v. Williams (Cal.), 55 Pac. 602, majority holding conveyance of all grantor's water right limited by clause providing that water should be diverted at particular point.

Effect of Other Language in Deed to cut down estate conveyed by granting clause. See note, 12 L. R. A. (n. s.) 964.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 52 CALIFORNIA.

52 Cal. 3–7, PACHECO v. BECK.

Mandamus Lies to Compel Secretary of State to estimate votes cast for members of Congress as shown in records of counties transmitted to him by clerks, and to issue certificate to persons having highest number.

Approved in Cerini v. De Long, 7 Cal. App. 404, 94 Pac. 585, holding mandamus lies to compel election commissioners to canvass returns of election held to fix boundary lines of counties.

Distinguished in Gibson v. Twaddle, 1 Cal. App. 128, 81 Pac. 728, mandamus does not lie to compel supervisors to permit election officers to authenticate returns, after board has issued certificate of election and adjourned as board of canvassers.

Miscellaneous.—Cited in Swamp Land Reclamation Dist. No. 407 v. Wilcox (Cal.), 14 Pac. 845, to point that clerk of board of supervisors cannot alter records of proceedings of board once entered, although he knows record to be incorrect.

52 Cal. 36–42, CRAWFORD v. DUNBAR.

Candidate for Office Who Fails to Receive Majority or plurality of votes is not elected because one who was elected proves ineligible.

Reaffirmed in Campbell v. Free, 7 Cal. App. 154, 93 Pac. 1061.

Effect of Election Where Successful Candidate is ineligible. See note, 124 Am. St. Rep. 211.

Office of County School Superintendent is Civil Office within meaning of constitution.

Approved in State v. Theus, 114 La. 1103, 38 So. 872, holding parish superintendent a public officer.

52 Cal. 42–45, PILLER v. SOUTHERN PACIFIC R. R. CO.

Two Years' Limitation Provided for in Section 339, subdivision 1, Code of Civil Procedure, applies to all actions at law not specifically mentioned in other portions of statute.

Cited in Meigs v. Pinkham, 159 Cal. 110, 112 Pac. 885, arguendo.

Distinguished in Christensen v. Jessen (Cal.), 40 Pac. 748, section 338, subdivision 4, Code of Civil Procedure, applies to actions at law as well as in equity.

52 Cal. 45–53, FERNANDES v. SACRAMENTO CITY RY. CO.

When Facts in Regard to Negligence are doubtful, it is question for jury.

Approved in Payne v. Oakland Traction Co., 15 Cal. App. 148, 113 Pac. 1082, and Wheeler v. Oregon R. R. etc. Co., 16 Idaho, 392, 102 Pac. 353, both following rule; Mugford v. Atlantic etc. Co., 7 Cal. App. 675, 95 Pac. 675, holding facts show contributory negligence as matter of law; Williams v. Southern Pac. R. Co. (Cal.), 9 Pac. 157, holding plaintiff guilty of contributory negligence as matter of law where he lay down drunk on railroad track; dissenting opinion in Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, majority holding person lying down and sleeping on railroad track guilty of contributory negligence as matter of law.

Distinguished in Morrison v. Lee, 16 N. D. 384, 113 N. W. 1028, 13 L. R. A. (n. s.) 650, denying recovery to plaintiff who poured contents of can of kerosene, sold by defendant with knowledge that one-ninth of contents was gasoline, into fire.

52 Cal. 53–65, 28 Am. Rep. 629, LOW v. CALIFORNIA PACIFIC R. R. CO.

Railroad Corporation has Power, on sufficient consideration, to guarantee bonds of another railroad corporation.

Approved in Smith v. Ferries etc. Ry. Co. (Cal.), 51 Pac. 713, holding corporation could assume bonds of another corporation issued in violation of section 309, Civil Code.

Implied Power of Corporation to Borrow Money and give evidence of indebtedness and security therefor. See note, 111 Am. St. Rep. 330.

52 Cal. 73–75, BANK OF WOODLAND v. WEBBER.

Proof That Tax was Paid Under Written Protest before delinquent, and before threats were made to sell property, is not proof of payment under duress.

Approved in Justice v. Robinson, 142 Cal. 201, 75 Pac. 777, holding as voluntary, payment of drainage district tax under protest where protest merely assailed legality of district and validity of assessment; Decker v. Perry (Cal.), 35 Pac. 1019, holding complaint to recover assessment paid on irrigation district failed to show duress in payment when it failed to show threat to sell before payment.

52 Cal. 75–77, LIVERMORE v. CAMPBELL.

Appeal Lies from Order Vacating Judgment of dismissal.

Approved in Shumake v. Shumake, 17 Idaho, 656, 658, 107 Pac. 44, 45, appeal lies from order setting aside final judgment.

If Appeal is Taken from Order of District Court setting aside judgment, court cannot try case until appeal is heard and determined.

Approved in Davis v. Wallace (Cal.), 38 Pac. 1107, following rule; In re Bullard's Estate (Cal.), 31 Pac. 1120, holding after order was entered from which appeal was taken in probate proceedings, court had no power to make new or further findings in regard to matters involved.

Writ of Prohibition. See note, 111 Am. St. Rep. 947.

52 Cal. 77–81, **SMITH v. FARRELLY.**

Tax for Local Improvement Levied on district created by legislature is not assessment within meaning of article XI, section 8, Constitution.

Distinguished in Wheatland v. Boston, 202 Mass. 261, 88 N. E. 770, holding provision for bringing suit to recover back a tax applies to assessment for local improvement.

Local Assessments for Benefits, on property exempt from general taxation. See note, 35 L. R. A. 34.

52 Cal. 81–84, **MOULTON v. LOUX.**

In Action to Recover Money Laid Out and expended for another, it is necessary to prove, either directly or presumptively, that plaintiff was requested by defendant to lay out money for his use.

Distinguished in Union Collection Co. v. Snell, 5 Cal. App. 131, 89 Pac. 860, on supplementary proceedings, judgment creditor cannot have order that third person, who has received money from judgment debtor, shall pay it to sheriff on execution.

52 Cal. 84–87, **ESTATE OF PICO.**

Section 230, Civil Code, Provides for and applies only to adoption of minors.

Approved in Estate of Jessup, 2 Cof. Prob. 495, 496, reaffirming rule; Garner v. Judd (Cal.) 64 Pac. 1076, acknowledgment of illegitimate child by father without receiving it into his family does not constitute adoption; Miller v. Pennington, 218 Ill. 225, 75 N. E. 921, 1 L. R. A. (n. s.) 773, parol acknowledgment of paternity and intermarriage of parents legitimate child.

52 Cal. 87–89, **KENNEDY v. BERRY.**

In Action for Damages for Breach of Contract, if consideration of contract is denied in answer, court must find on that issue.

Approved in Holzheier v. Hayes (Cal.), 52 Pac. 838, following rule.

52 Cal. 90–91, **PATOCHI v. CENTRAL PACIFIC R. R. CO.**

Clerk has No Authority to Enter Judgment at variance with verdict.

Approved in McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 402, 84 Pac. 351, following rule.

52 Cal. 93–94, **VANCE v. EVANS.**

The Only Contests in Respect to Right to Purchase state lands, of which district courts have jurisdiction, are those which arise in surveyor general's, or register's office.

Approved in Youle v. Thomas, 146 Cal. 543, 80 Pac. 716, denying intervention of one not in privity with state in contest of right to purchase state lands.

District Court has No Jurisdiction of Application to purchase lands filed after order referring contest to court for determination.

Approved in Blakeley v. Kingsbury, 6 Cal. App. 710, 93 Pac. 131, patent cannot issue on state swamp lands until contest, referred to court by surveyor general, has been determined.

Distinguished in Kleinsorge v. Burgbacher, 6 Cal. App. 353, 92 Pac. 202, jurisdiction of court upon reference of contest of rights of applicants to purchase timber lands is not confined to dates of ap-

parent filings of applications by surveyor general, where priority of right depends upon actual offers to file applications with tender of purchase money.

52 Cal. 97–99, **TURRILL v. GRATTAN.**

Supervisors cannot Give Notice of Intention to grade street in absence of petition signed by owners of majority of frontage.

Approved in Wilcox v. Engebretsen, 160 Cal. 292, 116 Pac. 751, applying rule to change of street grade.

52 Cal. 111–126, **SPRING VALLEY WATER WORKS v. SAN FRANCISCO.**

Writ of Prohibition is Prerogative Writ to be issued only in sound discretion of court.

Approved in Stein v. Morrison, 9 Idaho, 457, 75 Pac. 256, denying writ to restrain state officers from issuing and selling state bonds; Kalbfell v. Wood, 193 Mo. 688, 92 S. W. 233, refusing writ to prevent board of election commissioners from selecting judges, clerks and challengers from certain list; dissenting opinion in Bates v. Gregory (Cal.), 22 Pac. 687, majority holding mandamus does not lie to compel board of city trustees to issue bonds under act of 1864 in liquidation of bonds issued under acts of 1853 and 1854, when such have become barred since 1864.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 91.

52 Cal. 132–142, **SPRING VALLEY WATERWORKS v. BRYANT.**

Passage of Ordinance of Legislative Character by board of supervisors is not reviewable on certiorari.

Approved in State v. White Pine County, 31 Nev. 117, 101 Pac. 105, action of county commissioners in contracting for indexing of records not reviewable on certiorari; Tenny v. Seattle Electric Co., 48 Wash. 152, 92 Pac. 896, passage of city ordinance granting franchise to public service corporation not reviewable on certiorari; State v. Superior Court, 44 Wash. 530, 87 Pac. 819, action of mayor and council in revoking liquor license not reviewable by superior court.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 39, 91, 101.

52 Cal. 142–154, **HOAGLAND v. SACRAMENTO.**

Legislature cannot Compel City to Pay Claim which it is under no obligation, moral or equitable, to pay.

Approved in Fleming v. Hance, 153 Cal. 168, 94 Pac. 622, holding city cannot be compelled to pay salary of prosecuting attorney in police court when attorney acts for state.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 474.

52 Cal. 158–159, **BOTSFORD v. HOWELL.**

Affidavit Made on Application to Purchase Swamp Lands must state, directly and positively, facts required by section 3442, Political Code, to be stated in affidavit.

Reaffirmed in Moran v. Bonynge, 157 Cal. 299, 107 Pac. 314.

52 Cal. 159–164, **MAHONEY v. SPRING VALLEY WORKS CO.**

Corporation, Having Commenced Condemnation Proceedings, cannot sell its right to prosecute them in name of original petitioner to another corporation.

Approved in Contra Costa Water Co. v. Van Rensselaer, 155 Fed. 141, 142, right to condemn land for public use is not right of property capable of being transferred, but a governmental function.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 20, 57, 157, 158.

52 Cal. 164–169, **KENTFIELD v. IRWIN.**

Special Election is One Held to Supply Vacancy occurring before expiration of full term for which incumbent was elected.

Approved in State v. Howell, 59 Wash. 498, 110 Pac. 388, special election is one held at time other than that fixed by law to elect officer for regular term.

Time for Holding Election, General or Special, must be authoritatively designated in advance.

Approved in Marsden v. Harlocker, 48 Or. 93, 120 Am. St. Rep. 786, 85 Pac. 329, holding void local option election when county court failed to inspect petition and issue order for election.

Necessity of Notice or proclamation of election. See note, 120 Am. St. Rep. 795.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 67.

52 Cal. 170–171, **BANK OF SANTA ROSA v. CHALFANT.**

To Allow Recovery of Illegal Tax Paid under protest, tax must have been delinquent, and officer to whom paid must have had real or pretended authority, and have threatened to seize and sell property.

Approved in Decker v. Perry (Cal.), 35 Pac. 1019, holding complaint against irrigation district assessment to recover tax paid under protest failed to show threat of sale before payment.

52 Cal. 171–189, **PEOPLE v. HAGAR.**

General Denial in Verified Answer is admissible and may be stricken out.

Approved in People v. Lowden (Cal.), 8 Pac. 68, following rule.

Wherever Jurisdiction of Court not of Record depends on a fact which court is required to ascertain and settle by its decision, such decision, if court has jurisdiction of parties, is conclusive, and not subject to collateral attack.

Approved in Spaulding v. North San Francisco etc. Assn., 87 Cal. 42, 24 Pac. 601, applying rule to action of board of supervisors on petition for grading street in deciding that majority of lot frontage was represented in petition; State v. Schenkel, 129 Mo. App. 238, 108 S. W. 639, county court's finding as to facts permitting opening of road held conclusive.

Certificate of Incorporation is Best Evidence of act of incorporation.

Reaffirmed in Creditors' Union v. Lundy, 16 Cal. App. 570, 117 Pac. 626.

Procedure for Establishment of drains and sewers. See notes, 60 L. R. A. 171, 243.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 620.

Who is Liable for Expense of Drainage. See note, 58 L. R. A. 364.

Miscellaneous.—Cited in Board of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. 354, 26 Pac. 242, to point that decisions with respect to formation of swamp land reclamation districts are applicable to irrigation districts.

52 Cal. 192–196, **SOUTHERN CALIFORNIA COLONY ASSN. v. BUSTAMENTE.**

Affixing of Seal of Corporation to Writing purporting to be executed by it with signature of proper officers attached is prima facie evidence that seal was affixed by proper authority.

Approved in Greve v. Echo Oil Company, 8 Cal. App. 284, 96 Pac. 907, following rule.

52 Cal. 196–198, **BANK OF SONOMA COUNTY v. FAIRBANKS.**

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 469.

52 Cal. 198–201, **SAN FRANCISCO v. FORD.**

Under Article IV, Section 34, Constitution, deposit and loan associations may be formed which do not issue paper money, and such are not banks within prohibition of Constitution, although so called.

Approved in Bank of Martinez v. Hemme Orchard etc. Co., 105 Cal. 377, 38 Pac. 964, following rule.

52 Cal. 206–208, **PICO v. GALLARDO.**

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 56.

52 Cal. 212–213, **PEOPLE v. ENGLISH.**

When Two Persons are Jointly Indicted, declarations of one not on trial, made after offense was consummated, are not admissible against other on his trial.

Approved in People v. Sidelinger, 9 Cal. App. 300, 99 Pac. 391, following rule; People v. Ayhens, 16 Cal. App. 622, 117 Pac. 790, declarations of codefendant to policeman after arrest made in presence of defendant, charging defendant with crime, which latter promptly denied, are inadmissible.

Distinguished in People v. Brady (Cal.), 36 Pac. 950, holding admissible statements made by defendant's partner in pursuance of agreement between them and third person by which partner was to go with such third person and deliver to him stolen property; Durkee v. Central Pacific R. Co. (Cal.), 9 Pac. 101, holding declarations of engineer within five minutes after accident injuring child admissible as res gestae.

52 Cal. 217–219, **SMITH v. ACKER.**

When Ultimate Fact is Found, no finding of probative facts, which may tend to establish that ultimate fact was found against evidence, can overcome finding of ultimate fact.

Approved in People v. McCue, 150 Cal. 199, 88 Pac. 901, and Forsythe v. Los Angeles Ry. Co., 149 Cal. 575, 87 Pac. 27, both following rule; Bryan v. Tormey (Cal.), 21 Pac. 726, holding findings in regard

to defendant's claim of title in action to quiet title not necessarily inconsistent with finding of ownership in plaintiff; Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, in action to determine adverse claim, findings that plaintiff is owner and entitled to possession and defendant has no claim are of ultimate fact, and support judgment confirming plaintiff's title.

Distinguished in Gardner v. San Gabriel Valley Bank, 7 Cal. App. 109, 93 Pac. 902, finding against ownership of easement by successors of grantor, where easement is reserved in deed, is not of ultimate fact to be reviewed only for insufficiency of evidence, but conclusion of law.

52 Cal. 225-227, **DRAKE v. FOSTER.**

When Defendant Dies During Pendency of action, and administrator is substituted, and plaintiff obtains judgment without presenting claim for allowance, objection thereto cannot be made for first time in supreme court.

Approved in Clayton v. Dinwoodey, 33 Utah, 263, 93 Pac. 727, holding presentation of claim to executor arising from breach of covenant of warranty in decedent's deed not to be jurisdictional to action thereon.

Distinguished in Burke v. Maguire, 154 Cal. 464, 98 Pac. 24, action does not lie against administrator upon claim against fund in his possession which is not claimed to be part of estate without previous demand against the fund.

52 Cal. 227-231, **CENTRAL PACIFIC R. R. CO. v. HOWARD.**

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 332, 336, 346, 349.

52 Cal. 238-244, **MERRITT v. WILCOX.**

Attorney cannot Bind Client by Verbal Stipulation made during trial and not entered on minutes.

Approved in McWhirter v. Donaldson, 36 Utah, 304, 104 Pac. 735, oral stipulation of attorney not entered on minutes held void; Eisenberg v. Nichols, 57 Wash. 563, 107 Pac. 372, holding void oral "street" stipulation of attorneys.

Special Finding of Fraud is Necessary to authorize judgment running against person of debtor.

Approved in Ledford v. Emerson, 143 N. C. 535, 55 S. E. 972, 10 L. R. A. (n. s.) 362, discharging debtor on habeas corpus when arrested on execution on judgment not supported by special finding of fraud.

52 Cal. 248-249, **NEILSON v. CRAWFORD.**

Use of Person's Books of Account as evidence upon issues between other parties. See note, 53 L. R. A. 537.

52 Cal. 250-251, **UHL v. UHL.**

Action to Annul Marriage by Reason of Marriage of plaintiff to one still alive cannot be united with action to quiet title to her separate property in which defendant claims interest.

Approved in Reed v. Reed, 70 Neb. 777, 98 N. W. 77, sustaining demurrer to joinder of action to determine property rights not growing

out of marriage, with action for divorce; Reed v. Reed, 65 Neb. 852, 91 N. W. 858, holding court could hear and determine in divorce suit property rights not growing out of marriage when no objection was made.

Right to Join Prayer for Return of Property with prayer for divorce. See note, 29 L. R. A. (n. s.) 821.

52 Cal. 251-252, PEOPLE v. LEITH.

Homicide in Carrying Out unlawful conspiracy. See note, 68 L. R. A. 202.

52 Cal. 263-269, MORENHAUT v. WILSON.

Tenant in Common may Maintain Action to recover mining claim without joining cotenants.

Approved in Binswanger v. Henninger, 1 Alaska, 511, following rule.

Cotenancy in Mines. See note, 91 Am. St. Rep. 889.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 405, 413.

Relocation of Mining Claim as abandoned or forfeited. See note, 68 L. R. A. 847.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 893.

52 Cal. 280-292, BANK OF CALIFORNIA v. WESTERN UNION TEL. CO.

Principal is Bound by Acts of Agent committed in transaction of business of agency, even though acts were wrongful.

Approved in Castroville Co-op. Creamery Co. v. Col, 6 Cal. App. 537, 92 Pac. 649, following rule.

Telegraph Company is Responsible to Bank for its payment of false telegraph order to pay money purporting to come from cashier of bank, and transmitted by agent of company.

Approved in Morris v. Warlick, 118 Ga. 422, 45 S. E. 408, agent having authority to employ subagent not liable for negligence of subagent when due care was used in his selection; Thyssen v. Davenport Ice & Storage Co., 134 Iowa, 752, 112 N. W. 178, master liable for injury caused by servant permitting stranger to assist him; Usher v. Western Union Tel. Co., 122 Mo. App. 105, 98 S. W. 86, holding telegraph company liable for injury caused by forged telegram sent by station agent, who also received messages from public for transmission; Western Union Tel. Co. v. Uvalde Nat. Bk., 97 Tex. 225, 77 S. W. 605, 65 L. R. A. 805, holding telegraph company liable for injury caused by false message sent by wire-tappers and delivered by agent of company; Fanset v. Garden City State Bank, 24 S. D. 253, 123 N. W. 688, bank receiving check for collection not liable for failure of collecting bank to transmit proceeds, on ground depositor of check authorized by implication appointment of such bank as subagent; Bank of Havelock v. Western Union Tel. Co., 141 Fed. 531, 532, 72 C. C. A. 580, 4 L. R. A. (n. s.) 181, holding telegraph company liable for loss of lien due to sending of message without exercise of care in determining identity of sender.

Duty of Telegraph Company to ascertain identity or authority of sender of message. See note, 4 L. R. A. (n. s.) 182.

Liability of Telegraph Company for transmission or delivery of forged message. See note, 65 L. R. A. 807.

Liability of Master to One to Whom he owes no contractual duty, for acts of volunteer whom servant permits to assist. See note, 13 L. R. A. (n. s.) 574.

52 Cal. 294-299, ESTATE OF HEADEN.

Under Section 1265, Civil Code, Homestead declared on separate property of one spouse passes to survivor as joint tenant, and not by descent, even if other spouse dies after amendment of 1874, which limited title of survivor.

Distinguished in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 353, 355, 107 Pac. 337, holding section 1265, Civil Code, merely determines nature of tenancy of homestead during joint life of spouses.

Right of Children in Homestead of Parent. See note, 56 L. R. A. 44, 48.

52 Cal. 302-306, KRAEMER v. KRAEMER.

Property Which is Separate Property of Spouse in one state does not change its character by removal of spouses to another state in which it would be community property.

Approved in Brookman v. Durkee, 46 Wash. 584, 123 Am. St. Rep. 944, 90 Pac. 915, 12 L. R. A. (n. s.) 921, following rule.

Conflict of Laws as to Rights and obligations of married women. See notes, 85 Am. St. Rep. 565; 57 L. R. A. 363.

52 Cal. 306-309, MORRISON v. GOLD MOUNTAIN ETC. MIN. CO.

Liability of Corporations on contracts of promoters. See note, 26 L. R. A. 547.

52 Cal. 315-319, STONE v. GEYSER QUICKSILVER MIN. CO.

Court Should not Instruct Jury that they are authorized to find fact from existence of other facts.

Approved in Linforth v. S. F. Gas & Electric Co., 156 Cal. 67, 103 Pac. 324, and Liverpool etc. Ins. Co. v. Southern Pacific Co., 125 Cal. 444, 58 Pac. 59, both following rule; Davis v. Hearst, 160 Cal. 177, 116 Pac. 545, discussing presumption of malice in libel case.

Distinguished in People v. Crowl (Cal.), 34 Pac. 861, upholding instruction given in regard to presumptions arising on proof of facts.

Intention to Return is Test of abandonment.

Reaffirmed in Doyle v. Burns, 123 Iowa, 510, 99 N. W. 203.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 404.

52 Cal. 319-322, TUOHY v. WINGFIELD.

Creditor Who Attaches Property Obtains Lien only upon interest actually owned by debtor when attachment was levied.

Approved in National Bank of the Pacific v. Western Pac. Ry. Co., 157 Cal. 576, 108 Pac. 677, holding attaching creditor had no lien on shares of stock sold by debtor before attachment but not transferred on corporation books.

Levy under Execution or Attachment, upon rights under lease. See note, 17 L. R. A. (n. s.) 843.

Garnishment of Unliquidated Claims. See note, 59 L. R. A. 376.

52 Cal. 322–325, WEST v. SMITH.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 751.

52 Cal. 325–326, REED v. KIMBALL.

Appeal will be Dismissed if Undertaking Thereon is not filed within five days after service of notice of appeal.

Reaffirmed in Buhman v. Nickels, 1 Cal. App. 269, 82 Pac. 86.

52 Cal. 334–336, PARRY v. KELLEY.

Mortgage Given by Wife on Property Deeded to her, but purchased by community funds, creates no lien on property.

Approved in Pryal v. Pryal (Cal.), 71 Pac. 804, holding void deed of wife to third person of homestead from community deeded to her by husband; Freiermuth v. Steigleman, 130 Cal. 393, 80 Am. St. Rep. 138, 62 Pac. 615, holding invalid wife's mortgage on community homestead.

Distinguished in Anima v. Lau Kona, 9 Haw. 375, holding woman who married and acquired land prior to passage of married woman's act may after its passage make valid lease of such land without husband's consent so as to entitle lessee to possession after death of husband.

52 Cal. 345–348, SMITH v. REED.

Effect of Death of Party After Judgment upon remedy by execution. See note, 61 L. R. A. 363, 393.

52 Cal. 348–350, McFADDEN v. ELLMAKER.

Declarations of Grantor, Made While in Possession of title, are admissible in disparagement of title in his grantee.

Approved in Frink v. Roe (Cal.), 7 Pac. 486, following rule.

52 Cal. 350–352, RHODA v. ALAMEDA COUNTY.

In Action on Claim Against County, plaintiff must aver all matters required by statute in relation to his presentation of claim to board of supervisors, and their rejection of same.

Approved in Farmers' etc. Bank v. Los Angeles, 151 Cal. 658, 91 Pac. 796, holding previous demand for repayment of taxes paid under protest must be alleged in action to recover same.

General Allegation in Pleading of Performance of condition precedent prescribed by statute is insufficient.

Approved in Estate v. Renton, 3 Cof. Prob. 530, allegation that will contestants are adopted children of decedent, without setting forth particular facts upon which claim for adoption rests, is insufficient.

Liabilities of Counties for Torts and negligence. See note, 39 L. R. A. 73.

52 Cal. 363–371, SILVEY v. HODGDON.

Trust in Personalty may be Established by parol, but must be proved by clear and unequivocal evidence.

Reaffirmed in Austin v. Wilcoxson, 149 Cal. 29, 84 Pac. 419.

52 Cal. 378–380, SOMO v. OLIVER.

Contest cannot be Made Before Surveyor General in respect to right to purchase land for which patent has been issued to one of parties.

Distinguished in Miller v. Engle, 3 Cal. App. 329, 85 Pac. 160, holding section 3414, Political Code, does not allow entryman on state lands to shield himself from effects of violating statute in entry by paying in full for land.

52 Cal. 382-384, EVERETT v. EVERETT.

Right of Wife Against Whom Absolute Divorce granted to permanent alimony.

52 Cal. 385-399, 28 Am. Rep. 634, COBURN v. AMES.

State may Maintain Ejectment for wharf constructed without authority beyond low-water mark.

Approved in City of Providence v. Comstock, 27 R. I. 557, 65 Atl. 314, ejectment lies at suit of city to recover possession of tide lands.

Distinguished in Bonetti v. Ruiz, 15 Cal. App. 10, 113 Pac. 118, injunction lies to prevent one from diverting percolating water from land of abutting owner by means of well on highway.

Riparian Owner cannot Maintain Ejectment to remove that part of wharf which extends beyond low-water mark from his land.

Approved in Conradt v. Miller, 2 Alaska, 436, holding injunction is remedy of private owner to prevent building of wharves opposite his property; Clark v. Evansville Boat Club, 44 Ind. App. 429, 88 N. E. 101, arguendo.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 579, 585.

Right to Erect Wharves. See note, 40 L. R. A. 644.

Right of Eminent Domain as Affected by extent to which general scheme has progressed. See note, 7 L. R. A. (n. s.) 200.

Rights, Obligations and Remedies of persons over whose land a highway runs. See note, 101 Am. St. Rep. 109.

52 Cal. 399-403, FRAZIER v. CROWELL.

Certified Copy of Judgment is not an abstract thereof.

Approved in Erkson v. Parker, 3 Cal. App. 100, 84 Pac. 438, under section 710, Code of Civil Procedure, filing abstract of judgment with auditor is not sufficient, but transcript must be filed.

In Ejectment, Finding That Defendant has good and perfect title supports judgment for him, whether regarded as finding of fact or conclusion of law.

Approved in People v. McCue, 150 Cal. 199, 88 Pac. 901, where in action to abate obstructions to several streets it was found that such streets are public highways and probative facts found are not inconsistent therewith, it is sufficient to sustain judgment abating obstructions; Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, in action to determine adverse claim findings that plaintiff is owner and entitled to possession, and that defendant is without right, are findings of ultimate fact, and support judgment for plaintiff.

52 Cal. 403-406, ESTATE OF SCOTT.

When Executor Mingles Funds of Estate with his own, he will be charged with legal interest with annual rests.

Reaffirmed in Estate of McPhee, 156 Cal. 341, 104 Pac. 457.

Liability of Executors or Trustees for compound interest. See note, 29 L. R. A. 631, 656.

52 Cal. 407–411, YOUNG v. WRIGHT.

Allegation That Judgment was "Duly Rendered" is not equivalent to allegation that it was "duly given or made."

Approved in Baker v. Healey, 1 Alaska, 46, holding complaint on a judgment sufficient against demurrer; Mears v. Shaw, 32 Mont. 578, 81 Pac. 339, allegation that certain parties were adjudged bankrupt held insufficient as not alleging judgment "duly given and made"; State v. Lagoni, 30 Mont. 477, 76 Pac. 1046, complaint on bail bond alleging judgment held defective as not alleging it to be "duly given or made"; Ashley v. Pick, 53 Or. 415, 100 Pac. 1105, upholding averment that judgment was "duly given."

Distinguished in Gurnsey v. Northern California Power Co., 7 Cal. App. 344, 94 Pac. 862, holding allegation that franchise had been "granted" implied that it was done by ordinance.

Party Relying on Judgment as Estoppel who in pleading it undertakes to avail himself of statute releasing him from pleading jurisdictional facts must comply strictly with terms of statute.

Approved in Wolters v. Thomas (Cal.), 32 Pac. 567, holding statute of limitations must be pleaded by stating section and subdivision of code which bars action when facts are not set forth, pleading number of section alone being insufficient.

52 Cal. 411–412, WIGGINTON v. MARKLEY.

Mandamus Does not Lie to Compel clerk of board of supervisors to correct records.

Approved in Swamp Land Reclamation Dist. No. 407 v. Wilcox (Cal.), 14 Pac. 845, holding clerk of board of supervisors had no right to alter incorrect order of board entered on minute-book.

52 Cal. 417–419, SWIFT v. CANAVAN.

Court must Find on Issue Raised by affirmative matter set up in answer constituting valid defense.

Approved in Bordeaux v. Bordeaux, 30 Mont. 42, 75 Pac. 526, court must make findings on cross-complaint in divorce to support judgment for plaintiff; Dillon Implement Co. v. Cleaveland, 32 Utah, 5, 88 Pac. 671, judgment cannot be rendered until issues raised by counterclaims are found upon.

52 Cal. 420–422, GLASCOCK v. ASHMAN.

On Appeal from Judgment, Appellate Court may order new trial as to part of issues only.

Approved in Robinson v. Muir, 151 Cal. 125, 90 Pac. 524, following rule.

Burden of Proof in Suit for failure to execute process. See note, 3 L. R. A. (n. s.) 426.

52 Cal. 428–430, LAKE v. LAKE.

Land Held Under Claim of Ownership by party before marriage continues his separate estate after marriage although title is thereafter perfected by deed from paramount source.

Reaffirmed in Estate of Pepper, 158 Cal. 623, 112 Pac. 64.

What is Community Property. See notes, 126 Am. St. Rep. 116; 4 Cof. Prob. 58.

Real Property Granted by Government to citizen as separate or community property. See notes, 96 Am. St. Rep. 920; 26 L. R. A. (n. s.) 1118.

52 Cal. 430–434, **BRANDT v. WHEATON.**

General Verdict in Equity Case must be disregarded, and court must find facts.

Approved in Sweetser v. Dobbins (Cal.), 3 Pac. 117, and Evans v. Ross (Cal.), 8 Pac. 89, both following rule.

As Against Mere Trespasser, one in possession of public land is deemed owner.

Approved in Foss v. Dam, 1 Alaska, 347, one in possession of public lands for trade or residence may maintain action to quiet title thereto.

One in Possession of Public Land cannot maintain action in equity against applicant to purchase same from United States, to enjoin him from setting up any title thereto.

Approved in Allen v. Myers, 1 Alaska, 120, holding plaintiff in equity suit to quiet title will have such suit dismissed when he applies for patent to same land.

Effect of Legal Remedy upon Equitable Jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 73.

52 Cal. 438–440, **JARVIS v. SANTA CLARA VALLEY R. R. CO.**

Private Person cannot Maintain Action to abate nuisance unless he suffers damage peculiar to himself as distinct from damage to general public.

Approved in Donahue v. Stockton Gas etc. Co., 6 Cal. App. 280, 92 Pac. 198, following rule; Reynolds v. Presidio etc. R. R. Co., 1 Cal. App. 233, 81 Pac. 1119, holding owner of abutting property has no special cause of action against railroad not laid in center of street according to its franchise.

Right to Obstruct or Destroy Rights of navigation. See note, 59 L. R. A. 82.

52 Cal. 440–442, **DYER v. CHASE.**

Assessment for Work Done on Street and Sidewalk cannot be demanded where resolution of intention is to curb and macadamize the street only.

Approved in Gallagher v. Garland, 126 Iowa, 210, 101 N. W. 868, holding void in toto assessment for improving street which covered both grading and graveling, when city had no authority to do the grading.

Distinguished in Williams v. Bisagno (Cal.), 34 Pac. 641, upholding assessment for street work when estimates included a small amount of grading of surface inequalities, though resolution did not mention it.

52 Cal. 442–445, **SPRING v. HEWSTON.**

Creek Referred to in Deed as Boundary Line held to be monument prevailing over calls for courses.

Approved in Park Commissioners v. Taylor, 133 Iowa, 459, 108 N. W. 929, river referred to in deed as boundary of lots held to be fixed monument controlling courses and distances.

Effect of Bounding Grant on River or tide water. See note, 42 L. R. A. 502.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 680.

Location of Boundaries. See note, 129 Am. St. Rep. 998.

52 Cal. 447–449, SCHACHT v. ODELL.

Appeal Need not be Dismissed for mere lack of prescribed justification of sureties.

Approved in Wilson v. Eagleson, 9 Idaho, 27, 108 Am. St. Rep. 110, 71 Pac. 616, injunction bond not void though sureties did not justify they were householders or freeholders.

Miscellaneous.—Cited in Meysan v. Chabrie (Cal.), 5 Pac. 670, refusing to dismiss appeal on authority of principal case.

52 Cal. 452–455, PEOPLE v. JEFFERSON.

Burglary may be Generally Alleged in indictment, leaving time and consequent degree to be determined at trial.

Approved in State v. Copenhaver, 35 Mont. 344, 89 Pac. 62, where indictment charged burglary in first degree, conviction could not be had in second degree, since second is not included in first degree.

When Defendant Pleads Guilty to Indictment for offense divided into degrees, court must determine degree.

Approved in Ex parte Haase, 5 Cal. App. 543, 90 Pac. 947, holding court will be presumed to have determined degree when record does not show contrary; People v. Bannister (Cal.), 34 Pac. 710, holding erroneous verdict not stating degree of crime when crime is divided into degrees.

52 Cal. 465–466, ESTATE OF CUNNINGHAM.

Settlement of Partnership Accounts between partners can only be made in action in which all partners are parties.

Approved in Dryden v. Sewell, 2 Alaska, 186, reaffirming rule.

If Instructions are Contradictory so as to confuse jury in their deliberations, verdict cannot stand.

Reaffirmed in Rathbun v. White, 157 Cal. 253, 107 Pac. 311.

Effect of Intoxication on Question of undue influence. See note, 1 Cof. Prob. 405, 532.

52 Cal. 466–468, YOUNG v. HOGLAN.

Partnership Accounts Between Partners can only be settled in action in which all partners are joined.

Approved in Mitau v. Roddan, 149 Cal. 7, 84 Pac. 147, 6 L. R. A. (n. s.) 275, in action to enforce deed of trust given to secure indebtedness to individual and also to firm of which he is member, which involves accounting between beneficiaries, such firm must be party to action, though not to deed of trust.

52 Cal. 470–471, PEOPLE v. BEVANS.

Venue must be Proved as charged.

Approved in People v. Meseros, 16 Cal. App. 278, 116 Pac. 679, in prosecution for embezzling money by cashing checks in San Francisco, which were intrusted to defendant in Alameda, venue is in San Francisco.

52 Cal. 473–475, DE BAKER v. CARILLO.

Illegal Assessment Levied on Lot for improvements and paid by owner is deemed voluntarily paid, and cannot be recovered back in

action at law against officer, although paid under protest after threatened sale.

Approved in Decker v. Perry (Cal.), 35 Pac. 1019, holding defective, complaint to recover irrigation district assessment for failure to show nature of proceedings to collect it, the threat of which constituted compulsion.

52 Cal. 479–481, PEOPLE v. GAINES.

Omission to Plead to Indictment is Fatal to judgment for conviction even after verdict.

Approved in Territory v. Blevins, 4 Ariz. 69, 77 Pac. 616, and State v. De Wolfe, 29 Mont. 419, 74 Pac. 1085, both following rule; State v. Chambers, 9 Idaho, 678, 75 Pac. 276, failure to read indictment and state plea held reversible error; State v. Beatty, 51 W. Va. 237, 41 S. E. 436, where record showed defendant "pleaded not guilty," record is sufficient as to plea to sustain conviction.

Distinguished in State v. Suttles, 13 Idaho, 93, 88 Pac. 239, fact that prisoner was informed of his right to challenge individual jurors need not be shown by record.

52 Cal. 482–487, 28 Am. Rep. 639, LINCOLN v. ALEXANDER.

Constitutionality of Private Statutes to authorize disposal of property. See note, 16 L. R. A. 253.

52 Cal. 489–491, BROWN v. RICE.

Action to Recover Excessive Turnpike Toll does not involve legality of toll within meaning of Constitution relating to jurisdiction of courts.

Approved in Thomas v. Lincoln County, 41 Wash. 152, 83 Pac. 19, action to recover excessive tax levied through mistake in acreage held not to avoid legality of tax.

52 Cal. 494–495, GLASCOCK v. ASHMAN.

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 529, 532.

52 Cal. 496–500, PENRY v. RICHARDS.

Deed Referring to Map for Description and to monuments erected by surveyor must be construed as referring to monuments, and they control over courses and distances on map.

Approved in Beall v. Weir, 11 Cal. App. 369, 105 Pac. 135, where land has once been conveyed with reference to monuments in place at time of conveyance, such conveyance cannot afterward be defeated by survey showing such monuments were improperly placed.

Location of Boundaries. See note, 129 Am. St. Rep. 1013.

Where Deed Describes Property Conveyed by reference to map, map may be identified by parol, and when so identified it becomes portion of deed.

Reaffirmed in Snooke v. Wingfield, 52 W. Va. 445, 44 S. E. 278.

52 Cal. 506–508, LARRABEE v. SELBY.

Proceedings to Punish Party for Contempt are not appropriate proceedings for trial of issue of title.

Approved in Ex parte Pahia, 13 Haw. 581, following rule.

Re-entry on Land, from Which Party has been removed under judgment in ejectment, under new right is not contempt.

Approved in Carr v. District Court of Van Buren County, 147 Iowa, 674, 126 N. W. 795, proceedings to issue new school warrants held not to be contempt where officers of district were enjoined from paying balance due on former warrants.

52 Cal. 513–515, HAWKINS v. MANSFIELD ETC. MIN. CO.

Liability of Corporations on contracts of promoters. See note, 26 L. R. A. 547.

52 Cal. 538–540, ESTATE OF BARTON.

Where Decedent Left Will, Granting of Letters of administration with will annexed is not limited to order prescribed in Code of Civil Procedure, section 1365.

Approved in Estate of Bergin, 3 Cof. Prob. 290, following rule; Estate of Carlson, 2 Cof. Prob. 278, 279, under Code of Civil Procedure, section 1350, as amended in 1878, where sole executor dies, public administrator is entitled to letters as against nonrelative of deceased.

Miscellaneous.—Cited in Ninia v. Wilder, 12 Haw. 117, suggesting that preamble of will frequently furnishes source of interesting litigation.

52 Cal. 540–550, NISBET v. NASH.

If One Partner of Mining Claim Conveys His Interest to stranger, such stranger thereby becomes partner with other owners, with all his grantor's rights.

Approved in Loy v. Alston, 172 Fed. 92, 96 C. C. A. 578, holding conveyance of interest by one partner did not dissolve mining partnership.

52 Cal. 561–565, McCARTHY v. POPE.

Statute of Frauds Does not Apply to parol contract for purchase of land which has been executed.

Approved in Jones v. Patrick, 140 Fed. 408, holding as not within statute of frauds verbal agreement to find purchaser at advanced price for mining property on which one party held an option bond, and to share in profits of sale.

52 Cal. 565–568, BILLINGS v. DREW.

Inconsistent Defenses may be Set Up.

Reaffirmed in Light v. Stevens, 8 Cal. App. 79, 103 Pac. 363.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 197, 204, 206.

52 Cal. 568–577, ESTATE OF McCAUSLAND.

Claim or Demand as Used in Probate Act refers to such debts or demands against decedent as might have been enforced against him in life by personal action for recovery of money.

Approved in Estate of Finch, 3 Cof. Prob. 297, undertaker's claim need not be presented for allowance against estate of decedent; Kline v. Gingery, 25 S. D. 19, 124 N. W. 959, demand for rescission of sale of horse and return of purchase notes not claim to be presented to executor.

52 Cal. 586–590, GREEN v. CAMPBELL.

What Contracts will Support Maritime Lien. See note, 70 L. R. A. 369.

52 Cal. 590–598, COX v. McLAUGHLIN; S. C., 54 Cal. 605.

Where Work is to be Done Under Contract and payment made in installments, mere failure to pay installment as it becomes due does not amount to prevention of continuance of work.

Approved in Barrett v. Austin (Cal.), 31 Pac. 5, following rule; Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 273, 110 Pac. 955, building contractor can rescind for owner's failure to pay installments of contract price on time.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 67.

52 Cal. 598–602, PEOPLE v. LATHAM.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

52 Cal. 602–605, MEEKS v. SOUTHERN PACIFIC R. R. CO.

Section 486, Civil Code, Does not Abrogate Doctrine of contributory negligence.

Approved in Hutson v. Southern California Ry. Co., 150 Cal. 703, 89 Pac. 1094, holding traveler approaching crossing has no right to remit any care which law demands of him, on assumption that due care will be exercised by train operatives; Wheeler v. Oregon R. R. etc. Co., 16 Idaho, 394, 102 Pac. 353, section 2821, Revised Codes, relating to sounding bells and whistles at railroad crossings, does not abrogate rule of contributory negligence; Baker v. Seaboard Air Line R. R., 150 N. C. 566, 64 S. E. 508, denying recovery for injury to boy of fourteen caused by voluntarily jumping from car.

As to How Far Statutes will be Regarded as abrogating maxim that one cannot profit by his own wrong. See note, 25 L. R. A. 572.

It is Negligence Per Se for Parents to allow child to play on railroad tracks and to lie down upon them unattended, and bars recovery for its death.

Approved in Wardlaw v. California Ry. Co. (Cal.), 42 Pac. 1076, holding passenger guilty of contributory negligence as matter of law in attempting to board train by climbing on bumper between cars.

Denied in Atchison, Topeka etc. R. R. Co. v. Calhoun, 18 Okl. 82, 89 Pac. 209, negligence of parent held not imputable to child.

Contributory Negligence of Parent or custodian as bar to negligence action by child. See note, 21 L. R. A. 78.

Care Required of Railroad Companies to prevent injuring children upon track. See note, 25 L. R. A. 785.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 524.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 342.

52 Cal. 606–611, 28 Am. Rep. 642, EX PARTE FRANK.

City Ordinance Exacting License for transaction of business must be reasonable and impartial.

Approved in In re McCoy, 10 Cal. App. 126, 101 Pac. 424, holding ordinance of supervisors placing license tax on sheep pasturing unreasonable; Union Transportation Co. v. Bassett (Cal.), 46 Pac. 909, 910, holding courts can declare invalid unreasonable resolution of harbor commissioners.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 254.

Limit of Amount of License Fees. See note, 30 L. R. A. 425, 431, 438.

Police Powers of Municipalities over pawnbrokers, junk dealers, and dealers in second-hand clothes. See note, 32 L. R. A. 116.

Statute Authorizing City to "License and Regulate" all such callings or employments as public good may require empowers city to exact license for revenue.

Approved in Abraham v. Roseburg, 55 Or. 362, 105 Pac. 402, upholding license fee, under Roseburg charter, on attorneys.

Municipal Corporation is Creature of statute, with such power and capacity only as is conferred by statute, or passes by necessary implication.

Reaffirmed in City of Arcata v. Green, 156 Cal. 763, 106 Pac. 87.

Test of Validity of Municipal Ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 48, 52.

Discrimination by Municipality between its own residents and residents of same state. See note, 16 L. R. A. 49.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 455.

Miscellaneous.—Cited in Johnson v. Town of Fayette, 148 Ala. 499, 42 So. 622, to point that court and not jury must pass on validity of ordinance.

52 Cal. 611–616, 28 Am. Rep. 647, DAVIS v. RUSSELL.

Pre-existing Debt is Sufficient Consideration for transfer of property.

Approved in Virginia Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 261, 90 Pac. 50, following rule.

Where There is Evidence Tending to Establish Fact, instruction thereon should be given.

Reaffirmed in State v. Shockley, 29 Utah, 84, 80 Pac. 885.

52 Cal. 616–617, PEOPLE v. GRIFFIN.

Declarations Made When Defendant is not present are inadmissible against him.

Reaffirmed in People v. Schmitz, 7 Cal. App. 356, 94 Pac. 414.

52 Cal. 617–619, CLARK v. CUSHING.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 481, 485.

52 Cal. 619–620, PEOPLE v. BLANKENSHIP.

Statute as to Limitation of Actions in case of fraud applies to state as well as to individuals.

Approved in State v. Campbell, 3 Cal. App. 605, 86 Pac. 842, holding statute as to place of trial of action applies to state as well as to individuals.

Action for Relief on Ground of Mistake or fraud must be brought within three years after discovery of cause of action.

Approved in Murphy v. Crowley (Cal.), 70 Pac. 1026, following rule; Smith v. Irving (Cal.), 22 Pac. 171, holding complaint in action brought thirty years after alleged fraud bad on demurrer as not stating when discovery took place.

52 Cal. 620–621, **PEOPLE v. SEALE.**

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 79.

52 Cal. 622–623, **COVARRUBIAS v. SUPERVISORS OF SANTA BARBARA CO.**

Writ of Prohibition Where Jurisdiction Lost by appeal. See note, 111 Am. St. Rep. 947.

52 Cal. 624–628, **SNOW v. KIMMER.**

Agreement With Pre-emptioner not to Oppose his application for patent is void.

Approved in Roy v. Harney Peak Min. Co., 21 S. D. 143, 130 Am. St. Rep. 706, 110 N. W. 107, following rule.

52 Cal. 629–630, **BABCOCK v. GIBBS.**

To Constitute Valid Homestead, claimant must actually reside on premises when declaration is filed.

Approved in Maloney v. Hefer (Cal.), 15 Pac. 764, following rule.

52 Cal. 630–631, **DORN v. HOWE.**

To Constitute Valid Homestead, Claimant must actually reside on premises when declaration is filed.

Approved in Hanley v. Hanley, 4 Cof. Prob. 474, and Maloney v. Hefer (Cal.), 15 Pac. 764, both following rule.

52 Cal. 636–638, **GRAFF v. MESMER.**

Action Does not Lie Against Sureties on guardian's bond until account is settled by probate court.

Approved in Elizalde v. Murphy, 4 Cal. App. 118, 87 Pac. 247, applying rule to action on administrator's bond; Robbins v. Burridge, 128 Mich. 28, 87 N. W. 94, holding bondsmen of administrator of executor not liable for default of principal in accounting for proceeds of property belonging to first estate.

52 Cal. 638–643, **WETZLER v. FITCH.**

Probate Court has No Jurisdiction to receive or act upon an account presented by executor of executor against estate of deceased.

Distinguished in Elizalde v. Murphy, 4 Cal. App. 119, 87 Pac. 247, holding superior court can require accounting of administrator of deceased administrator.

52 Cal. 644, **WATSON v. CORNELL.**

Appeal will be Dismissed if Transcript does not contain copy of undertaking on appeal, and certificate of clerk is not in conformity with statute.

Approved in Village of Hailey v. Riley, 13 Idaho, 753, 92 Pac. 757, dismissing appeal when transcript failed to show certificate of clerk that undertaking was filed.

52 Cal. 644–650, **SIMPSON v. CASTLE.**

Where **Mortgagee Purchases Land on Foreclosure Sale** for less than amount of mortgage, and dockets deficiency judgment, purchaser from mortgagor pending time for redemption may redeem without paying deficiency.

Approved in McQueeney v. Toomey, 36 Mont. 290, 296, 122 Am. St. Rep. 358, 92 Pac. 563, 564, where land sold under execution was bid

in by judgment creditor for less than amount of judgment, and deficiency judgment was entered, one purchasing judgment debtor's interest and redeeming from judgment takes title free from lien of judgment.

52 Cal. 653–655, **THOMPSON v. CORPSTEIN.**

Cattle Driven Along Road which casually eat grass in passing are not "running at large" within meaning of estray act.

Reaffirmed in Donley v. Fowler, 147 Mich. 294, 110 N. W. 1102.

52 Cal. 655–656, **WALLACE v. MILLER.**

When Deed Conveys Certain Area, to be taken from larger tract described, grantee becomes tenant in common of whole tract, having interest in proportion to share conveyed.

Approved in Schoonover v. Tyner, 72 Kan. 478, 84 Pac. 125, purchaser of interest of tenant in common becomes cotenant of other owners; Fisher v. Wailehua, 16 Haw. 157, 2 Ann Cas. 916, upholding deed conveying fifty acres from larger tract, as conveying interest to grantee as tenant in common.

52 Cal. 658–661, **ESTATE OF FREY.**

Testator cannot Dispose of More Than Half of community property by will.

Approved in Painter v. Painter, 4 Cof. Prob. 345, holding wife took half of community property as survivor and half of remainder under will giving her half of testator's property.

Widow, by Acting as Administratrix and taking under will, held not to have renounced her rights in common property.

Approved in Hoggard v. Jordan, 140 N. C. 617, 53 S. E. 223, 4 L. R. A. (n. s.) 1065, reaffirming rule.

Widow's Election Between Will and Dower or community property. See note, 92 Am. St. Rep. 705.

52 Cal. 661–664, **BILLINGS v. EVERETT.**

Appellate Court, on Appeal from Judgment, may order new trial as to part of issues only.

Reaffirmed in Robinson v. Muir, 151 Cal. 125, 90 Pac. 524.

If Answer Sets Up New Matter which, if true, constitutes defense, court must find facts thereon.

Approved in Bordeaux v. Bordeaux, 30 Mont. 42, 75 Pac. 526, reversing judgment for plaintiff in divorce where court failed to find on allegation of cross-complaint; Dillon Implement Co. v. Cleaveland, 32 Utah, 5, 88 Pac. 671, holding court should find on allegation of counterclaim.

Failure of Consideration of Note may be shown by parol.

Reaffirmed in Muir v. Hamilton, 152 Cal. 636, 93 Pac. 858.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 476.

52 Cal. 672–675, **PENRY v. RICHARDS.**

Where Map Which has Been Made Part of Deed purports to have been drawn according to certain survey, deed must be considered as referring to monuments of that survey.

Approved in Bayhouse v. Urquides, 17 Idaho, 291, 105 Pac. 1067, question of correctness of original survey cannot enter into resurvey when title was taken with reference to original survey.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 53 CALIFORNIA.

53 Cal. 9–10, WENTWORTH v. MILLER & LUX.

Where Lessee of Farm Land Agrees to Pay Crop rent to lessor and to give lessor possession of whole crop until rent is paid, sale of crop by lessee does not pass title as against lessor.

Approved in Yarber v. Gianella (Cal.), 30 Pac. 842, where owner leased farm for cash and lessee subleased for crop rent, sale of farm by owner with rents, issues and profits subject to lease does not give purchaser right to lessee's share of sublessee's crop; Gray v. Robinson, 4 Ariz. 32, 33 Pac. 713, execution on judgment against cropper cannot be levied on crop before division.

Distinguished in Stockton Savings etc. Soc. v. Purvis (Cal.), 42 Pac. 442, oral agreement that title to crops remains in landlord, and crops be stored and sold by him to pay stipulated rent with balance for tenant, is merely agreement that homestead crop shall be pledge for payment of rent, and creates no lien to support action against sheriff for levying upon growing crop in suit against tenant.

Croppers. See note, 98 Am. St. Rep. 956.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 470.

53 Cal. 11–13, STOCKTON ETC. GRAVEL ROAD CO. v. STOCKTON ETC. R. R. CO.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 294.

53 Cal. 15–16, CROGHAN v. SPENCE.

Persons Claiming Title Adversely to Mortgagor are not proper parties to foreclosure suit.

Approved in Tinsley v. Atlantic Mines Co., 20 Colo. App. 65, 66, 77 Pac. 13, 14, following rule.

53 Cal. 16–18, ALLEN v. TIFFANY.

Action Against Guardian for Default in accounts will not lie in district court until after accounting and settlement in probate court.

Approved in McFadden v. Mason (Cal.), 3 Pac. 893, following rule.

Right to Maintain Action at Law against guardian for guardianship funds before settlement of account. See note, 26 L. R. A. (n. s.) 792.

53 Cal. 18–19, **PIERCE v. FELTER.**

Owner of Estate or Interest in Land less than estate in fee may maintain action to determine adverse claim made by another.

Approved in Johnson v. Hurst, 10 Idaho, 326, 77 Pac. 791, following rule; German-American Sav. Bank v. Gollmer, 155 Cal. 687, 102 Pac. 933, 24 L. R. A. (n. s.) 1066, holding owner of leasehold interest may maintain action to quiet title as against owner in fee; Shields v. Johnson, 10 Idaho, 481, 79 Pac. 393, possession of leasehold estate is sufficient for action; Pollack Min. & Mill Co. v. Davenport, 31 Mont. 453, 78 Pac. 768, upholding complaint to quiet title alleging plaintiff "claims to be owner"; Blakemore v. Roberts, 12 N. D. 401, 96 N. W. 1031, executor may bring suit to quiet title to lands of estate; Battelle v. Wolven, 19 S. D. 88, 102 N. W. 298, owner of note secured by trust deed on property may bring suit to quiet title.

53 Cal. 23–24, **LIVINGSTON v. MORGAN.**

Special Contracts and Obligations to Make Payment in gold or silver. See note, 29 L. R. A. 523.

Form of Judgment and Procedure in Case of liability to make payment in coin. See note, 29 L. R. A. 596.

53 Cal. 24–26, **LORENZ v. JACOBS.**

In Partition Suit Before Ordering Sale it must first be decreed what are respective rights and interests of parties in subject matter.

Approved in Lee Chu v. Noar, 14 Haw. 650, following rule.

53 Cal. 28–29, **AMBROSE v. McDONALD.**

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 164.

53 Cal. 32–34, **SHAFTER v. EVANS.**

When Facts from Which Negligence is Sought to be inferred are within experience of all men of common education, jury must determine questions without aid of experts.

Approved in Parkin v. Grayson-Owen Co., 157 Cal. 45, 106 Pac. 212, expert testimony as to best method of hitching team is inadmissible; Coe v. Van Why, 33 Colo. 318, 80 Pac. 895, refusing to admit testimony of experts as to negligent use of simple hoisting machinery; State v. Nevada etc. R. R. Co., 28 Nev. 215, 113 Am. St. Rep. 834, 81 Pac. 105, applying rule as to earning capacity of railroad for tax purposes.

Question of Negligence is for Jury where evidence is conflicting.

Approved in dissenting opinion in Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, majority holding evidence showed contributory negligence as matter of law.

53 Cal. 35–36, **McDONALD v. HAZLETINE.**

Employer is not Liable for Injury to Servant by negligence of fellow-servant unless he failed to use ordinary care in selecting him.

Cited in Hardesty v. Largy Lumber Co., 34 Mont. 164, 86 Pac. 33, holding employer liable for injury to servant caused by fall of pile of lumber carelessly piled.

Liability of Master for Injuries to servant by incompetency of fellow-servant. See note, 25 L. R. A. 713.

Vice-principalship Considered with reference to superior rank of negligent servant. See note, 51 L. R. A. 533, 607.

53 Cal. 37–38, JOHNSON v. SQUIRES.

Finding That "All Issues of Fact raised by pleadings are found in favor of plaintiffs and against defendants" is indefinite and insufficient.

Approved in Wood v. Broderson, 12 Idaho, 198, 85 Pac. 491, finding "that all issues of fact raised by pleadings are found in favor of defendant and against plaintiff" is insufficient.

Distinguished in Chatfield v. Continental Bldg. etc. Assn., 6 Cal. App. 668, 92 Pac. 1042, holding sufficient general finding that all allegations of complaint are true when answer consists of denials only.

53 Cal. 38–39, ROBINSON v. GLEASON.

When Answer Discloses That Persons not parties have succeeded to any part of defendant's interest, complaint must be amended to bring in such parties.

Approved in People's Ditch Co. v. Land and Water Co. (Cal.), 44 Pac. 177, holding court may order one who purchased rights in property in litigation after suit begun to be made defendant in amended complaint.

53 Cal. 46–48, WEIL v. JONES.

Where Parties to Contract Used Word, "Rescind" where "cancel" was plainly meant, the word should be so interpreted.

Approved in Gray v. Maier & Zobelein Brewery, 2 Cal. App. 657, 84 Pac. 282, holding option to renew lease given to "party of first part," who was lessor, should be read, "party of second part," or lessee, when such reading only would give it meaning.

53 Cal. 55–56, CREIGHTON v. EVANS.

Right of Riparian Owner to have Water of Stream run through his land is vested right, and interference therewith imports damage.

Approved in Lux v. Haggin (Cal.), 4 Pac. 926, following rule.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 757.

53 Cal. 56–58, CHIDESTER v. CONSOLIDATED PEOPLE'S DITCH CO.

When Two Instructions are Essentially Contradictory, judgment will be reversed.

Reaffirmed in Watts v. Murphy, 9 Cal. App. 569, 99 Pac. 1107.

Distinguished in Hayden v. Consolidated Min. etc. Co., 3 Cal. App. 139, 84 Pac. 423, holding instructions when read together could not have misled jury.

53 Cal. 58–59, PEOPLE v. JONES.

Robbery Defined.

Approved in People v. Cleary, 1 Cal. App. 53, 81 Pac. 754, averment of ownership of property taken in addition to that of possession is essential in indictment for robbery; McGinnis v. State, 16 Wyo. 77, 91 Pac. 938, information for robbery must allege ownership of property taken.

53 Cal. 60–61, PEOPLE v. GREEN.

Where Jury is Permitted View of Premises, no person can be allowed to speak to jury on any subject connected with trial.

Distinguished in Hatton v. Gregg, 4 Cal. App. 540, 88 Pac. 593, court in action to quiet title may treat knowledge as to character of land learned on view of premises as independent evidence.

View by Jury. See note, 42 L. R. A. 377, 382, 383.

53 Cal. 65–66, PEOPLE v. McKELLER.

Witness cannot be Cross-examined on collateral and irrelevant fact merely for purpose of contradicting him.

Approved in Gulf, Colo. etc. Ry. Co. v. Johnson, 97 Tex. 264, 78 S. W. 225, where witness was asked for purpose of contradiction whether he had ever been in penitentiary, evidence is not admissible to contradict his answer.

Equitable Remedy to Subject Choses in Action to judgment after return of no property found. See note, 63 L. R. A. 689.

53 Cal. 68–69, PEOPLE v. METHVIN.

Right to Testify to Character from personal knowledge. See note, 22 L. R. A. (n. s.) 656.

53 Cal. 69–74, REIDY v. SCOTT.

Mistake as to Day of Service of Summons held ground for opening default.

Approved in Walsh v. Boyle, 94 Minn. 438, 103 N. W. 506, opening default on showing of reasonable excuse for delay of one day in filing answer; Greene v. Montana Brewing Co., 32 Mont. 108, 79 Pac. 694, opening default on ground of mistake of attorney's stenographer in losing complaint.

53 Cal. 74–76, JACOBS v. SCOTT.

In Action Against Husband for Goods Furnished to wife, complaint must allege that goods were sold and delivered to husband.

Approved in Nissen v. Bendixsen (Cal.), 9 Pac. 111, following rule; Hoey v. Hechtman, 2 Cal. App. 121, 122, 83 Pac. 85, holding insufficient complaint failing to allege either sale to husband or that husband had neglected to make adequate provision for wife.

53 Cal. 82–83, STOCKTON v. CLARK.

Sufficiency of Specifications for Guidance of bidder for public contract. See note, 30 L. R. A. (n. s.) 220.

53 Cal. 87, PHIPPS v. HARLAN.

Where Answer Sets Up Affirmative Defense, findings must respond thereto.

Reaffirmed in Bordeaux v. Bordeaux, 30 Mont. 42, 75 Pac. 526.

53 Cal. 88–90, BAGGS v. SMITH.

Court cannot Amend Findings after appeal has been taken.

Reaffirmed in In re Bullard's Estate (Cal.), 31 Pac. 1120.

53 Cal. 99–102, BANK OF SAN LUIS OBISPO v. JOHNSON.

Where Mortgage Securing Note Authorizes Sale of property on default of payment of principal or interest, failure to pay interest when due authorized only action for such interest.

Distinguished in San Gabriel Valley Bank v. Lake View Town Co. (Cal. App.), 86 Pac. 728, 729, terms of mortgage and note considered,

and held to authorize foreclosure as to whole amount on default in payment of interest; Davis v. Dodson, 4 Ariz. 170, 35 Pac. 1059, where mortgage provided, on default in payment of "said principal or interest," mortgagee might sell premises and out of proceeds retain said principal and interest upon sale for default in interest only, only interest can be retained; Cooper v. Island Realty Co., 16 Haw. 101, holding mortgage may be foreclosed for default in payment of interest.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 740.

53 Cal. 102–106, ATKINSON v. AMADOR ETC. CANAL CO.

When Amended Complaint Embraces Cause of action, original complaint does not stop statute of limitations as to such new cause.

Reaffirmed in Perkins v. West Coast Lumber Co. (Cal.), 48 Pac. 983.

Distinguished in Hill v. Empire State-Idaho Min. etc. Co., 158 Fed. 885, where complaint alleges defendant built and operated ore reduction works, from which waste discharged into stream, causing it to overflow plaintiff's lands, cause of action is on case and not governed by statute of limitations as to trespass.

Relation of New Pleadings to statutes of limitations. See note, 3 L. R. A. (n. s.) 306.

53 Cal. 106–110, SANTA CRUZ R. R. CO. v. SCHWARTZ.

Liability to Corporations of subscribers to stock. See note, 93 Am. St. Rep. 369.

53 Cal. 113–118, KELLER v. LEWIS.

Equity will not Enforce Either Penalty or forfeiture.

Approved in Heywood v. Berkeley Land & Town Imp. Assn. (Cal.), 11 Pac. 247, holding question of relief from forfeiture for condition broken in operation of ferry does not arise; Spies v. Arvondale etc. R. R. Co., 60 W. Va. 393, 55 S. E. 466, refusing to enforce forfeiture in equity.

Decree in Equity Foreclosing Right of Vendee to purchase land after default usually gives vendee a limited time to consummate purchase.

Approved in Kornblum v. Arthurs, 154 Cal. 249, 97 Pac. 421, upholding allowance of ten days to vendee to consummate purchase in action to foreclose his right under contract or sell land; Southern Pac. R. Co. v. Allen (Cal.), 40 Pac. 753, holding vendor could foreclose vendee's right to purchase land under contract on failure of vendee to pay.

Distinguished in Gates v. Green, 151 Cal. 69, 90 Pac. 190, holding time to consummate contract properly refused when action was to recover unpaid purchase price, and obtain judgment for sale of property on which plaintiff had lien for unpaid purchase price.

Vendee cannot Remain in Possession of Land without payment of purchase price.

Approved in Gervaise v. Brookins, 156 Cal. 108, 103 Pac. 331, holding vendee cannot continue in possession without paying purchase price under contract of sale even though vendor cannot deliver title.

53 Cal. 119–120, **PEOPLE v. BELL.**

If Question is Put to Witness which is collateral or irrelevant to issue, his answer cannot be contradicted by party who asked question.

Reaffirmed in Jordan v. Duke, 4 Ariz. 281, 36 Pac. 897.

53 Cal. 120–122, **TERRY v. HAMMOND.**

Note and Agreement Executed at Same Time in same agreement construed together.

Approved in Myrick v. Purcell, 95 Minn. 134, 103 N. W. 903, construing note with contemporary written agreement in same transaction.

Miscellaneous.—Cited in Ferry v. Hammond, 59 Cal. 27, on another appeal.

53 Cal. 123–129, **MONTEREY ETC. R. R. CO. v. HILDRETH.**

If Statement in Articles of Incorporation is incorrect as to amount subscribed, either the attempt to form corporation is abortive or corporation is estopped to set up any different claim as to amount subscribed.

Distinguished in Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 444, 108 Pac. 308, holding corporation not estopped to enforce payment of residue of subscription on ground that subscriber was not included as stockholder in original articles of incorporation.

Nature and Validity of Subscription Agreement to corporate stock. See note, 136 Am. St. Rep. 746.

Signing Agreement to Take Stock in Railroad Corporation before incorporation does not make subscriber a stockholder so as to be liable for assessments subsequently levied.

Distinguished in Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 446, 108 Pac. 309, holding subscription to erection of pier not dependent upon formation of corporation, and enforceable as separate contract.

53 Cal. 135–141, **CAVE v. CRAFTS.**

Any Interruption of Five Years' Adverse User prevents acquisition of title by prescription.

Approved in Big Three Min. and Mill Co. v. Hamilton, 157 Cal. 140, 137 Am. St. Rep. 118, 107 Pac. 306, following rule; Anderson v. Bassman, 140 Fed. 26, holding use of water does not become adverse until it becomes injurious to riparian owner.

Adverse User of Water in Order to Ripen into title must be open and peaceable.

Cited in Wutchumna Water Co. v. Ragle, 148 Cal. 764, 84 Pac. 165, to point that limitations apply to water rights.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 730.

When Owner of Land Divides His Property into two parts, granting away one of them, he impliedly includes in grant all such easements in remaining part as are necessary to reasonable enjoyment of part granted.

Approved in Rubio Canyon etc. Assn. v. Everett, 154 Cal. 32, 33, 96 Pac. 813, holding grant of pumping plant carries with it right to use of pipe-line connected therewith and passing over other lands of grantor; Anaheim Union Water Co. v. Ashcroft, 153 Cal. 156, 94 Pac. 615, where cotenants severally in possession of portions of ranch which were subsequently allotted to them in partition, jointly con-

structed ditch over lands of one for use of their respective lands, extent of easement of each in ditch is measured by extent of use at time of partition; Stanislaus Water Co. v. Bachman, 152 Cal. 724, 93 Pac. 862, 15 L. R. A. (n. s.) 359, holding water right appurtenant to lands passes in proportion to acreage on sale of portion of land on foreclosure of mortgage thereon; Oliver v. Burnett, 10 Cal. App. 408, 102 Pac. 225, holding servitudes created by grant or transfer must correspond to benefits or burdens existing at time of transfer; Oahu Ry. & Land Co. v. Armstrong, 18 Haw. 261, holding deed by implication conveyed right to convey water under and across other land of grantor; Kalaukoa v. Keawe, 9 Haw. 195, holding way of necessity created by implied grant over one lot of land in favor of another, upon conveyance of one by former owner of both.

Distinguished in Davis v. Randall, 44 Colo. 491, 99 Pac. 324, where deeds to portions of divided property specifically described water rights annexed thereto, grantees did not take by implication rights to water to irrigate land which could not be irrigated from right granted.

Easements Created by Severance of Tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 319.

Creation and Conveyance of easements appurtenant. See note, 136 Am. St. Rep. 695.

Where Case has Been Tried upon Assumption that all material allegations of complaint were denied by answer, parties cannot question sufficiency of denials upon appeal.

Approved in Ennor v. Raine, 27 Nev. 216, 74 Pac. 3, holding plaintiff's failure to object in trial court that answer did not set up proper counterclaim constituted waiver thereto.

Purchaser of Land Takes Appurtenances belonging thereto at time of purchase.

Approved in Josslyn v. Daly, 15 Idaho, 145, 96 Pac. 570, deed to land with appurtenant water rights held to convey only those appurtenant at time of conveyance.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

Transfer of Right to Use Water for irrigation. See note, 65 L. R. A. 413.

Implication from Necessity of Easement other than of way. See note, 8 L. R. A. (n. s.) 346.

53 Cal. 147–149, PEOPLE v. VAN DELEER.

Words "Other Noxious Substance or Liquid," as used in section 216, Penal Code, include substances which act on system mechanically, so as to destroy life.

Approved in Runnels v. State, 45 Tex. Cr. 448, 77 S. W. 460, holding "noxious portion or substance" means some character of poison.

53 Cal. 149–151, HOLLAND v. MOUNT AUBURN ETC. MIN. CO.

Posting of Notice on Trees at Either End of mining claim is not compliance with statute requiring location to be "distinctly marked on ground so that boundaries can be readily traced."

Approved in Green v. Gavin, 10 Cal. App. 333, 101 Pac. 932, upholding sufficiency of notice of location of mining claims; Worthen v. Sidway, 72 Ark. 226, 79 S. W. 781, location not distinctly marking boundaries of claim held void.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 861.

53 Cal. 152–180, WILLS v. AUSTIN.

Payment of Taxes Without Legal Duress is deemed voluntary and money cannot be recovered back.

Approved in Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 759, 103 Pac. 943, holding where higher price was demanded, after expiration of prior contract, as condition for delivery of goods, payment of such was voluntary.

53 Cal. 183–185, PEOPLE v. KEYSER.

Upon Appeal from Judgment Without Motion for new trial, appellant may rely upon any ground of exception mentioned in section 1170, Penal Code.

Approved in People v. Durand, 1 Cal. App. 72, 73, 74, 81 Pac. 673, 674, on appeal from judgment of conviction of assault with deadly weapon, without motion for new trial, if there was some evidence to show weapon was deadly, and correct instruction thereon was given, evidence will not be reviewed as to sufficiency.

Distinguished in People v. Amer, 8 Cal. App. 141, 96 Pac. 403, on appeal from judgment without motion for new trial, action of district attorney in commenting on failure of accused to testify cannot be reviewed in absence of complaint as to action of court thereon.

Bill of Exceptions to Rulings of Court as to evidence at trial may be presented within ten days after entry of judgment, and may be used on appeal from judgment.

Reaffirmed in People v. Long, 7 Cal. App. 30, 93 Pac. 369.

53 Cal. 185–187, PEOPLE v. COLLINS.

One cannot be Guilty of Burglary as Accomplice when associate entered building alone and without felonious intent.

Reaffirmed in State v. Waghalter, 177 Mo. 687, 76 S. W. 1031.

Breaking and Entry in Burglary. See note, 139 Am. St. Rep. 1062.

Instigation or Consent to Crime for Purpose of detecting criminal as defense to prosecution. See note, 25 L. R. A. 342.

53 Cal. 188–190, ANDERSON v. COLEMAN.

Malice and Want of Probable Cause must concur to sustain action for malicious prosecution.

Approved in Hynes v. Nelson (Cal.), 2 Pac. 37, 38, holding verdict for plaintiff in malicious prosecution properly set aside when uncontradicted evidence showed probable cause, and verdict was contrary to instructions; Dowdell v. Carpy (Cal.), 61 Pac. 950, holding defective complaint in malicious prosecution as not showing want of probable cause, when complaint showed defendant had obtained judgment in his favor in action in question which was reversed by supreme court.

53 Cal. 199–201, TALCOTT v. BOARD OF HARBOR COMMISSIONERS.

General Law Relating to Powers of Board and special law relating to particular matter must be construed together, and general law prevails except in so far as matter is provided for in special law.

Approved in Chapell v. Lancaster County, 84 Neb. 305, 120 N. W. 1117, holding statute should be construed in light of all general laws on same subject in force at time of its enactment.

53 Cal. 201-203, BANK OF CALIFORNIA v. FRESNO CANAL ETC. CO.

Power to Grant Mandatory Injunctions. See note, 20 L. R. A. 168.

53 Cal. 204-208, EX PARTE SMITH.

Probate Court may by Contempt Proceedings compel executor to deliver to distributee property distributed by its order.

Approved in Estate of Treweek, 1 Cof. Prob. 134, following rule; St. Mary's Hospital v. Perry, 152 Cal. 340, 92 Pac. 866, distributee may sue executor to recover shares of estate due such distributee; Estate of Wittmeier, 118 Cal. 256, 50 Pac. 393, no appeal lies from order adjudging executrix in contempt for disobedience of order to distribute funds of estate; Ex parte Dickens, 162 Ala. 285, 50 So. 222, holding refusal to obey order to put property of corporation in possession of receiver appointed by court is contempt; dissenting opinion in Rosenberg v. Frank, 58 Cal. 415, majority holding district courts have equity jurisdiction to construe will. See note, 1 Cof. Prob. 134.

Proceedings for Settlement of Estate are not civil action within meaning of section 15, article I, Constitution.

Approved in Estate of Harris, 3 Cof. Prob. 3, 5, applying rule to will contest; State v. District Court, 34 Mont. 230, 85 Pac. 1023, probate of will not civil action so as to allow guardian ad litem to appear for minors to contest probate.

Constitutionality of Imprisonment for Debt. See note, 34 L. R. A. 664.

Miscellaneous.—Cited in Runge v. Wilson, 7 Cal. App. 578, 91 Pac. 179, to point that contract of sale of personal property, made by decedent but not consummated by change of possession, is void as to executor who sells property in good faith and sale is confirmed by court.

53 Cal. 208-212, VILHAC v. STOCKTON & IONE R. R. CO.

Security must be Given for Payment of compensation and damages before court will authorize entry on land sought to be condemned.

Approved in De Hansen v. District Court, 11 Ariz. 384, 94 Pac. 1127, holding compensation for land sought to be condemned must be provided for before taking; Portneuf Irr. Co. v. Budge, 16 Idaho, 122, 123, 100 Pac. 1048, upholding act requiring value of property assessed by commissioners appointed by court to be paid into court before entry on land pending suit; Brown v. Chicago etc. R. R. Co., 66 Neb. 112, 92 N. W. 128, deposit of security with court does not constitute payment of compensation for taking under eminent domain.

53 Cal. 213-217, HEWELL v. LANE.

Sheriff may Voluntarily Correct His Return of tax sale after it has been filed, but cannot be compelled by court to do so.

Approved in Flynn v. Kalamazoo Circuit Judge, 138 Mich. 126, 101 N. W. 222, following rule.

53 Cal. 217-220, GELCICH v. MORIARTY.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 856, 861.

Miscellaneous.—Cited in Smith Oyster Co. v. Darbee & Immel etc. Co., 149 Fed. 557, to point that section 738, Code of Civil Procedure,

authorizes suit to quiet title by occupant of state tide lands planted to oysters.

53 Cal. 221-222, PRESCOTT v. SALTHOUSE.

Appeal will be Dismissed When Notice is not signed by attorney of record.

Approved in Harrigan v. Bolte (Cal.), 8 Pac. 184, following rule.

53 Cal. 223-228, SOUTHERN PACIFIC R. R. CO. v. RAYMOND.

Workshop for Repair and Safekeeping of Cars should be classed as an appendage to a railroad, and company has power to condemn land for construction of shop when necessary.

Approved in Central Pacific Ry. Co. v. Feldman, 152 Cal. 308, 92 Pac. 851, holding land may be condemned for railroad freight-house.

Distinguished in Los Angeles Southern Pac. R. R. Co., 157 Cal. 369, 108 Pac. 68, holding street granted for use of railroad tracks cannot have third track laid in it as "adjunct or appendage."

Uses for Which Power of Eminent Domain cannot be exercised. See note, 102 Am. St. Rep. 826.

Whether Land is Necessary for Railroad Purposes is question of fact.

Approved in Beaulieu Vineyard v. Superior Court, 6 Cal. App. 248, 91 Pac. 1018, following rule.

Necessity of Taking Particular Land by eminent domain, as a judicial question. See note, 11 L. R. A. (n. s.) 946.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 122.

53 Cal. 233-238, HARPER v. ROWE.

Acts of March 28 and 30, 1874, did not validate tax sales under law as it existed when sales were made, for reason that property cannot be taken without due process of law.

Approved in Lantz v. Fishburn (Cal. App.), 91 Pac. 818, approving rule in an opinion later overruled by supreme court.

Distinguished in Baird v. Monroe, 150 Cal. 568, 89 Pac. 355, holding curative act of 1903 had effect to legalize deed to state for delinquent taxes not containing recital of time allowed for redemption, provided five years have elapsed since date of sale and deed.

Tax Sale for Sum in Excess of that authorized by law is void.

Approved in Hotchkiss v. Hansberger, 15 Cal. App. 606, 115 Pac. 958, and Rimmer v. Hotchkiss, 14 Cal. App. 561, both following rule.

Payment of Tax by Purchaser at Void Tax Sale is voluntary and owner is under no obligation to refund.

Approved in Rowe v. Current River Co., 99 Mo. App. 164, 73 S. W. 364, following rule; Hotchkiss v. Hansberger, 15 Cal. App. 612, 115 Pac. 961, owner suing to quiet title by removal of void tax deed need not, as condition precedent, pay holder of deed costs and taxes paid on tax sale.

Miscellaneous.—Cited in Ukiah Guaranty Co. v. Curry, 148 Cal. 258, 82 Pac. 1049, as instance of tax being delinquent for long period before penalty attaches.

53 Cal. 239-243, CRUZ v. MARTINEZ.

Validity of United States Patent to Land, regular on its face, cannot be attacked in action of ejectment.

Approved in Miller v. Grunsky, 141 Cal. 457, 66 Pac. 859, holding state patent conclusive as between parties and privies against collateral attack.

53 Cal. 243–245, ESTATE OF MORGAN.

Request of Incapable Distributees as to Appointment of administrators is addressed to discretion of court, which may appoint public administrator.

Approved in Estate of Pickett, 1 Cof. Prob. 94, widow cannot nominate administrator for first husband's estate after her remarriage; Estate of Daggett, 15 Idaho, 509, 98 Pac. 851, request of person entitled to administer for appointment of another is addressed to discretion of court.

Distinguished in Estate of Bergin, 3 Cof. Prob. 290, public administrator is not entitled to letters as against resident devisee in foreign will who files authenticated copy thereof and of its probate in foreign jurisdiction, with petition for letters; Estate of Bedell, 3 Cof. Prob. 83, nominee of parents, though of lower class than public administrator, is entitled to precedence over latter.

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1163.

53 Cal. 246–247, EX PARTE AH YEM.

One Who Bets at a Game is not accessory to crime of gaming.

Distinguished in In re Rowland, 8 Idaho, 596, 70 Pac. 611, person engaging in game by playing therein, in which anything of value is won or lost, is guilty of misdemeanor.

53 Cal. 247–251, McCOY v. BRIANT.

Municipal Corporation can Only Act in Cases and in mode provided in its charter.

Approved in City of Arcata v. Green, 156 Cal. 763, 106 Pac. 87, holding ultra vires contract with railroad to give franchise on condition it would construct road to another town outside corporation limits; Snyder v. Albuquerque, 10 N. M. 474, 62 Pac. 1093, holding member of board of education cannot recover on quantum meruit for services amounting to three hundred dollars in view of statute under which board was organized limiting expenditures to two hundred dollars except by written contract; Paul v. Seattle, 40 Wash. 300, 82 Pac. 604, holding void contract not made in mode prescribed by city charter.

Bonds of Municipal Corporation Void in hands of innocent holder are not charge against public, and their circulation will not be enjoined.

Approved in Streator v. Linscott, 153 Cal. 287, 95 Pac. 43, holding taxpayer cannot maintain injunction suit to restrain issuance of school bonds invalid on their face; Winn v. Shaw (Cal.), 25 Pac. 244, holding injunction does not lie at suit of taxpayer to restrain county auditor from issuing warrant for payment of alleged illegal claims allowed by supervisors.

53 Cal. 259–261, ESTATE OF AVELINE.

Authority of Public Administrator as to unfinished business continues after expiration of term.

Approved in O'Rourke v. Harper, 35 Mont. 350, 89 Pac. 66, following rule; Estate of Bergin, 3 Cof. Prob. 289, arguendo.

One not Party to Proceeding cannot make motion therein.

Reaffirmed in United States Bank v. City of Kendall, 179 Fed. 916.

53 Cal. 262–263, HUSTON v. LEACH.

Effect of Grant upon Rights in percolating water. See note, 19 L. R. A. 99.

53 Cal. 263–264, PEOPLE v. FINE.

Miscellaneous.—Cited in State v. Peace, 121 La. 1080, 47 So. 31.

53 Cal. 284–287, 31 Am. Rep. 59, PEOPLE v. ABBOTT.

Larceny by Fraudulent Conversion by One legally in charge or custody of property. See notes, 88 Am. St. Rep. 578; 2 L. R. A. (n. s.) 249.

53 Cal. 289–293, MAURER v. MITCHELL.

Office of Writ of Prohibition is to Restrain subordinate courts and inferior judicial tribunals from exceeding their lawful authority.

Approved in Beaulieu Vineyard v. Superior Court, 6 Cal. App. 247, 91 Pac. 1017, holding prohibition did not lie to review regularity of proceedings of court within its jurisdiction; Johnston v. Superior Court, 4 Cal. App. 92, 87 Pac. 212, holding prohibition did not lie to prevent superior court from determining contest between rival applicants for letters of administration, over which court had jurisdiction; Stein v. Morrison, 9 Idaho, 454, 457, 75 Pac. 256, refusing writ to prevent state officers from issuing and selling state bonds; Kalbfell v. Wood, 193 Mo. 688, 92 S. W. 233, refusing writ to prevent election commissioners from appointing judges and clerks of election in alleged unlawful manner; State v. Durand, 36 Utah, 101, 104 Pac. 763, refusing prohibition to restrain justice from hearing cause alleged to be brought in wrong precinct; Board of Home Missions v. Maughn, 35 Utah, 521, 101 Pac. 583, writ does not lie to arrest proceeding in court of general jurisdiction on ground suitor is illegally using legal process therein.

Writ of Prohibition. See note, 111 Am. St. Rep. 931.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 75, 81.

53 Cal. 293–296, ELDER v. SPINKS.

Amended Complaint must be Served on all adverse parties who are to be bound by judgment, whether it materially affects them or not.

Approved in Southern Ins. Co. v. Smith-Tyler, 43 Fla. 300, 31 So. 248, setting aside default against party not served with amended complaint.

53 Cal. 296–300, REED v. GOLDSTEIN.

Where Creditor of Corporation has Suffered because of fraudulent misappropriation of corporation funds rendering it insolvent, his remedy is by creditor's bill against corporation and other creditors or wrongdoers, wherein rights of all parties in interest may be adjudicated.

Approved in Watkins v. Wilhoit (Cal.), 35 Pac. 649, right to bring creditor's bill to set aside assignment for benefit of creditors as in

fraud of plaintiff's rights accrues when execution of plaintiff's judgment against assignor is returned unsatisfied.

53 Cal. 303–304, SEYMOUR v. WOOD.

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 902.

53 Cal. 304–305, S. C. V. PEAT FUEL CO. v. TUCK.

Attachment Lies in Action to Recover Money paid upon consideration which has entirely failed.

Approved in Hanley v. Combs, 48 Or. 412, 87 Pac. 144, attachment lies in action to recover money paid on contract wrongfully rescinded.

53 Cal. 312–316, SCHERR v. HIMMELMAN.

Party Levying Execution on Property Found not to belong to judgment debtor may bring action in equity to revive original judgment and set aside credit on execution.

Approved in Bailey v. Buchanan, 126 Mo. App. 204, 102 S. W. 40, judgment creditor who purchases property of third person at execution sale under belief it belongs to judgment debtor may have satisfaction vacated.

Right of Creditor to Cancellation of Satisfaction where property levied on proves exempt or to belong to a third person. See note, 11 L. R. A. (n. s.) 397.

53 Cal. 346–351, PEOPLE v. RECLAMATION DISTRICT.

Reclamation District is Public Corporation for municipal purposes.

Approved in People v. San Joaquin etc. Agricultural Assn., 151 Cal. 805, 91 Pac. 744, district agricultural association organized under act of April 15, 1880, is a public corporation; Whipple v. Tuxworth, 81 Ark. 402, 99 S. W. 90, holding improvement district to be corporation de facto when it had for years been operating as corporation, though imperfectly organized.

Distinguished in Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 405, 105 Pac. 280, reclamation districts do not belong to any class of corporations defined by section 284, Civil Code, nor within purview in section 1, article XII, nor section 6, article XI, Constitution.

Existence of Reclamation District may be Established by implication arising from acts recognizing its existence, and requiring of it performance of duties and powers enjoined or conferred by such acts, however defective original organization may have been.

Approved in People v. Levee Dist. No. 6 (Cal.), 63 Pac. 342, holding legislative recognition of levee district organized under act declared void gave legal existence to such district.

Procedure for Establishment of drains and sewers. See note, 60 L. R. A. 169.

53 Cal. 354–355, PEOPLE v. HICKS.

When Witness is Willfully False in one part of his testimony, he is to be distrusted in other parts, but his whole testimony is not to be rejected.

Approved in In re Vandiveer, 4 Cal. App. 653, 88 Pac. 994, following rule; State v. Connors, 37 Mont. 18, 94 Pac. 200, upholding in-

struction as to distrust of witness willfully false in part of his testimony.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 681.

53 Cal. 355–360, ESTATE OF CLARK.

Executor Who Mingles Funds of Estate with his own must be charged compound interest on funds so converted.

Approved in Estate of McPhee, 156 Cal. 341, 104 Pac. 457, following rule; Title Insurance etc. Co. v. Ingersoll, 158 Cal. 488, 111 Pac. 366, holding trustee mingling trust funds with his own, though prudently invested, liable for interest thereon.

Liability of Executors and Trustees, for compound interest. See note, 29 L. R. A. 625, 656.

53 Cal. 362–372, HANCOCK v. LOPEZ.

Judgment as to Title in Action of Partition is admissible in evidence in action of ejectment by party to partition suit against other parties in same suit, and is conclusive on question of title.

Approved in Lorenz v. Jacobs (Cal.), 3 Pac. 656, in action to determine water rights, where right of property is in issue, judgment-roll in former action is admissible to prove interest in such property of parties bound by judgment.

Right of One Out of Possession to partition. See note, 20 L. R. A. 629.

53 Cal. 375–379, HIBERNIA SAVINGS ETC. SOCIETY v. HERBERT.

Where Mortgagor Granted Mortgaged Property to wife, and died before debt was barred, wife can plead limitations although no administration has been granted on husband's estate, and as to it, debt was not barred.

Approved in California Title Ins. etc. Co. v. Miller, 3 Cal. App. 57, 84 Pac. 455, holding grantee of mortgagor may plead limitations in action to foreclose against him and personal representatives of mortgagor, although as to mortgagor statute was tolled by his death; dissenting opinion in Colonial & United States Mortgage Co. v. Flemington, 14 N. D. 188, 116 Am. St. Rep. 670, 103 N. W. 931, majority holding failure to appoint administrator for estate of deceased mortgagor did not prevent running of limitations in favor of heirs against mortgage.

53 Cal. 380–383, DE FREMERY v. AUSTIN.

Illegal Taxes Paid Under Threat That Property would be seized and sold are paid under compulsion.

Distinguished in Decker v. Perry (Cal.), 35 Pac. 1019, holding complaint to recover alleged illegal irrigation district assessment must show nature of proceedings to collect, threat of which constituted compulsion.

53 Cal. 383–385, MAHONEY v. SAN FRANCISCO.

Acquisition of Water Supply by eminent domain. See note, 58 L. R. A. 250.

53 Cal. 389–394, MAXWELL v. STANISLAUS COUNTY.

Contract for County Printing not made with lowest bidder in statutory manner is void.

Approved in Anderson v. Fuller, 51 Fla. 390, 120 Am. St. Rep. 170, 41 So. 687, 6 L. R. A. (n. s.) 1026, applying rule to city contract for public works.

Who may Prosecute Writ of Certiorari. See note, 103 Am. St. Rep. 115, 116.

53 Cal. 394–399, STODDART v. BURGE.

Under Section 738, Code of Civil Procedure, owner of any estate or interest in land may maintain action to quiet his title as against any adverse interest and have such adverse interest determined.

Approved in German-American Sav. Bank v. Gollmer, 155 Cal. 687, 102 Pac. 933, 24 L. R. A. (n. s.) 1066, holding owner of leasehold in realty may have action to quiet title as against owner in fee; Smith Oyster Co. v. Darbee & Immel etc. Co., 149 Fed. 557, one in possession of state tide lands used by him as oyster-beds may maintain action to quiet title thereto; Pollack Min. & Mill Co. v. Davenport, 31 Mont. 453, 78 Pac. 768, upholding complaint in quiet title suit in which plaintiff avers that he "claims to be owner"; Battelle v. Wolven, 19 S. D. 88, 102 N. W. 298, owner of note secured by deed of trust may bring suit to quiet title to property in deed.

In Action to Quiet Title, if Defendant's Claim be pleaded, burden is on him to establish it, failing in which judgment should be for plaintiff.

Approved in Dorris v. McManus, 4 Cal. App. 152, 87 Pac. 289, holding claims of defendant not supported and sustaining judgment for plaintiff.

53 Cal. 399–400, BACON v. ROBSON.

In Action to Recover Personal Property or its value, where it appears that property came lawfully into possession of defendant, demand and refusal to deliver must be shown.

Approved in McNally v. Connolly (Cal.), 9 Pac. 170, following rule.

53 Cal. 401–403, WATSON v. RODGERS.

Sale of Personal Property not Accompanied by immediate delivery and continued possession is void as to creditors, although vendee obtains possession before levy is made by creditor.

Disapproved in Western Min. Supply Co. v. Quinn, 40 Mont. 162, 135 Am. St. Rep. 612, 105 Pac. 733, such sale not void where purchaser takes possession before attachment is levied by creditors.

Taking Possession Before Attachment of right or lien of person attacking sale of chattels as curing failure to take immediate possession. See note, 28 L. R. A. (n. s.) 215.

Whether Presumption of Fraud flowing from retention of chattel by vendor may be overcome. See note, 24 L. R. A. (n. s.) 1143.

53 Cal. 403–405, BIGLEY v. NUNAN.

To Maintain Action for Damages caused by obstruction of highway, constituting public nuisance, plaintiff must have suffered injury different in kind from that sustained by public at large.

Approved in Brown v. Rea, 150 Cal. 174, 88 Pac. 714, holding abutting property owner had no cause of action in nuisance against railroad company laying tracks in street; Donahue v. Stockton Gas etc. Co., 6 Cal. App. 280, 92 Pac. 198, holding complaint shows special injury as to pollution of soil and water in action against gas works; Sloss-Sheffield Steel & Iron Co. v. Johnson, 147 Ala. 386, 119 Am. St. Rep. 89, 41 So. 908, 8 L. R. A. (n. s.) 226, abutting owner compelled to take circuitous route to his property by reason of dumping slag on street entitled to injunction; Smart v. Aroostook Lumber Co., 103 Me. 50, 68 Atl. 532, 14 L. R. A. (n. s.) 1083, holding riparian owner using stream as highway had right of action against mill company for obstructing stream with logs; McKay v. City of Enid, 26 Okl. 282, 109 Pac. 522, holding complaint failed to state cause of action when special injury by railroad's use of street was not alleged.

Right of One Prevented by Unlawful Obstruction from using highway to maintain action. See note, 28 L. R. A. (n. s.) 1054.

Nuisance may be Abated or Removed, and to give damages on account of decreased value of land would be to give damages for all injury land would ever sustain, which would be clearly wrong.

Approved in Meek v. De Latour, 2 Cal. App. 265, 83 Pac. 302, reaffirming rule; Reynolds v. Presidio etc. R. R. Co., 1 Cal. App. 233, 81 Pac. 1119, holding abutting property owner has no action to abate street railroad as nuisance on ground tracks are not laid in center of street according to its franchise.

53 Cal. 408–409, SPRAGUE v. FAWCETT.

Mandamus Does not Lie to Compel Judge to settle bill of exceptions after unreasonable delay in presentation.

Reaffirmed in State v. Maiden, 110 Tenn. 490, 75 S. W. 710.

53 Cal. 409–410, CLARK v. PORTER.

In Action on Street Assessment, Where Pleadings admit several persons to be owners of lot assessed, judgment cannot be entered against one owner for whole assessment.

Approved in Worth v. Emerson, 3 Cal. App. 161, 85 Pac. 665, holding judgment entered against one of several defendants for whole amount of street assessment, improper; Dyer v. Heydenfeldt (Cal.), 4 Pac. 1187, holding dismissal, in street assessment suit, as to defendants not having any interest in land assessed is not error prejudicial to other defendants.

53 Cal. 410–412, EX PARTE DUNCAN.

Supreme Court will not Reduce Bail of prisoner unless bail demanded is per se excessive.

Approved in Ex parte McClellan, 1 Okl. Cr. 302, 97 Pac. 1020, following rule; Ex parte Ruef, 7 Cal. App. 752, 96 Pac. 25, and Ex parte Houghton, 1 Okl. Cr. 305, 97 Pac. 1022, both holding bail to be excessive.

Presumption of Innocence in habeas corpus proceedings. See note, 22 L. R. A. 679.

53 Cal. 412–414, EX PARTE McCARTHY.

County Court has Jurisdiction to Try an indictment for misdemeanor, jurisdiction of justice's courts being exclusive where no indictment is found.

Distinguished in Moore v. Orr, 30 Nev. 463, 467, 468, 98 Pac. 399, 401, holding under Constitution, section 6, article VI, district court was deprived of original jurisdiction of all misdemeanors punishable by fine not exceeding five hundred dollars or six months' imprisonment, and cannot try such case by indictment after trial in justice's court.

53 Cal. 415–416, PEOPLE v. SOTO.

Where Person Secretly Enters House through window at night, jury are justified in finding he entered with intent to commit larceny.

Approved in Walker v. State, 44 Fla. 470, 32 So. 955, reaffirming rule; Moore v. State, 52 Tex. Cr. 367, 107 S. W. 357, holding evidence in burglary sufficient to show defendant made entry with intent to commit theft.

53 Cal. 420–422, PEOPLE v. WHITNEY.

Instruction That if Jurors Believed as Men that defendant was guilty, they should so believe as jurors, is correct.

Approved in McQueary v. People, 48 Colo. 224, 225, 110 Pac. 214, approving similar instruction.

53 Cal. 422–425, PEOPLE v. SPRAGUE.

Statute Directing Statement or Bill of Exceptions in criminal case to be settled within ten days and signed by judge is directory only.

Distinguished in People v. Blis, 3 Cal. App. 165, 84 Pac. 676, holding section 1171, Penal Code, as amended in 1905, is mandatory.

53 Cal. 428–432, WINTER v. BELMONT MIN. CO.

Unregistered Transfers of Stock are Valid against all persons except bona fide purchasers.

Approved in Nat. Bank etc. v. Western Pac. Ry. Co., 157 Cal. 580, 108 Pac. 679, unregistered transfer of stock is valid as against mere levy of attachment or execution by creditor against person in whose name it may remain on books.

Validity of Pledge or Other Transfer of Stock when not made in books of corporation, as against attachments, executions, or subsequent transfers. See note, 6 L. R. A. 660.

53 Cal. 433–435, RICHARDS v. KIRKPATRICK.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 116, 134.

53 Cal. 437–451, PEOPLE v. POPE.

No One can Acquire, as Against the Public, by adverse occupation, the right to obstruct a street dedicated to public use.

Approved in People v. Kerber, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 879, holding private persons cannot obtain title by prescription to tide lands along navigable bay, such being part of public waterfront.

Rights Acquired as Against Public by adverse possession of highway or street. See note, 18 L. R. A. 148.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 177.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 453.

53 Cal. 456–461, MARLOW v. BARLEW.

Married Woman can Execute Promissory Note and secure it by mortgage on her separate real estate.

Approved in Bank of Commerce v. Baldwin, 14 Idaho, 81, 93 Pac. 506, wife cannot be surety, such contract not being in relation to her separate estate.

53 Cal. 466–469, FARMERS' AND MERCHANTS' BANK v. DOWNEY.

Directors of Corporation are Trustees for stockholders.

Approved in Boyd v. Mutual etc. Assn., 116 Wis. 172, 96 Am. St. Rep. 948, 90 N. W. 1092, 61 L. R. A. 918, officers and directors of mutual insurance corporation are trustees of express trust.

Where Director of Bank Loaned Its Money and took note in favor of bank but made private agreement with borrower to participate in profits of sale of lands, his share of such profits belongs to bank.

Approved in D. M. Steward Mfg. Co. v. Steward, 109 Tenn. 304, 70 S. W. 812, where president and manager of corporation had his own inventions made by corporation but sold them on his own account, profits thereon belonged to corporation.

53 Cal. 475–482, SAN JOSE v. SAN JOSE ETC. R. R. CO.

Franchise of Street Railway is not Exempt from taxation, nor road operated thereunder from police regulations, even though its lines extend beyond city limits.

Approved in Newport News etc. R. Co. v. Newport News, 100 Va. 161, 162, 163, 40 S. E. 646, 647, upholding license tax on street railway although extending beyond city limits.

City may be Authorized to tax occupations for purposes of revenue.

Approved in Abraham v. Roseburg, 55 Or. 362, 105 Pac. 402, upholding license fee, under Roseburg charter, on attorneys.

Limit of Amount of License Fees. See note, 30 L. R. A. 417, 438.

53 Cal. 491–495, PEOPLE v. SPRAGUE.

Failure of Clerk to Read Indictment and state plea is not fatal error.

Reaffirmed in Territory v. Ussery, 4 Ariz. 178, 36 Pac. 35.

Disapproved in State v. Chambers, 9 Idaho, 676, 75 Pac. 275, holding failure to read indictment and state plea reversible error.

It is not Error to Refuse Instructions that witness false in one part of his testimony is to be distrusted in others, when same instruction is given with "willfully" inserted before "false."

Approved in Gregory v. Estate of Filbeck, 20 Colo. App. 135, 77 Pac. 370, holding court could disregard testimony of interested witness which was contradicted on material points; State v. Connors, 37 Mont. 17, 18, 94 Pac. 200, upholding instruction omitting "willfully" before "false"; State v. Lee, 34 Mont. 588, 87 Pac. 979, upholding instruction in regard to rejection of testimony of witness willfully false in part of testimony; Kaufman v. Boismier, 25 Okl. 255, 105 Pac. 327, arguendo.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 680, 681.

Right to Exclude Public during criminal trial. See note, 9 L. R. A. (n. s.) 279.

53 Cal. 495–554, LA SOCIETE FRANCAISE v. DISTRICT COURT.

Order Made Before Judgment appointing receiver is not appealable.

Approved in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 486, 114 Pac. 839, appeal does not lie from interlocutory order denying motion to vacate appointment of receiver.

Authority to Appoint Receiver must be found in section 564, Code of Civil Procedure, as general equity jurisdiction does not confer such power.

Approved in First Nat. Bank v. Superior Court, 12 Cal. App. 344, 107 Pac. 326, and Feess v. Mechanics' State Bank, 84 Kan. 835, 115 Pac. 566, both following rule; Hobson v. Pacific States Mercantile Co., 5 Cal. App. 101, 89 Pac. 869, holding invalid ex parte order appointing receiver on complaint made on information and belief alleging insolvency of corporation.

Equity has No Power to Appoint Receiver for going business corporation in aid of suit prosecuted against it by private person.

Approved in People v. District Court, 33 Colo. 303, 80 Pac. 911, equity could not appoint receiver of going concern in absence of permissive statute; Hall v. Nieukirk, 12 Idaho, 46, 118 Am. St. Rep. 188, 85 Pac. 488, appointing receiver to manage affairs of corporation on application of stockholder and showing of mismanagement by officers; Gibbs v. Morgan, 9 Idaho, 112, 113, 72 Pac. 737, upholding appointment of receiver for corporation pendente lite; State v. Foster, 225 Mo. 194, 125 S. W. 190, upholding appointment of receiver for corporation on allegation of fraud in management, at suit of minority stockholders; Villa v. Grand Island Elec. etc. Co., 68 Neb. 240, 110 Am. St. Rep. 400, 97 N. W. 616, 63 L. R. A. 791, court cannot appoint receiver of corporate body in absence of statutory authority; Slover v. Coal Cr. etc. Co., 113 Tenn. 436, 438, 106 Am. St. Rep. 851, 82 S. W. 1134, 1135, 68 L. R. A. 852, power of court of equity to appoint receiver cannot be invoked in behalf of person's suing in tort; dissenting opinion in Ashton v. Penfield, 233 Mo. 444, 135 S. W. 954, majority holding minority stockholder entitled to appointment of receiver on showing fraud and mismanagement.

As to When and at Whose Instance receiver of corporation may be appointed. See note, 118 Am. St. Rep. 199.

Power to Appoint Receivers of Corporations where no other relief asked. See note, 20 L. R. A. 210.

53 Cal. 557–559, NEWMARK v. CHAPMAN.

Tenant Under Lease Made After Commencement of Action cannot collaterally attack writ of assistance on ground that it is erroneous.

Approved in Baldwin v. Foster, 157 Cal. 649, 108 Pac. 717, holding judgment awarding costs as general lien on land in quiet title and partition suit not collaterally assailable.

53 CAL. 563–566, STEIN CANAL CO. v. KERN ISLAND ETC. CANAL CO.

Owner of Water Rights is Entitled to injunction to restrain diversion of water above end of his ditch to injury of his right.

Approved in Cole v. Richards Irr. Co., 27 Utah, 209, 101 Am. St. Rep. 962, 75 Pac. 378, refusing to enjoin prior appropriators of water of stream fed by lakes from use of water from lakes at suit of company seeking to use lakes as reservoirs.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 669.

53 Cal. 566–571, PEOPLE v. YOAKUM.

Discretion of Court on Application for change of venue on ground fair trial cannot be had is not arbitrary and must be exercised in reasonable manner.

Approved in Garrison v. Territory, 13 Okl. 707, 76 Pac. 187, application for change of venue on ground fair trial could not be had in county held improperly refused.

53 Cal. 576–578, PEOPLE v. MONTGOMERY.

Evidence That Defendant, When Confined in Jail, had opportunity to escape and declined to do so is inadmissible.

Approved in State v. Bickle, 53 W. Va. 611, 45 S. E. 923, following rule; Thomas v. State, 47 Fla. 105, 36 So. 164, holding evidence that accused refused to flee but readily surrendered is inadmissible.

Admissibility of Evidence of Defendant's Voluntary surrender or refusal to embrace opportunity to escape. See note, 20 L. R. A. (n. s.) 410.

53 Cal. 578–585, HALE v. McLEA.

Rights to Well-defined Subterranean Stream are same as if it flowed on surface.

Approved in Barclay v. Abraham, 121 Iowa, 623, 100 Am. St. Rep. 365, 96 N. W. 1082, 64 L. R. A. 255, such stream cannot be diverted to detriment of adjoining land owner.

Rights in Subterranean Waters. See note, 19 L. R. A. 97.

53 Cal. 597–600, HEGLER v. EDDY.

Conditional Sale is Valid.

Approved in Houser & Haines Mfg. Co. v. Hargrove (Cal.), 59 Pac. 949, and Liver v. Mills, 155 Cal. 462, 101 Pac. 299, both holding even bona fide purchaser for value of property which is subject of conditional sale obtains no title as against vendor who retained title.

Rights and Liabilities of Parties to conditional sale on default. See note, 32 L. R. A. 460, 469, 471.

53 Cal. 600–601, PEOPLE v. ESTRADA.

Indictment for Assault With Intent to commit rape need not necessarily allege that person assaulted was not wife of defendant.

Distinguished in People v. Miles, 9 Cal. App. 316, 101 Pac. 527, information for rape must aver female was not wife of accused; People v. Everett, 10 Cal. App. 14, 101 Pac. 529, information charging crime of assault with intent to commit rape must aver female was not wife of accused.

Miscellaneous.—Cited in Frazier v. State, 48 Tex. Cr. 144, 122 Am. St. Rep. 738, 86 S. W. 755, to point that husband cannot rape his wife.

53 Cal. 602–604, PEOPLE v. TAING.

No Exception is Allowed to Denial of challenge to juror for actual bias.

Approved in People v. Brown (Cal.), 13 Pac. 223, following rule.

Evidence of Threats in prosecution for homicide. See note, 89 Am. St. Rep. 704.

53 Cal. 604–608, PEOPLE v. CURLEE.

Question of Conspiracy, Under Evidence of Case, was for jury, and court erred in instruction that there was no evidence tending to show witness was accomplice of defendant.

Approved in People v. Bunkus, 2 Cal. App. 203, 207, 84 Pac. 367, 369, holding, in trial for accepting bribe, question whether witnesses were accomplices of accused is for jury.

53 Cal. 608–611, SAN FRANCISCO v. SPRING VALLEY WATER WORKS.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 334, 344.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 39, 91, 101.

53 Cal. 613–615, PEOPLE v. AH YUTE.

Statements Made to Prisoner in respect to his connection with alleged offense are admissible to show his conduct when statements were made, but not to show truth of statements.

Approved in People v. Rollins, 14 Cal. App. 138, 111 Pac. 124, defendant's conduct when incriminating letters were read to him shown in evidence; People v. Sullivan, 3 Cal. App. 510, 86 Pac. 837, holding admissible, as calling for reply and to show conduct, statements made by deceased in presence of defendant in murder case; People v. Ayhens, 16 Cal. App. 623, 117 Pac. 791, testimony of policeman that several days after codefendant's arrest, latter, in presence of defendant, charged defendant with crime, and latter denied accusation, is inadmissible; State v. Brown, 168 Mo. 472, 68 S. W. 576, repugnance of defendant in homicide case to having his shoe measured may be shown in evidence.

Uncontradicted Statement in Presence of accused as confession. See note, 25 L. R. A. (n. s.) 549, 567.

When Court Fails to Give Instruction to limit effect of evidence, it is not error, unless defense specifically asks instruction to that effect.

Reaffirmed in Ball v. United States, 147 Fed. 41, 78 C. C. A. 126.

Affidavits for Continuance for Absence of witness should state facts from which court may infer that there is reasonable ground to believe attendance of witness at future day can be procured.

Reaffirmed in People v. Barnnovich, 16 Cal. App. 431, 117 Pac. 574.

53 Cal. 619–621, TURNEY v. DOUGHERTY.

Board of Supervisors cannot Grant Extension of time for completion of street contract after time mentioned in contract for completion of work has expired.

Approved in Owens v. Heydenfeldt (Cal.), 6 Pac. 423, following rule; Union Contracting etc. Co. v. Campbell, 2 Cal. App. 535, 84 Pac. 305, holding void assessment for street work completed after time limited for performance when no extension of time was granted during contract period for performance.

53 Cal. 627, PEOPLE v. COCH.

Where Defendant is Charged With Arson, it is duty of jury to find degree.

Distinguished in State v. McDonald, 16 S. D. 83, 91 N. W. 448, upholding verdict of "guilty as charged" when indictment charged arson in third degree.

53 Cal. 627-628, PEOPLE v. AH GOW.

Judgment for Conviction will be Reversed unless verdict finds defendant guilty of offense charged in indictment, or some offense included in offense so charged.

Approved in People v. Bannister (Cal.), 34 Pac. 710, where crime is divided into degrees, jury must find degree of crime in verdict of guilty.

53 Cal. 629-630, PEOPLE v. GIRR.

Indictment Charging Assault to Commit Rape need not strictly follow language of statute in describing offense, but words conveying same meaning may be employed.

Distinguished in People v. Miles, 9 Cal. App. 317, 101 Pac. 527, holding insufficient information for rape which did not aver female was not wife of accused.

53 Cal. 631-632, ESTATE OF DUNNE.

Appeal Does not Lie from Order of probate court setting aside order by which annual account of executor was allowed.

Approved in Estate of Overton, 13 Cal. App. 118, 108 Pac. 1022, order discontinuing family allowance granted "until further order of court" is not appealable.

53 Cal. 635-643, BELCHER v. CHAMBERS.

Supreme Court of State will Follow Rulings of federal supreme court in passing upon question reviewable in that court.

Approved in United Land Assn. v. Knight (Cal.), 23 Pac. 268, holding federal supreme court decisions control in action of ejectment for tide lands conveyed by Mexican grant and confirmed by United States patent as San Francisco pueblo lands.

In Absence of Attachment or Seizure of property in this state against nonresident, personal judgment, rendered upon service by publication only, is involved.

Approved in Smith v. Supreme Lodge A. O. U. W., 12 Cal. App. 190, 106 Pac. 1103, following rule; O'Neill v. Potvin, 13 Idaho, 728, 729, 93 Pac. 22, 23, upholding on collateral attack, judgment of court of general jurisdiction had on service by publication, quieting title to lands, when judgment was not void on face.

Validity of Personal Judgments rendered upon constructive service. See note, 16 L. R. A. 234.

53 Cal. 644-647, FRASER v. FREELON.

Constitutionality of Court cannot be Litigated in action brought by private person to review its proceedings.

Approved in Dean v. Dimmick, 18 N. D. 400, 122 N. W. 246, constitutionality of act providing for vote for relocating county seat cannot be litigated in mandamus proceeding brought by private person against county officers to compel them to change location of offices.

Who may Prosecute Writ of Certiorari. See note, 103 Am. St. Rep. 113.

Miscellaneous.—Cited in Knight v. District Court, 32 Nev. 350, 108 Pac. 359, to point that prohibition does not lie where indictment is regular on face and trial court had jurisdiction of accused, and there was another remedy.

53 Cal. 655–656, HARPER v. STRUTZ.

Ejectment by Executor or Administrator. See note, 136 Am. St. Rep. 82.

53 Cal. 656–659, KRAFT v. DE FOREST.

It is Duty of Court of Equity, when all parties are before it, to take jurisdiction of whole subject matter of litigation.

Approved in Swan v. Talbot, 152 Cal. 147, 94 Pac. 240, 17 L. R. A. (n. s.) 1066, in action to set aside contract on ground of imposition, court may decree accounting between parties; Curtin v. Krohn, 4 Cal. App. 135, 87 Pac. 245, holding equity could order sale of property involved in trust deed by its commissioner and direct deficiency judgment against debtors, in action to foreclose trust deed.

53 Cal. 663–664, ALEXANDER v. DENAVEAUX.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 172.

Implied Power of Attorney to Bind Client for expenses incidental to trial, including associate counsel fees. See note, 23 L. R. A. (n. s.) 710.

53 Cal. 666–667, GROTEFEND v. ULTZ.

Property Must be Assessed to Owner if known, otherwise to unknown owners, and assessment to any others is void.

Approved in Houser & Haines Mfg. Co. v. Hargrove (Cal.), 59 Pac. 949, holding void tax assessment to wrong person as owner.

An Assessment to "A and All Owners and claimants known or unknown," is void.

Reaffirmed in Stitt v. Stringham, 55 Or. 93, 105 Pac. 254.

53 Cal. 667–675, POTTER v. MERCER.

Executory License in Respect to real property is revocable at will of licensor, even though licensee has expended money on faith of license.

Approved in Clark v. Wall, 32 Mont. 225, 79 Pac. 1053, following rule; Goldstein v. Webster, 7 Cal. App. 708, 709, 95 Pac. 678, holding license to agent to lease subject to approval revoked by failure to approve of lease made by agent.

Revocability of License to Maintain Burden on land, after licensee has incurred expense. See note, 49 L. R. A. 502.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 400.

Possession Under Agreement for Lease not executed. See note, 20 L. R. A. 35.

53 Cal. 677–680, PORTER v. MULLER.

Mortgage Lien on Realty can be Created only by instrument in writing, executed with formalities required in case of grant of real property.

Approved in Marshall v. Livermore Spring Water Co. (Cal.), 5 Pac. 102, holding void verbal agreements to create liens on realty.

53 Cal. 686–689, GAYLOR v. REYNOLDS.

Actions for Contribution not founded on express promise. See note, 98 Am. St. Rep. 32, 41, 48, 50.

53 Cal. 694–697, PEOPLE v. PITTSBURG R. R. CO.

Private Property cannot be Condemned for Alleged public use and then used exclusively for private purposes.

Distinguished in State v. Centralia etc. Ry. & Power Co., 42 Wash. 638, 85 Pac. 345, 7 L. R. A. (n. s.) 198, holding corporation could exercise right of eminent domain to acquire dam site for purpose of obtaining power to carry on business of public carrier, although some of its objects were private.

Uses for Which Power of Eminent Domain cannot be exercised. See note, 102 Am. St. Rep. 823.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 132.

Miscellaneous.—Cited in Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 679, 87 Pac. 31, to point that quo warranto proceedings are proper means to accomplish dissolution of railroad corporation and forfeiture of franchise.

53 Cal. 706–709, VAN VALKENBURG v. McCAULEY.

Liability of Owner for Trespass of Cattle. See note, 22 L. R. A. 56.

53 Cal. 715–720, EPROSON v. WHEAT.

A Bequest by Husband to Wife of sum of money in lieu of homestead will not, if not accepted, bar her right to homestead.

Approved in Estate of Bump, 152 Cal. 278, 279, 92 Pac. 644, holding husband could not deprive wife of allowance for family by will, but could so frame will as to put her to election between bequest and allowance.

Agreement of Husband and Wife to live separately, husband paying certain annual sum to wife, does not bar her right to probate homestead.

Approved in Estate of McVay, 14 Idaho, 73, 93 Pac. 34, holding separation of husband and wife on account of former's cruelty did not bar probate homestead.

53 Cal. 724–734, KEYES v. LITTLE YORK ETC. WATER CO.

Where Action for Tort is Brought against several codefendants, it is essential that wrong complained of must be joint.

Approved in Livesay v. First Nat. Bank, 36 Colo. 534, 117 Am. St. Rep. 120, 86 Pac. 105, 6 L. R. A. (n. s.) 598, several independent execution and attachment creditors held not jointly liable for torts of sheriff in levying writs; Watson v. Colusa-Parrot M. & S. Co., 31 Mont. 517, 79 Pac. 15, holding one of several mining companies in-

dependently polluting stream liable only for injury resulting from its own acts.

Disapproved in Warren v. Parkhurst, 186 N. Y. 53, 78 N. E. 582, holding riparian owner may maintain suit in equity against several upper owners to restrain them, acting independently, from polluting stream by depositing filth therein, when acts of all concurred in causing injury.

Character of Liability of Several whose independent wrongs contribute to enhance degree or extent of injury. See note, 10 L. R. A. (n. s.) 168.

Pollution of Stream by Mining. See note, 24 L. R. A. 65.

53 Cal. 735–737, WILSON v. SOUTHERN PACIFIC R. R. CO.

Attorney Employed by Depository to Defend Action by depositors for destruction of deposit, under section 1838, Civil Code, has no authority, by virtue of his employment, to make in pais admissions, in respect to circumstances under which destruction occurred, that are binding on depositary.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, holding statements in pais by agent, who was member of law firm retained by purchaser from his principal through his agency, and tending to show different transaction from that shown upon face of papers as demanded by him to be done, are not binding upon purchaser.

53 Cal. 737–741, SACRAMENTO SAVINGS BANK v. SPENCER.

Court cannot Appoint Guardian ad Litem for incompetent defendant unless he is brought into court by personal service of summons.

Approved in State v. District Court, 38 Mont. 170, 129 Am. St. Rep. 636, 99 Pac. 293, holding summons in divorce against insane husband must be personally served.

Judgments for or Against Insane Persons. See note, 130 Am. St. Rep. 845.

53 Cal. 742–745, COBURN v. SMART.

Sureties of Defendant in Replevin on bond given to effect return of property may intervene if defendant is insolvent and action is not being defended in good faith.

Approved in Price v. Carlton, 121 Ga. 18, 48 S. E. 723, 68 L. R. A. 736, surety of judicial bond may intervene on showing of bad faith in defense, and of defenses peculiar to himself.

Right of Surety to Intervene in Action against principal. See note, 68 L. R. A. 742, 745, 747.

53 Cal. 745–749, IN RE STUART.

Terms of State Officers Begin on First Monday after first day of January next following their election.

Approved in People v. Nye, 9 Cal. App. 165, 98 Pac. 247, applying rule to controller.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 54 CALIFORNIA.

54 Cal. 3–5, POPE v. KINMAN.

Riparian Proprietor has Usufruct in Stream as it passes over his land.

Approved in Lux v. Haggin (Cal.), 4 Pac. 926, following rule.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 744.

Right of Prior Appropriation of Water. See note, 30 L. R. A. 671.

54 Cal. 6–24, HILL v. DEN.

Power of Sale will not be Implied from direction of testator in will to pay debts.

Reaffirmed in Chandler v. Thompson, 62 N. J. Eq. 726, 48 Atl. 585.

Finding That Trust Deed was Never Delivered must be disregarded when contrary to allegations and admissions in pleadings.

Approved in Callahan v. James (Cal.), 71 Pac. 107, holding delivery of trust deed should be inferred from finding that it was made and executed and left with certain person; California Ins. Co. v. Schindler (Cal.), 1 Pac. 476, holding as erroneous finding contrary to averments of complaint and outside case made by plaintiff.

Trust will not be Permitted to fail for want of a trustee.

Cited in Estate of Tessier, 2 Cof. Prob. 368, arguendo.

54 Cal. 24–28, CATE v. STANFORD.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

54 Cal. 28–35, FOLTZ v. HOGE.

Right of Women to Practice Law. See note, 21 L. R. A. 702.

Nature of Incorporated Institutions belonging to state. See note, 29 L. R. A. 382.

54 Cal. 35–37, EX PARTE SMALLMAN.

Admission to Bail Pending Appeal after conviction of felony is at discretion of court and should not be allowed except under extraordinary circumstances.

Approved in In re Schriber, 19 Idaho, 535, 114 Pac. 30, following rule; Ex parte Hatch, 15 Cal. App. 187, 114 Pac. 410, refusing application for bail made on ground that confinement pending appeal would endanger health.

54 Cal. 37–41, PEOPLE v. COLBY.

Motion to Set Aside Indictment can be based only upon grounds mentioned in section 995, Penal Code.

Approved in People v. Hatch, 13 Cal. App. 526, 109 Pac. 1099, refusing to set aside indictment for alleged irregularity in impanelment of grand jury.

Indictment Found by Twelve Jurors is "found" as prescribed under section 995, Penal Code.

Reaffirmed in Shivers v. Territory, 13 Okl. 472, 74 Pac. 901.

Number of Grand Jurors Necessary to concur in indictment. **See** note, 28 L. R. A. 35.

Organization of Grand Jury. See note, 27 L. R. A. 776, 790.

Miscellaneous.—Cited in Evans v. Willis, 22 Okl. 322, 97 Pac. 1051, 19 L. R. A. (n. s.) 1050, prohibition lies to restrain action on indictment absolutely void.

54 Cal. 48–51, DOWD v. CLARKE.

Lessee Under Option to Purchase at Any Time may demand specific performance of option upon tender of agreed price.

Approved in Smith v. Phenix Ins. Co. (Cal.), 23 Pac. 384, holding lessee with option to purchase at any time during lease and who is bound to purchase at its expiration is equitable owner of land.

54 Cal. 51–53, 35 Am. Rep. 67, HANKS v. NAGLEE.

Promise of Marriage in Consideration of illicit sexual intercourse is void.

Approved in Sramek v. Sklenar, 73 Kan. 452, 85 Pac. 567, Edmonds v. Hughes, 115 Ky. 565, 74 S. W. 284, and Salemonson v. Thompson, 13 N. D. 192, 101 N. W. 323, reaffirming rule; Brown v. Bannister, 14 Haw. 36, holding contract of marriage not void where consent to sexual intercourse was given only after mutual promise to marry.

54 Cal. 53–54, PEOPLE v. CUDDIHI.

Averments in Indictment, and not Name given it by the pleader, determine offense charged.

Approved in Lee Yau v. Republic of Hawaii, 11 Haw. 145, following rule; Brady v. Territory, 7 Ariz. 17, 60 Pac. 699, upholding indictment charging embezzlement of public money which pleaded essential facts but failed to name offense.

54 Cal. 54–57, BEVERIDGE v. LIVINGSTONE.

Board of Supervisors cannot Extend Time for completing street contract after expiration of time limited in contract.

Approved in Union Contracting etc. Co. v. Campbell, 2 Cal. App. 535, 84 Pac. 305, Palmer v. Burnham (Cal.), 47 Pac. 600, La Societe Francaise v. Fishel (Cal.), 10 Pac. 395, Owens v. Heydenfeldt (Cal.), 6 Pac. 423, and Torrens v. Townsend (Cal.), 6 Pac. 424, all following rule.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 915.

54 Cal. 63–64, PEOPLE v. CARRILLO.

Where Legal Presumption Does not Exist, it is error to instruct jury that one fact should be inferred from another.

Approved in People v. Elster (Cal.), 3 Pac. 888, holding court erred in instructing jury in regard to inferring guilt from possession of property recently stolen where there was no evidence to warrant inference from inculpatory surrounding circumstances.

54 Cal. 65–71, PEOPLE v. HUNTER.

Objection to Formation of Grand Jury cannot be presented to court below on motion to set aside indictment.

Approved in People v. Hatch, 13 Cal. App. 526, 109 Pac. 1099, refusing to set aside indictment because three jurors were excluded from grand jury room.

Indictment Found by Twelve Grand Jurors is valid although jury, owing to death of member, numbers fewer than nineteen.

Approved in Kitts v. Superior Court, 5 Cal. App. 469, 90 Pac. 980, holding validity of indictment not affected by disqualification of certain grand jurors when requisite number concurred in finding it; State v. Weber, 31 Nev. 390, 103 Pac. 412, upholding indictment found by twelve grand jurors only; State v. Williams, 31 Nev. 363, 102 Pac. 976, not necessary to have full venire of twenty-four present before grand jury of seventeen is selected; Jones v. United States, 162 Fed. 421, 89 C. C. A. 303, improper discharge of grand juror will not vitiate indictment if necessary number concur therein.

Number of Grand Jurors Necessary or proper to act. See note, 27 L. R. A. 846.

Miscellaneous.—Cited in Evans v. Willis, 22 Okl. 322, 97 Pac. 1051, 19 L. R. A. (n. s.) 1050, prohibition lies to restrain proceedings on indictment absolutely void.

54 Cal. 72–74, SAN FRANCISCO v. ELLIS.

Plaintiff in Action to Quiet Title cannot prevail unless he shows title in himself.

Approved in Williams v. San Pedro, 153 Cal. 49, 51, 94 Pac. 236, 237, following rule; Conrad v. Adler, 13 N. D. 203, 100 N. W. 723, dismissing suit when plaintiff failed to show any title.

Miscellaneous.—Cited in United Land Assn. v. Pacific Imp. Co., 139 Cal. 377, 69 Pac. 1065, referring to principal case as not deciding question of title to land in question in citing case.

54 Cal. 75–80, EX PARTE DUNCAN.

Appellate Court will not Interfere With Bail fixed by trial court unless the amount per se is unreasonably great.

Approved in Ex parte Ruef, 7 Cal. App. 752, 753, 96 Pac. 25, where reasonable bail is demanded on a first indictment, bail in equal amounts on successive indictments for like offenses is excessive; Ex parte Houghton, 1 Okl. Cr. 305, 97 Pac. 1022, refusing to reduce bail; Ex parte McClellan, 1 Okl. Cr. 302, 97 Pac. 1020, holding bail excessive; Paskenham v. Reed, 37 Wash. 261, 79 Pac. 787, habeas corpus proceedings in supreme court is proper practice when bail is refused on appeal.

Presumption of Innocence in habeas corpus proceedings. See note, 22 L. R. A. 679.

54 Cal. 81–83, McCRACKEN v. HARRIS.

Undertaking on Part of Plaintiff is necessary to granting of injunction.

Cited in Wilson v. Eagleson, 9 Idaho, 27, 108 Am. St. Rep. 110, 71 Pac. 616, justification of sureties is no part of injunction bond.

54 Cal. 87–88, BANDY v. RANSOM.

Writ of Prohibition Does not Lie to Restrain Court from proceeding within its jurisdiction in insolvency proceedings.

Approved in Johnston v. Superior Court, 4 Cal. App. 92, 87 Pac. 212, holding prohibition did not lie to prevent hearing of contest of right to administer estate within jurisdiction of court, and errors in such contest reviewable only on appeal.

54 Cal. 89–91, PEOPLE v. AH YUTE.

Statements of Third Persons in Presence of defendant are admissible against him only to the extent that they are admitted by him, by words or conduct, to be correct.

Approved in People v. Wong Loung, 159 Cal. 531, 114 Pac. 834, holding conversation between officers upon arrest of defendant inadmissible on ground he did not assent to statements made; People v. Long, 7 Cal. App. 32, 93 Pac. 390, refusing statements made in presence of accused, which he denied; People v. Ayhens, 16 Cal. App. 623, 117 Pac. 791, testimony of policeman that several days after codefendant's arrest latter, in presence of defendant, charged defendant with crime, and latter denied accusation, is inadmissible.

54 Cal. 94–97, EX PARTE FRAZER.

State may Provide for Board Authorized to examine persons seeking right to practice medicine, to be appointed by citizens.

Approved in State v. Chittenden, 127 Wis. 522, 107 N. W. 518, applying rule to appointment of board of dental examiners.

Membership in Association as Condition of Right to transact business. See note, 6 L. R. A. (n. s.) 433.

54 Cal. 98–100, FORBES v. McDONALD.

Agreement of Trustee of Corporation to Resign for pecuniary consideration is void.

Approved in Glass v. Basin & Bay State Min. Co., 31 Mont. 31, 77 Pac. 304, holding void agreement to deposit stock with company to be sold in consideration of depositors holding certain offices in company; Sauerhering v. Rueping, 137 Wis. 412, 119 N. W. 187, holding void agreement of officers to use influence to secure resignation of directors of mutual insurance company, and to secure removal of company's principal office.

Resignation of Corporate Officers. See note, 95 Am. St. Rep. 581.

Validity of Agreement to elect "dummy" directors. See note, 27 L. R. A. (n. s.) 659.

54 Cal. 101–102, EX PARTE FENNESSY.

Delay of Prosecution as ground for discharge. See note, 56 L. R. A. 539, 542.

54 Cal. 103–107, CHAMBERLAIN v. PACIFIC WOOL GROWING CO.

Resolution of Board of Trustees of Corporation carried by vote of president, ratifying his unauthorized act, in matter in which he was personally interested is void.

Approved in Ritchie v. People's Tel. Co., 22 S. D. 606, 119 N. W. 993, director of telephone company cannot vote on resolution to increase his own salary.

Personal Liability of Officers on note made for corporation. See note, 19 L. R. A. 679.

Liability of Principal on Negotiable Paper executed by agent. See note, 21 L. R. A. (n. s.) 1054.

54 Cal. 107–110, SACKETT v. JOHNSON.

Pre-existing Indebtedness of Indorser to Indorsee is valuable consideration for indorsement and transfer of negotiable instrument.

Approved in Virginia etc. Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 261, 90 Pac. 50, holding transfer of lumber to pay pre-existing debt on valuable consideration; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 567, 86 Pac. 822, holding pre-existing debt of drawer of order in favor of a bank to bank sufficient consideration to support it.

54 Cal. 110–111, MAIN v. HILTON.

Indorsement by One of Two Joint Payees or indorsees of bill or note. See note, 18 L. R. A. (n. s.) 631.

54 Cal. 111–118, WEILL v. KENFIELD.

Section 15, Article IV, Constitution, Provides that every bill before it becomes a law shall be read at length and on three separate days.

Distinguished in People ex rel. Leverson v. Thompson (Cal.), 7 Pac. 142, holding bill need not be read at length on three separate days after amendment thereto.

Conclusiveness of Enrolled Bill. See note, 23 L. R. A. 343, 348.

Where Language of Constitutional Provision is plain, courts cannot consider its policy.

Approved in State v. Scales, 21 Okl. 693, 97 Pac. 588, construing constitutional provision with reference to freeholders' charters.

54 Cal. 118–119, DU BRUTZ v. JESSUP.

Ground That Verdict is not Sustained by Evidence includes specification that damages allowed by verdict are too great or too small.

Approved in Tathwell v. Cedar Rapids, 122 Iowa, 56, 97 N. W. 98, court may set aside verdict when damages, according to uncontradicted testimony, are too small.

Inadequacy of Damages as Ground for setting aside verdict. See note, 47 L. R. A. 50.

54 Cal. 120–121, BANCROFT & CO. v. HERINGHI.

Where Fraud in Purchase and Sale of Property is in issue, evidence is admissible of other frauds of like character committed by same parties at or near same time.

Reaffirmed in Kornblum v. Arthurs, 154 Cal. 248, 97 Pac. 421.

54 Cal. 121–123, PAGE v. TUCKER.

Administrator may Recover Possession of Estate pending administration from heir or devisee.

Approved in Blakemore v. Roberts, 12 N. D. 402, 96 N. W. 1031, administrator may maintain suit to quiet title to lands of decedent.

Ejectment by Executor or Administrator. See note, 136 Am. St. Rep. 85.

Rights of Heir in Personal Property of ancestor. See note, 112 Am. St. Rep. 731.

Authority of One of Several Executors or administrators. See notes, 127 Am. St. Rep. 383; 5 Cof. Prob. 379.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 790.

54 Cal. 124–127, UPSTONE v. WEIR.

Profits as Damages for Breach of Contract. See note, 96 Am. St. Rep. 37.

Loss of Profits of Sale or Purchase as Damages. See note, 52 L. R. A. 255.

54 Cal. 127–131, RIDER v. EDGAR.

Exceptions to Oral Charge must be specific and point out particular portions claimed to be objectionable.

Approved in Moore v. Moore (Cal.), 34 Pac. 92, exception "to said oral instructions and each and every part thereof," is too general; Los Angeles County v. Reyes (Cal.), 32 Pac. 234, refusing to consider objections to oral instructions where no exception taken.

Levy by Sheriff on Mortgaged Personal Property in possession of mortgagor is a taking such as to support action for conversion by mortgagee, although property is not disturbed, and is released before any demand by mortgagee.

Approved in Sousa v. Lucas, 156 Cal. 465, 105 Pac. 415, holding no lien created on mortgaged personal property by attachment levied against mortgagor without tender of mortgage debt or deposit thereof with county clerk or treasurer.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 457, 465.

54 Cal. 135–137, GLEASON v. GLEASON.

Supplemental Complaint cannot Set Up new cause of action.

Approved in Cassidy v. Saline County Bank, 7 Ind. Ter. 559, 104 S. W. 835, in action on open account, complaint cannot be amended by setting up judgment of another state on same cause of action.

54 Cal. 136–140, ROUSSET v. GREEN.

Under Act of 1868, Homestead Declared on Land exclusively occupied by declarant is valid although he owns but an undivided interest therein.

Approved in Swan v. Walden, 156 Cal. 199, 134 Am. St. Rep. 118, 103 Pac. 933, holding wife may declare homestead in land held in joint tenancy with her husband.

54 Cal. 140–143, SALTER v. BAKER.

Whenever Equities are Unequal, Preference is always given to superior equity.

Approved in Nolan v. Nolan, 155 Cal. 487, 132 Am. St. Rep. 99, 101 Pac. 525, holding vendee of land subject to vendor's lien who has later mortgaged it and also later acquired land, on which he has homestead, cannot demand sale of land subject to vendor's lien to satisfy mortgage debt before sale of land subject to homestead.

Where One Joint Purchaser Allowed Property to be deeded to another and other procured loan upon it and improved it and treated it as his own, with full knowledge of first, first cannot claim an interest prior to bank which made loan upon faith in second's ownership.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, holding in action to establish resulting trust in plaintiff's favor arising out of fraud in procurement of land, where fraud was by plaintiff's agent, plaintiff could not complain of consequences.

54 Cal. 146–147, BOIGNERES v. BOULON.

Promise to Marry on Consideration of continuing immoral relations is void.

Reaffirmed in Salemonson v. Thompson, 13 N. D. 192, 101 N. W. 323.

54 Cal. 147–148, PICKETT v. WALLACE.

It is Always in Power of Court to suspend its own rules.

Approved in Chielovich v. Krauss (Cal.), 9 Pac. 946, and Symons v. Bunnell (Cal.), 20 Pac. 859, both following rule; Youree v. Youree, 1 Cal. App. 155, 81 Pac. 1024, holding court had discretion to allow presentation of affidavit of wife seeking alimony pendente lite at hearing of motion although not served one day before hearing as required by rule.

54 Cal. 151–154, 35 Am. Rep. 69, PEOPLE v. WONG AH NGOW.

Flight on Part of Person Accused of Crime is circumstance for jury to consider in determining question of guilt or innocence, but does not give rise to legal presumption of guilt.

Approved in People v. Mar Gin Sine, 11 Cal. App. 49, 103 Pac. 955, approving instruction in regard to flight of accused; People v. Elster (Cal.), 3 Pac. 888, holding erroneous instruction in regard to inference of guilt from possession of property recently stolen; People v. Gee Gong, 15 Cal. App. 33, 114 Pac. 79, instruction that evidence of flight is received as indicative of guilty mind is erroneous; Davis v. Hearst, 160 Cal. 177, 116 Pac. 545, discussing law of presumption of malicious intent in libel case; State v. Poe, 123 Iowa, 127, 101 Am. St. Rep. 307, 98 N. W. 591, instruction that flight of defendant was presumptive evidence of guilt is erroneous.

Erroneous Instruction is not Cured by correct statement of law in another part of charge.

Approved in People v. Maughs, 149 Cal. 261, 86 Pac. 190, reversing judgment because of contradictory instructions in regard to self-defense.

54 Cal. 155, BYRNES v. CLAFFEY.

Findings must Dispose of all material issues.

Approved in Dillon Implement Co. v. Cleaveland, 32 Utah, 5, 88 Pac. 671, reversing judgment where all material issues were not found upon.

54 Cal. 156–161, 35 Am. Rep. 72, HELBING v. SVEA INS. CO.

Untrue Statement of Insured, in Order to avoid policy of insurance, must have been knowingly and willfully made with intention to defraud insurer.

Approved in Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 398, 92 Pac. 333, following rule.

Mere Discrepancy in Statements of Insured does not create presumption of fraud.

Approved in Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 398, 92 Pac. 333, following rule; Schmidt v. Royal Ins. Co., 10 Haw. 686, holding no legal inference of intentional fraud can be derived from mere fact of over-valuation of property by insured.

Mere Discrepancy Does not, as Matter of Law, create presumption of fraud.

Cited in Davis v. Hearst, 160 Cal. 177, 116 Pac. 545, discussing law of presumption of malicious intent in libel case.

Statements as Representations, although expressly denominated in policy as warranties. See note, 11 L. R. A. (n. s.) 983.

Conclusiveness of Proof of Loss as against insured or his beneficiaries. See note, 44 L. R. A. 858.

54 Cal. 168–169, McCREERY v. EVERDING.

Where Defendant is Sued and Answers by wrong name, and judgment against him is entered accordingly, no advantage can be taken of misnomer.

Approved in El Capitan Land & Cattle Co. v. Lees, 13 N. M. 412, 86 Pac. 925, and Commissioners v. Aiken Canning Co., 123 Ga. 649, 51 S. E. 586, both following rule.

In Ejectment Against Tenant, where landlord assumes defense, he is bound by judgment.

Reaffirmed in Elliott v. Morris, 43 Tex. Civ. App. 484, 98 S. W. 221.

Effect of Judgment Against Tenant as res judicata. See notes, 112 Am. St. Rep. 28; 26 L. R. A. (n. s.) 597.

54 Cal. 169–175, SHAY v. McNAMARA.

Judgment is Estoppel Only as to parties and privies.

Approved in Nemo v. Farrington, 7 Cal. App. 446, 94 Pac. 875, following rule; Schuler v. Ford, 10 Idaho, 746, 109 Am. St. Rep. 233, 80 Pac. 220, party in possession under contract to purchase not bound by judgment affecting property where action was commenced subsequent to entering into contract.

Distinguished in Shiels v. Nathan, 12 Cal. App. 616, 108 Pac. 39, holding all the world are parties to probate proceedings and bound by judgments therein where such proceedings have been regularly pursued.

Doctrine of Relation is Fiction of Law adopted by courts solely for purposes of justice.

Approved in Reese v. Bell (Cal.), 71 Pac. 90, where payee of note made equitable assignment thereof, and after maturity indorsed it, doctrine of relation will not cut off right of makers to set up any defense good against payee.

54 Cal. 176–177, SPIERS v. DUANE.

Where Plaintiff Tried Case on Theory that answer was sufficient to put in issue all material allegations of complaint, he cannot object to answer for first time in appellate court.

Approved in Ennor v. Raine, 27 Nev. 216, 74 Pac. 3, failure to object to counterclaim in lower court setting up prior appropriation, in action for injury to water rights, is waiver of objection thereto.

Distinguished in Burr v. Maclay Rancho Water Co., 160 Cal. 274, 116 Pac. 719, circumstance that evidence properly introduced to prove disputed fact may also have tended to prove admitted facts does not estop plaintiff from claiming its admission for purpose of sustaining the judgment; dissenting opinion in Gulling v. Washoe County Bank, 29 Nev. 274, 89 Pac. 31, majority upholding decree against one defendant and in favor of another when there were no cross-pleadings between them.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 384.

54 Cal. 179–180, MATTER OF FIFTEENTH AVE. EXTENSION.

When Judgment is Entered Nunc Pro Tunc as of day previous to actual entry, time for appeal dates from date of actual entry.

Approved in Noce v. Daveggio (Cal.), 4 Pac. 495, following rule; Stutsman v. Sharpless, 125 Iowa, 338, 101 N. W. 106, upholding appeal taken within six months of day judgment entered nunc pro tunc was actually recorded, although eighteen months after date of entry.

54 Cal. 180–182, BRADY v. FEISIL.

Where Judgment for Defendant is Reversed and cause remanded, with directions to enter judgment for plaintiff on findings, held, on appeal from order denying defendant's motion for new trial, notice of intention of which was given within ten days after entry of judgment, defendant should have filed notice within time prescribed in section 659, Code of Civil Procedure.

Overruled in Tuffree v. Stearns Ranchos Co. (Cal.), 54 Pac. 828, notice of intention to move for new trial, filed after judgment entered on remittitur from supreme court, may be given in reference to such judgment, rather than original judgment.

54 Cal. 187–188, O'NEIL v. O'NEIL.

All Defendants Need not Join in claim of right to have action involving right to realty tried in county where land situated.

Approved in Pittman v. Carstenbrook, 11 Cal. App. 227, 104 Pac. 701, holding where transitory action is brought in county outside residence of personal defendants, fact that a codefendant foreign corporation did not unite with them in demand for change of place of trial to their residence does not affect their right to such change.

Distinguished in Cochrane v. McDonald, 4 Cof. Prob. 537, 545, denying motion of certain defendants to change venue to county where land affected by action is located because basis of action is fraud, and one of nonmoving defendants is resident of forum.

54 Cal. 189–192, MARSTON v. SIMPON.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 593.

54 Cal. 192–196, **KELLY v. McKIBBEN.**

Amended Complaint Supersedes original complaint.

Approved in Lane v. Choctaw etc. R. R. Co., 19 Okl. 328, 91 Pac. 884, contents of original petition superseded by amended petition cannot be considered at trial as record or as admissions by plaintiff.

In Replevin, Value of Property at Date of taking and interest thereon from that date is recoverable as damages.

Reaffirmed in Webster v. Sherman, 33 Mont. 460, 84 Pac. 882.

Interest on Unliquidated Damages. See note, 38 L. R. A. (n. s.) 42.

Order Taxing Costs cannot be Reviewed on appeal on judgment-roll alone.

Approved in Schomberg v. Long, 15 N. D. 507, 108 N. W. 332, order taxing costs not reviewable in absence of settled statement of exceptions.

54 Cal. 201–204, **EX PARTE TINKUM.**

In Action Against Public Officer, his successor, when not party to suit, is not bound by proceedings.

Approved in Banter v. Superior Court, 6 Cal. App. 196, 91 Pac. 750, holding court without jurisdiction to punish for contempt, successor to secretary of corporation who was ordered to produce books, when successor was not a party to proceedings in which order was given.

54 Cal. 207–210, **NOE v. SPLIVALO.**

When Testator Disposes of Property of Third Person by Will, acceptance of bequest in will by such third person is confirmation of disposition by will.

Approved in In re Smith's Estate (Cal.), 38 Pac. 951, holding where will shows testator meant to dispose of community property, conveyance by testator's widow of life estate devised by will operates as acceptance by her of provisions of will.

As to When Beneficiary Deemed to have elected to take under will assuming to dispose of his property. See note, 4 L. R. A. (n. s.) 1065.

54 Cal. 211–212, **WELSH v. ALLEN.**

Order Substituting Party Plaintiff is not appealable.

Approved in Sears v. Dunbar, 50 Or. 39, 91 Pac. 146, following rule.

54 Cal. 212–215, **WILKE v. COHN.**

Affidavit for Attachment Stating in Alternative that debt was unsecured, or, if so secured, security was lost without fault of plaintiff, is insufficient.

Approved in O'Connell v. Walker, 12 Cal. App. 696, 108 Pac. 669, following rule.

54 Cal. 215–218, **ESTATE OF COTTER.**

Surviving Spouse, Although Incompetent to Serve on account of nonresidence, is entitled to nominate suitable person as administrator.

Approved in Estate of Bedell, 3 Cof. Prob. 81, reaffirming rule; Estate of Pickett, 1 Cof. Prob. 94, widow cannot nominate administrator of first husband's estate after her remarriage; Strong v. Dignan, 207 Ill. 393, 99 Am. St. Rep. 225, 69 N. E. 911, holding where resident intestate left no kin within state, but left property therein, a nonresident sister was entitled to nominate a resident as administrator.

Distinguished in Estate of Bergin, 3 Cof. Prob. 291, public administrator is not entitled to letters as against resident devisee under foreign will who files authenticated copy thereof and of its probate in foreign jurisdiction, with petition for letters.

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1162.

54 Cal. 218-223, HOOPER v. FLOOD.

To Maintain Claim of Mechanic's Lien, substantial compliance with provisions of statute is essential.

Approved in Hogan v. Bigler, 8 Cal. App. 13, 96 Pac. 97, holding void claim of lien stating incorrectly name of person to whom materials were furnished; Gordon Hardware Co. v. San Francisco etc. R. R. Co. (Cal.), 22 Pac. 406, holding claim of lien filed by materialman giving names of persons to whom materials were furnished at different times, but not stating what portions were furnished to each severally, is invalid.

54 Cal. 223-228, ESTATE OF BURNS.

Order Setting Apart Homestead to Widow is appealable and conclusive and cannot be reviewed on appeal from subsequent order.

Reaffirmed in Hanley v. Hanley, 4 Cof. Prob. 480, 482, 483.

54 Cal. 228-232, WOLF v. MARSH.

If One Voluntarily Puts It Out of His Power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor without demand, even though time specified for performance has not arrived.

Approved in Guthiel v. Gilmer, 27 Utah, 513, 76 Pac. 633, following rule; Marvin v. Rogers, 53 Tex. Civ. App. 427, 115 S. W. 865, contract performable on occurrence of future event becomes absolute if promisor prevents happening of event; Teachenor v. Tibbals, 31 Utah, 14, 86 Pac. 485, party agreeing to pay balance due for mine out of first profits could not, by selling mine before selling ore he had extracted, escape liability.

Distinguished in Barker etc. Lumber Co. v. Edward Hines Lumber Co., 137 Fed. 308, where defendant put it out of his power to perform an independent part of contract, acting on erroneous understanding thereof, plaintiff could not sue for breach nor be excused from further performance until the remaining part was completed.

Contract to Pay Money, With Understanding it shall not be paid on happening of contingency, is valid.

Approved in Fryberger v. Berven, 88 Minn. 316, 92 N. W. 1126, upholding similar contract.

54 Cal. 233-235, HOFF v. FUNKENSTEIN.

Interruption of Statute of Limitations by insolvency assignment. See note, 26 L. R. A. 738.

54 Cal. 236-237, PEOPLE v. CENTER.

After Appeal is Complete, Lower Court has no control over action except as to matters relating to appeal.

Approved in In re Bullard's Estate (Cal.), 31 Pac. 1120, holding after order was entered from which appeal was taken, court could make no new decree in regard to matters involved.

Miscellaneous.—Cited in Lux v. Haggin, 69 Cal. 424, 10 Pac. 773, referring historically to principal case.

54 Cal. 245–248, McDONALD v. PATTERSON.

Section 19, Article XI, Constitution, Relating to levy and collection in advance of assessment for street improvements, is self-executing.

Approved in Ex parte Show, 4 Okl. Cr. 429, 113 Pac. 1068, section 4a, article III, Constitution, prescribing educational qualification for voters, is self-executing; Ex parte McNaught, 23 Okl. 290, 291, 1 Okl. Cr. 264, 265, 274, 100 Pac. 28, 29, 32, section 17, article II, Constitution, forbidding prosecution for felony on information without preliminary examination, is self-executing.

Self-executing Constitutional Provisions. See note, 16 L. R. A. 282.

54 Cal. 248–251, PEOPLE v. SAN FRANCISCO GASLIGHT CO.

Wharfage Charges Imposed by Harbor Commissioners to assist in defraying expenses of dredging are valid.

Approved in People v. Board of State Harbor Com. v. Roberts (Cal.), 25 Pac. 496, following rule.

Right to Wharfage. See note, 70 L. R. A. 195.

54 Cal. 251–254, LINEHAN v. HATHAWAY.

Judgment in Partition Suit cannot be Attacked collaterally, although erroneous.

Approved in Baldwin v. Foster, 157 Cal. 648, 108 Pac. 716, holding judgment awarding costs as general lien on land in partition suit not collaterally assailable.

54 Cal. 254–258, REYNOLDS v. BRUMAGIM.

Decree Settling Administrator's Accounts is conclusive.

Approved in Estate of Byrne, 3 Cof. Prob. 69, reaffirming rule.

Findings are Unnecessary in granting nonsuit.

Approved in Broderins v. Anderson, 54 Wash. 593, 103 Pac. 838, following rule.

54 Cal. 262–265, HASKELL v. HASKELL.

Habitual Intemperance and Adultery being separate grounds for divorce, pleading instances of intoxication in connection with other matters as constituting acts of cruelty cannot, in absence of finding of cruelty, be regarded as sufficient allegation of cause of action for habitual intemperance.

Approved in Ring v. Ring, 118 Ga. 192, 44 S. E. 865, 62 L. R. A. 878, habitual and intemperate use of morphine does not alone constitute extreme cruelty.

Distinguished in Grierson v. Grierson, 156 Cal. 437, 134 Am. St. Rep. 137, 105 Pac. 121, holding, in pleading cause of action for divorce on ground of extreme cruelty, allegations of excessive drinking may be coupled with other acts which in themselves amount to cruelty.

Drunkenness as Affecting Divorce. See note, 34 L. R. A. 454.

Necessity of Alleging Jurisdictional Residence in divorce proceeding. See note, 12 L. R. A. (n. s.) 1198.

54 Cal. 273–275, TRENOUTH v. FARRINGTON.

Statute of Limitations Runs Against Judgment from date of entry, not from date of rendition.

Approved in Hall v. Justice's Court, 5 Cal. App. 138, 89 Pac. 871, and Feeney v. Hinckley (Cal.), 64 Pac. 409, both following rule.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 634.

54 Cal. 275-277, WINDER v. HENDRICK.

Clerk's Certificate to Transcript that undertaking was properly filed, omitting words "in due form," does not support appeal.

Approved in Village of Hailey v. Riley, 13 Idaho, 753, 92 Pac. 757, court will assume, in absence of certificate of clerk that undertaking in due form was filed, that no undertaking was filed in due form.

54 Cal. 278-280, WATSON v. DAMON.

Verdict for Recovery of Money must be certain as to amount.

Approved in Diggs v. Porteus (Cal.), 33 Pac. 449, verdict in unlawful detainer considered and held not sufficiently definite to support judgment for rent; Weruth v. Lashmett, 85 Neb. 291, 123 N. W. 429, verdict indefinite as to amount of recovery held nullity; Sonnesyn v. Akin, 14 N. D. 261, 104 N. W. 1031, ordering new trial where jury returned verdict for damages but failed to fix amount.

Distinguished in Electric Imp. Co. v. San Jose etc. R. R. Co. (Cal.), 31 Pac. 456, holding where defendant establishes claim greater than that of plaintiff in action for recovery of money, verdict for defendant "for its costs" is valid.

54 Cal. 285-289, BATEMAN v. SUPERIOR COURT.

District Court has No Jurisdiction to Appoint Receiver in action of ejectment.

Approved in First Nat. Bank v. Superior Court, 12 Cal. App. 343, 107 Pac. 326, holding receiver cannot be appointed in action at law upon mere averments of large indebtedness and insolvency of defendant.

54 Cal. 295-297, GOODWIN v. BUCKLEY.

Where Act is Passed to Go into Effect in stated time, and before that time a second act inconsistent with first is passed, to go into effect immediately, such later act repeals first so far as inconsistent.

Approved in Ex parte Sohncke, 148 Cal. 263, 113 Am. St. Rep. 236, 82 Pac. 957, 2 L. R. A. (n. s.) 813, following rule.

54 Cal. 298-301, GRANT v. BURR.

Where Legal Title of Land has Been Conveyed to trustee to secure debt, title and power of trustee are not affected by running of statute of limitations against debt.

Approved in Roberts v. True, 7 Cal. App. 381, 94 Pac. 393, and Travelli v. Bowman, 150 Cal. 590, 89 Pac. 348, both following rule; Sacramento Bank v. Murphy, 158 Cal. 396, 115 Pac. 235, action to construe trust deed, to have new trustees appointed in place of those who have died, and to have enforcement of deed directed according to terms, is not subject to limitations; Raggio v. Palmtag, 155 Cal. 802, 103 Pac. 314, holding where mortgagee came into possession, by purchase at probate sale, of mortgaged homestead sold after death of husband subject to mortgage, successors of wife cannot recover such homestead, in action to quiet title without payment of mortgage debt; Puckhaber v. Henry, 152 Cal. 423, 125 Am. St. Rep. 75, 93 Pac. 116, holding action did not lie for recovery of insurance policy pledged

for debt, when debt was barred, without payment thereof; Brereton v. Benedict, 41 Colo. 18, 92 Pac. 239, Holmquist v. Gilbert, 41 Colo. 117, 92 Pac. 233, 14 L. R. A. (n. s.) 479, and Foot v. Burr, 41 Colo. 197, 92 Pac. 237, 13 L. R. A. (n. s.) 1210, all holding limitations do not run against power of trustee under trust deed to foreclose after default; Cone v. Hyatt, 132 N. C. 814, 44 S. E. 679, and Menzel v. Hinton, 132 N. C. 665, 95 Am. St. Rep. 647, 44 S. E. 387, both holding where mortgage contains power of sale, right to foreclose by execution of power is unlimited as to time.

Distinguished in Marshutz v. Seltzor, 5 Cal. App. 143, 89 Pac. 878, holding plaintiff in quiet title suit not bound to pay outlawed mortgage of third party, where defendant fails to show connection of plaintiff's title therewith.

Effect of Bar of Statute of Limitations. See note, 95 Am. St. Rep. 667.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 555.

Effect of Bar of Other Remedies to prevent sale under power in trust deed or mortgage. See note, 13 L. R. A. (n. s.) 1210.

Statute of Limitations must be Pleaded or it is waived.

Approved in Bates v. Gregory (Cal.), 22 Pac. 685, mandamus does not lie to compel board of trustees of Sacramento to issue bonds under act of March 22, 1864, in liquidation of bonds barred by limitations when they pleaded the statute.

Deed of Trust Authorizing Trustee to Sell upon default is not a mortgage.

Cited in Brown v. Comonow, 17 N. D. 88, 114 N. W. 729, arguendo.

Distinguished in Langmaack v. Keith, 19 S. D. 356, 103 N. W. 211, instrument in form of deed of trust authorizing sale upon default held to be mortgage requiring foreclosure.

Right to Enjoin Sale Under Power in barred mortgage. See note, 6 L. R. A. (n. s.) 510.

54 Cal. 302–306, **WHEELER v. BOLTON.**

Distributee of Estate After Order of Distribution has right of action for his share against administrator.

Approved in St. Mary's Hospital v. Perry, 152 Cal. 340, 92 Pac. 865, following rule. See note, 1 Cof. Prob. 134.

54 Cal. 306–311, **WHITING v. QUACKENBUSH.**

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 444.

Constitutionality of Frontage Rule of assessment. See notes, 17 L. R. A. 334; 28 L. R. A. (n. s.) 1130, 1138.

54 Cal. 311–315, **HILL v. FINNIGAN.**

Failure of Sureties on Appeal Bond, after exception, to justify does not render appeal ineffectual, but merely avoids stay of execution of judgment appealed from.

Approved in Gooby v. Hanson (Cal.), 11 Pac. 489, following rule.

54 Cal. 319–329, **LAMB v. SCHOTTLER.**

Repeal of Statute Annuls All Proceedings had under it unless obligation of contract is thereby impaired.

Approved in People v. Bank of San Luis Obispo, 159 Cal. 76, 112 Pac. 870, when law which alone will support judgment is repealed pending appeal, appellate court will proceed no further but pronounce judgment under authority of existing law; In re Feland's Estate, 26 Okl. 452, 110 Pac. 738, proceedings commenced under act which has been repealed, not revived by repeal of repealing act.

Right of Condemning Party to Dismiss Proceedings before confirmation of judgment. See note, 28 L. R. A. (n. s.) 91.

54 Cal. 329–332, SHARP v. MILLER.

Where Complaint Contains Words which if properly arranged state two causes of action, it will be construed as stating only cause principally intended.

Approved in Santa Fe etc. Ry. Co. v. Hurley, 4 Ariz. 261, 36 Pac. 217, following rule.

54 Cal. 333–338, DINGLEY v. GREENE.

Liens of Employees of Original Contractor are enforceable only to extent of money due contractor on contract and in subordination to its terms.

Approved in Nason v. John, 1 Cal. App. 541, 82 Pac. 566, holding defective complaint by materialmen against owner in failing to allege anything due contractor when lien was filed or action brought.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

Where Building Contract Provided Payments should be made on certificate of architect, his certificate is conclusive of rights of all parties, unless shown to be obtained by collusion or fraud.

Approved in White v. Abbott, 188 Mass. 102, 74 N. E. 306, where contract provided that owner should complete work in case subcontractor failed to complete it, and expenses of owner so incurred should be audited and certified by architect and deducted from contract price, architect's determination thereunder is binding on parties.

If Contract is an Entirety, no mechanics' liens can be filed until after its completion.

Approved in Perry v. Brainard (Cal.), 8 Pac. 882, holding subcontractor cannot acquire lien when his claim is filed before completion of building.

54 Cal. 339–344, 35 Am. Rep. 80, PAYNE v. ELLIOT.

To Justify Arrest of Defendant in Civil Suit, facts constituting fraud must be specifically alleged in complaint.

Approved in Ledford v. Emerson, 143 N. C. 535, 55 S. E. 972, 10 L. R. A. (n. s.) 362, imprisonment to enforce payment of debt cannot be had unless jury has found defendant guilty of fraud on issue raised.

Distinguished in Banning v. Roy, 47 Or. 123, 114 Am. St. Rep. 908, 82 Pac. 710, judgment need not specify kind of execution which may issue for its enforcement.

54 Cal. 346–352, VIGOUREUX v. MURPHY.

Sale en Masse, Under Execution, of distinct parcels at price greatly below actual value is voidable, and will be set aside on application of judgment debtor.

Approved in Bechtel v. Wier, 152 Cal. 447, 93 Pac. 77, 15 L. R. A. (n. s.) 459, holding voidable, on application of judgment debtor, sale en masse under execution of distinct parcels ordered sold separately.

54 Cal. 353–374, HYATT v. ALLEN.

Provisions of Constitution Which Do not Require Legislation to enforce them are self-executing.

Approved in Halsey Co. v. Belle Plaine, 128 Iowa, 470, 104 N. W. 495, article XI, section 3, Constitution, prohibiting municipal corporations from becoming indebted in excess of five per cent of value of taxable property, is self-executing.

Mandamus Lies as Aid to Exercise of supreme court's appellate jurisdiction.

Approved in Stewart v. Torrance, 9 Cal. App. 211, 98 Pac. 397, denying district court of appeal's jurisdiction to compel superior judge to settle bill of exceptions in divorce case.

Original Jurisdiction of Court of last resort in mandamus. See note, 58 L. R. A. 834, 836, 853.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 36, 75, 108.

Mandamus Lies to Compel Assessor to assess all property in his district.

Approved in Goodell v. Woodbury, 71 N. H. 381, 52 Atl. 857, mandamus lies to compel police commissioners to perform duty in prosecuting violators of liquor law.

Taxpayer is Party "Beneficially Interested" so as to be proper party to make affidavit for issuance of mandamus to assessor to compel him to assess property subject to assessment.

Distinguished in Webster v. San Diego, 8 Cal. App. 482, 97 Pac. 93, taxpayer not "beneficially interested" in procuring mandamus to compel submission to popular vote of ordinance of San Diego confirming franchise to railroad to build wharf in tide waters within city.

"Other" Means Different from That Which has been specified.

Approved in Ex parte Williams (Cal. App.), 87 Pac. 567, 568, holding "other" will generally be read "other such like."

Where Law, Antecedent to Revision of Statute, is settled by clear expressions or adjudications of statutes, mere change in phraseology is not construed as change of law, unless clearly so intended.

Approved in State Commission in Lunacy v. Welch, 154 Cal. 777, 99 Pac. 182, holding decisions under old Practice Act apply to subdivision 2, section 393, Code of Civil Procedure, which is in same words.

54 Cal. 375–378, PEOPLE v. BOARD OF EDUCATION OF OAKLAND.

Certiorari Lies to Review Action of inferior tribunal, board, or officer exercising judicial functions.

Approved in Hammer v. Smith, 11 Ariz. 424, 94 Pac. 1122, action of supervisors in letting contract for county printing is not reviewable on certiorari; State v. Dunn, 86 Minn. 304, 90 N. W. 773, decision of state auditor as to proper county for taxing of personal property reviewed on certiorari; State v. White Pine County, 31 Nev. 117, 101 Pac. 105, action of county commissioners in contracting for indexing county records not reviewable on certiorari; Greenough v. School Committee of Pawtucket, 27 R. I. 428, 62 Atl. 978, action of school committee in

changing text-books not reviewable on certiorari; Newell v. Franklin, 30 R. I. 265, 74 Atl. 1011, holding acts of commission appointed to erect bridge between two towns not reviewable on certiorari.

Where Duty is Imposed by Law on inferior tribunal, board, or officer, in exercise of which it has no discretion, its action in performance of that duty is ministerial.

Approved in Kaiser Land and Fruit Co. v. Curry, 155 Cal. 657, 103 Pac. 348, holding duty of Secretary of State to determine what corporations come within exceptions to section 7, act of March 29, 1905, is merely incident to ministerial function and not binding on any corporation.

Adoption of Text-books for public schools. See note, 36 L. R. A. 278.

54 Cal. 388–389, HAWLEY v. McCREDY.

Rights Inter Se of Accommodation Parties to commercial paper. See note, 28 L. R. A. (n. s.) 1040.

54 Cal. 386–388, WALKER v. FELT.

Court will Protect Assignee of Cause of Action, who continues suit, against act of assignor in whose name it is continued.

Approved in King v. Miller, 53 Or. 61, 64, 97 Pac. 545, 546, assignee of judgment creditor may collect from party who had collected judgment upon assignee's authority, but had paid it to assignee of debt on which judgment was based, although assignor had attempted to revoke assignment after suit brought; Sykes v. Beck, 12 N. D. 252, 96 N. W. 846, assignee pendente lite may continue action in name of assignor, but assignor has no control over action.

54 Cal. 390–393, WILLIAMS v. HILL.

General Finding That Allegations of Complaint are true is conclusive as against defense of mistake pleaded in answer, which is deemed negatived by such finding.

Approved in Chatfield v. Continental Bldg. etc. Assn., 6 Cal. App. 668, 92 Pac. 1042, holding finding that all allegations of complaint are true when answer consisted of denials only is sufficiently definite and certain.

54 Cal. 395–396, LADD v. DURKIN.

Miscellaneous.—Cited in Krug v. Lux Brewing Co., 129 Cal. 323, to point that finding that "material" averments of pleading are true or untrue is insufficient.

54 Cal. 398–404, PEOPLE v. AH CHUNG.

Indictment Held to have Been Properly Found by grand jury.

Approved in State v. Cambron, 20 S. D. 285, 105 N. W. 242, upholding indictment found by grand jury, members of which were irregularly drawn.

Each Material, Independent Fact Relied on to prove guilt must be established beyond reasonable doubt.

Reaffirmed in State v. Blydenburg, 135 Iowa, 279, 112 N. W. 640.

Nature and Essentials of Circumstantial Evidence. See note, 97 Am. St. Rep. 777.

Improper Influence or Interference with grand jury. See note, 28 L. R. A. 372.

54 Cal. 404–407, PEOPLE ex rel. TAYLOR v. ELECTION COMMISSIONERS.

Action of Election Board in Ordering Election of freeholders to propose charter is not judicial and not reviewable on prohibition.

Approved in Anderson v. Arpin Hardwood Lumber Co., 131 Wis. 41, 110 N. W. 792, following rule; Kalbfell v. Wood, 193 Mo. 688, 92 S. W. 233, writ did not lie to prevent election commission from appointing judges and clerks in alleged illegal manner.

Prohibition as Remedy in Proceedings relating to election or removal of officers. See note, 111 Am. St. Rep. 942.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 81.

54 Cal. 407, ESTRADA v. ORENA.

Demand in Writing for Change of Place of trial is essential to entitle defendant sued in wrong county to order for change.

Approved in dissenting opinion in Warner v. Warner, 100 Cal. 17, 34 Pac. 525, majority granting change of place of trial without previous written demand.

54 Cal. 408–412, SAN FRANCISCO v. RANDALL.

Action on Forfeited Bail Bond is properly begun in name of county.

Approved in Malheur County v. Carter, 52 Or. 619, 98 Pac. 490, action on bail bond held properly brought by county although bond ran to state.

Oral Order of Police Judge from Bench upon giving bond for release of prisoner, followed by release, is sufficient compliance with statute to bind sureties on bond.

Approved in State v. Lagoni, 30 Mont. 482, 76 Pac. 1047, holding verbal order of release bound sureties.

Proceedings Against Persons by Less or other than full Christian names. See note, 132 Am. St. Rep. 580.

54 Cal. 418–421, SIEMERS v. EISEN.

Failure to Perform Duty Imposed by legal authority in itself constitutes negligence.

Approved in Stein v. United Railroads, 159 Cal. 371, 113 Pac. 664, violation of local ordinance forbidding fast driving over crossings is negligence per se; Cragg v. Los Angeles Trust Co., 154 Cal. 667, 98 Pac. 1065, holding owner of building negligent per se in employing unlicensed elevator operator; Fenn v. Clark, 11 Cal. App. 81, 103 Pac. 945, holding failure to provide automobile lights as required by city ordinance is proof of negligence in action for injury caused by collision with pedestrian; Warren v. Southern Cal. Ry. Co. (Cal.), 67 Pac. 2, holding general allegation of negligence will admit proof of negligence per se in violation of ordinance; Sluder v. St. Louis Transit Co., 189 Mo. 173, 88 S. W. 666, 5 L. R. A. (n. s.) 186, breach of ordinance requiring motorman to keep vigilant watch for vehicles is negligence per se; Peterson v. Standard Oil Co., 55 Or. 519, 520, 106 Pac. 340, violation of statute requiring names and grades of distillates to be marked on receptacles in which they are sold is negligence per se.

Distinguished in Manning v. App Cons. Gold Min. Co., 149 Cal. 45, 84 Pac. 661, holding section 4, act of 1893, did not impose upon

employer duty of lashing poles to cable when lowering poles by means of bucket into mine, so as to make him liable for injury caused by fall of poles while being lowered; Morrison v. Lee, 16 N. D. 384, 113 N. W. 1028, 13 L. R. A. (n. s.) 650, denying recovery to plaintiff who poured contents of can of kerosene sold by defendant, with knowledge that one-ninth of contents was gasoline.

Violation of Police Ordinance as ground for private action. See note, 5 L. R. A. (n. s.) 255.

54 Cal. 422–427, FISHBECK v. PHENIX INS. CO.

Where Insurance Policy Contained Clause forfeiting it for issuance of other insurance on same property, and agent knew of such other insurance being in force, company is deemed to have waived clause.

Approved in Arnold v. American Ins. Co., 148 Cal. 667, 84 Pac. 185, 25 L. R. A. (n. s.) 6, holding breach of condition of policy against keeping of gasoline on premises waived by agent when he had knowledge thereof, made no objection, and allowed policy to continue in force; German Ins. Co. v. Shader, 68 Neb. 9, 93 N. W. 975, 60 L. R. A. 918, holding acceptance of premium by agent after loss waived clause of policy that insurer is not liable for loss occurring before payment.

Criticised in Goorberg v. Western Assur. Co., 150 Cal. 519, 119 Am. St. Rep. 246, 89 Pac. 133, 10 L. R. A. (n. s.) 876, holding insurer's neglect to offer to repay premium after knowledge of breach of condition did not constitute waiver of such breach.

Waiver of Provisions of Nonwaiver or written waiver of conditions and forfeitures in policies. See note, 107 Am. St. Rep. 142.

Parol Evidence Rule as to Varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies. See note, 16 L. R. A. (n. s.) 1193.

To Avoid Policy on Ground of Deception, whole premium must be returned.

Approved in United States etc. Ins. Co. v. Clark, 41 Ind. App. 356, 83 N. E. 764, holding failure to return premium after knowledge of false statements in application for twenty-two months unreasonable and does not avoid policy.

Where Agent of Insurer Joined With Agents of other companies in adjusting loss and promised to pay his company's proportion, company is estopped to deny policy void by reason of clause against insurance in other companies.

Distinguished in Parsons, Rich & Co. v. Lane, 97 Minn. 120, 106 N. W. 494, 4 L. R. A. (n. s.) 231, insurer not estopped to deny liability on policy condition that insured owned property by failure to return premium paid before discovery that building was leased; Staats v. Pioneer Ins. Assn., 55 Wash. 60, 104 Pac. 189, insurer retaining premium on fire policy after full knowledge of facts which would make it void ab initio thereby asserts validity of contract.

54 Cal. 435–438, LANGLEY v. VOLL.

Query, Whether Stranger to Record is entitled to writ of assistance.

Cited in Emerich v. Miller, 159 Ind. 325, 64 N. E. 31, grantee of rights of purchaser at mortgage foreclosure sale has same right as purchaser to writ of assistance.

Jurisdiction of Equity to Put Party in possession in aid of decree. See note, 93 Am. St. Rep. 164.

54 Cal. 439–441, QUACKENBUSH v. SAWYER.

Partnership is not Created by Agreement to divide income of business carried on by third party with joint property of plaintiff and defendant.

Approved in Logan v. Oklahoma Mill Co., 14 Okl. 406, 79 Pac. 104, agreement that one joint owner work land, the other bearing half the expense and paying for half the former's time, is not partnership.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 437.

54 Cal. 442–452, 35 Am. Rep. 77, WILLIAMS v. HARTFORD INS. CO.

Provision in Policy Requiring Insured to furnish sworn proofs of loss will be deemed waived when conduct of insurers is such as to render production unavailing, or induce insured to believe it unnecessary.

Approved in Bank of Anderson v. Home Ins. Co., 14 Cal. App. 220, 111 Pac. 511, failure to furnish proof of loss held excused by conduct of insurer; McCollough v. Home Ins. Co., 155 Cal. 663, 102 Pac. 816, holding clause in policy requiring sworn proofs of loss waived by action of insurer in stating such to be unnecessary.

Total Loss Does not Mean Absolute Destruction, but that after fire thing insured did not exist as building.

Approved in Murphy v. American etc. Ins. Co., 25 Tex. Civ. App. 245, 54 S. W. 409, Liverpool & London etc. Ins. Co. v. Heckman, 64 Kan. 398, 67 Pac. 882, and Thuringia Ins. Co. v. Malott, 111 Ky. 923, 64 S. W. 992, 55 L. R. A. 277, all following rule; Palatine Ins. Co. v. Weiss, 109 Ky. 468, 59 S. W. 510, holding loss total although some posts of building remained standing but had to be pulled down.

Constructive Total Loss of Insured Building. See note, 56 L. R. A. 785, 787, 789.

Preliminary Proofs of Loss are not competent to prove amount of loss.

Approved in Goodwin v. Union Ins. Co., 163 Mich. 44, 127 N. W. 791, following rule.

Where Evidence Competent for One Purpose is admitted generally, failure to ask instruction limiting effect waives objection to its competency for any purpose.

Reaffirmed in State v. Greene, 33 Utah, 499, 94 Pac. 988.

54 Cal. 452–463, LE ROY v. DUNKERLY.

Tide Lands of California, not Disposed of by Mexican grant, were held by United States in trust for future state, and upon admission, title vested in state.

Approved in People v. San Francisco (Cal.), 15 Pac. 749, holding claim of state to tide lands subject to equities arising prior to admission and subject to power of federal government to confirm prior Mexican grants.

54 Cal. 471–476, ESTATE OF BROOKS.

That Principal Beneficiary Under Will was partner of testator for many years raises no presumption of undue influence.

Approved in Snodgrass v. Smith, 42 Colo. 68, 94 Pac. 315, existence of opportunity to exert undue influence over testator creates no

presumption of such influence; Ginter v. Ginter, 79 Kan. 750, 101 Pac. 645, 22 L. R. A. (n. s.) 1024, undue influence never presumed when will appears to be validly executed.

Nonexpert Opinions as to Sanity or Insanity. See note, 88 L. R. A. 722, 732.

54 Cal. 476–480, CRANE v. WEYMOUTH.

Where Judgment is Reversed on Appeal but finally affirmed on remittitur from federal supreme court, sureties on appeal bond are liable.

Approved in Culver v. Fidelity & Deposit Co., 149 Mich. 632, 113 N. W. 10, holding sureties liable where judgment reversed on appeal was affirmed on rehearing.

54 Cal. 491–493, McCOOL v. MAHONEY.

Damages Found Against Joint Tort-feasors cannot be severed.

Approved in Marriott v. Williams, 152 Cal. 711, 125 Am. St. Rep. 87, 93 Pac. 878, upholding instruction to find single verdict against several defendants for single tort.

Distinguished in Cole v. Roebling Construction Co., 156 Cal. 449, 105 Pac. 258, in action against joint tort-feasor, court has power to render several judgment against one on his default and proceed against other.

Release of One Joint Tort-feasor as affecting liability of others. See notes, 92 Am. St. Rep. 884; 58 L. R. A. 306.

54 Cal. 493–495, HILL v. FINNIGAN.

When Stay Bond on Appeal has Been Filed, but sureties fail, upon exception, to justify, new undertaking cannot be filed in lower court, but supreme court may make an order to operate as supersedeas.

Approved in Mansfield v. Stern (Cal.), 4 Pac. 777, and McClatchy v. Sperry (Cal.), 58 Pac. 530, both following rule.

Distinguished in Gross v. Kelleher, 73 Cal. 640, 15 Pac. 362, holding supreme court cannot grant stay of execution on filing new bond when sureties on bond on appeal to stay execution in unlawful detainer suit have failed to justify.

54 Cal. 496–501, GAGLIARDO v. DUMONT.

Homestead cannot be Alienated by Deed under power of attorney.

Approved in Thompson v. Foken, 81 Neb. 266, 115 N. W. 772, following rule; Keeline v. Clark, 132 Iowa, 370, 106 N. W. 260, deed to homestead signed by husband under power of attorney from wife held void.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 938.

Effect of Wife's Separate Deed of Homestead in connection with conveyance or encumbrance by husband, or her subsequent joinder therein. See note, 8 L. R. A. (n. s.) 749.

Miscellaneous.—Cited in McHarry v. Stewart (Cal.), 35 Pac. 144, holding it unnecessary to decide whether conveyance by widow of her interest in portion of premises set apart as homestead for her and minor children during existence of homestead transferred to grantee any title therein.

54 Cal. 502–508, HARDING v. MINEAR.

Motion to File Supplemental Answer is addressed to sound legal discretion of court.

Approved in Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 317, 90 Pac. 210, holding court did not abuse discretion in refusing to permit filing of amended answer more than four years after issue was joined; Reed v. Harshall, 12 Cal. App. 704, 108 Pac. 722, holding court could refuse to allow filing of plea in abatement by amended and supplemental answer after trial and submission of cause.

54 Cal. 509–518, 35 Am. Rep. 83, ESTATE OF TOOMES.

Opinion of Priest Held Admissible in will contest as that of expert as to sanity of testatrix.

Approved in Kimic v. San Jose-Los Gatos etc. Ry. Co., 156 Cal. 392, 104 Pac. 991, holding opinion of trained nurse admissible as that of expert in regard to physical condition of plaintiff; Estate of Dolbeer, 149 Cal. 248, 86 Pac. 704, holding medical practitioner whose experience covered all classes of cases qualified to testify as to sanity of testatrix.

Expert Opinions as to Sanity or Insanity. See note, 39 L. R. A. 317.

Upon Trial of Issue of Sanity of testatrix at time of executing will, proof of insanity at a time prior or subsequent thereto is admissible.

Approved in Estate of Godsil, 4 Cof. Prob. 517, reaffirming rule; Perkins v. Sunset Tel. and Tel. Co., 155 Cal. 717, 103 Pac. 193, in action to rescind release for damages for injury on ground of unsound mind of party giving it, proof of unsoundness before or after giving release is admissible.

Exclusion of Proper Testimony is always ground for reversal.

Approved in Hayden v. Collins, 1 Cal. App. 262, 81 Pac. 1122, when complaint stated cause of action in ejectment, court could not refuse to admit evidence on title.

54 Cal. 519–520, McLAUGHLIN v. DOHERTY.

Appeal Taken Before Entry of Judgment, though after rendition, will be dismissed.

Approved in Meysan v. Chabrie (Cal.), 7 Pac. 634, refusing to consider appeal from judgment when record showed no entry thereof.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 627.

54 Cal. 522–525, GRIMM v. O'CONNELL.

Mandamus Lies to Compel Officer to make tax deed comply with law.

Approved in Webster v. Somers, 159 Cal. 462, 114 Pac. 577, reaffirming rule.

Tax Deed is Void Unless Statutory Form prescribed is strictly followed.

Approved in Seaverns v. Costello, 8 Ariz. 312, 71 Pac. 931, holding void tax deed not reciting "name of person, firm, company, or corporation assessed, and from whom taxes were due," as required by statute.

Distinguished in Baird v. Monroe, 150 Cal. 564, 89 Pac. 353, holding curative act of 1903 validated tax deeds containing no recital of time allowed for redemption, provided five years have elapsed since date of sale and deed.

Assessment to "A and All Owners and claimants known or unknown," is void.

Reaffirmed in Stilt v. Stringham, 55 Or. 93, 105 Pac. 254.

54 Cal. 525–527, DIGGINS v. REAY.

In Action to Enforce Street Assessment judgment entered against all defendants except one who had not been served, but was alleged in complaint to have interest in property, is erroneous.

Approved in Milliken v. Houghton (Cal.), 4 Pac. 915, following rule.

Superiority of Lien of Local Assessment over prior lien. See note, 35 L. R. A. 376.

54 Cal. 527–532, PEOPLE v. LEE PAT.

On Trial of Indictment for Perjury, alleged to have been committed in testifying at examination of party charged with felony, complaint against latter, sworn to by defendant, is admissible to show pendency of case in which perjury was alleged to have been committed.

Approved in People v. Bradbury, 155 Cal. 815, 103 Pac. 219, admitting judgment-roll in action in which perjury was committed to show pendency of proceeding, jurisdiction, giving of testimony, and its materiality.

Reporter's Notes of Testimony Taken before committing magistrate are inadmissible at trial when testimony was taken through interpreter.

Approved in State v. Terline, 23 R. I. 540, 91 Am. St. Rep. 650, 51 Atl. 208, on prosecution for perjury where alleged false testimony was in foreign language, testimony of one who did not understand such language as to statements made by interpreter are hearsay.

Stenographer's Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 367.

Admissibility of Evidence Given through interpreter. See note, 17 L. R. A. 814.

Constitutional Right of Accused to be confronted by witnesses. See note, 129 Am. St. Rep. 28.

54 Cal. 532–533, PAYNE v. McKINLEY.

To Entitle Party to Maintain Action to enjoin construction of public nuisance, facts must be stated to show apprehension of injury to be well founded.

Approved in Brown v. Rea, 150 Cal. 176, 88 Pac. 715, following rule; Brown v. Florida Chautauqua Assn., 59 Fla. 452, 52 So. 804, parties whose property rights were specially injured by obstruction in street entitled to injunction.

Complaint by Individual in Action to restrain public nuisance must show damage peculiar to plaintiff.

Approved in City Store v. San Jose-Los Gatos etc. Ry. Co., 150 Cal. 279, 88 Pac. 978, holding complaint did not sufficiently allege special injury.

Order Dissolving Preliminary Injunction should not be disturbed, unless abuse of discretion appears.

Approved in Humphrey v. Buena Vista Water Co., 2 Cal. App. 544, 84 Pac. 297, holding preliminary injunction granted on notice

and hearing cannot be arbitrarily dissolved without good cause, merely because words "until further order of court" are inserted therein.

54 Cal. 534–535, PARROTT v. FLOYD.

Supreme Court will not Interfere with action of lower court in dissolving injunction after hearing upon affidavits unless there has been abuse of discretion.

Approved in Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 754, 115 Pac. 952, refusing to interfere with injunction granted pendente lite; Whitaker v. California Door Co., 7 Cal. App. 759, 95 Pac. 911, refusing to disturb order denying new trial made by another judge than one trying case when evidence was conflicting; Humphrey v. Buena Vista Water Co., 2 Cal. App. 543, 84 Pac. 297, holding preliminary injunction granted on notice and hearing could not be arbitrarily dissolved without good cause, merely because words "until further order of court" were inserted therein.

54 Cal. 536–539, PEOPLE v. HOUSTON.

Act Requiring Trustees of Swamp Land District to make statement of cost of reclamation "based on books and vouchers thereof," amount so reported to be assessed on district is unconstitutional as being levy of a tax by legislature.

Distinguished in Barnes v. Board of Supervisors, 13 Cal. App. 765, 110 Pac. 823, upholding act for formation of protection districts as not depriving supervisors of power to levy and fix amount of assessment within district.

Procedure for Establishment of drains and sewers. See note, 60 L. R. A. 235.

54 Cal. 542–547, THOMPSON v. PATTERSON.

Upon Appeal from Order Granting or Refusing new trial, appellate court can only consider transcript of record as it exists in lower court, duly authenticated in manner prescribed by law.

Approved in People v. Johnson, 9 Cal. App. 235, 98 Pac. 683, holding appellate court cannot amend bill of exceptions by inserting therein additional testimony; Raskin v. Robarts (Cal.), 35 Pac. 764, refusing to consider on appeal from order denying new trial question whether a conclusion of law is supported by findings.

Findings and Report of Referee Appointed to try and determine case are equivalent to findings and decision of court itself.

Approved in United States v. Ramsey, 158 Fed. 493, holding findings of referee can only be reviewed on motion for new trial; Chase v. Alaska F. & L. Co., 2 Alaska, 84, holding motion for new trial must specify actual and particular grounds relied on.

54 Cal. 547–555, THOMPSON v. FELTON.

Necessity of Color of Title, not Expressly Made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1189, 1196, 1208.

54 Cal. 556–557, ESTATE OF CUNNINGHAM.

Parties Represented upon Contest of Will by attorney appointed by court are not parties to contest so as to be barred by adjudication, but may contest validity of probate of will.

Approved in Tracy v. Muir, 151 Cal. 368, 121 Am. St. Rep. 117, 90 Pac. 833, holding heir of testator who was not party to contest of will before probate is not estopped by judgment.

Parties Represented upon Contest of Will by attorney appointed by court may contest will within year after probate.

Approved in Estate of Dalton, 2 Cof. Prob. 99, application for revocation of probate of will may be made within one year after probate, though final decree of distribution made and executor discharged.

54 Cal. 558–562, PACIFIC BRIDGE CO. v. KIRKHAM.

Assessment for Bridge Held Void when bridge rested in part on private land.

Approved in Manning v. City of Devil's Lake, 13 N. D. 52, 112 Am. St. Rep. 652, 99 N. W. 53, 65 L. R. A. 187, city cannot levy assessment to construct bridge on street which had no legal existence.

54 Cal. 562–565, PAGE v. WILLIAMS.

Permission to File Supplementary Answer after suit has been at issue two years denying consideration to notes sued on is properly refused.

Approved in Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 317, 90 Pac. 209, holding permission to file supplementary answer properly refused more than four years after issue joined; Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah, 597, 83 Pac. 685, rejecting amendment to pleading offered at close of trial without offer of further proof.

54 Cal. 565–571, MAHONEY v. BRAVERMAN.

Where Street Contract is not Completed by contractor within time specified in contract, assessment levied to pay for same is void.

Approved in Connolly v. San Francisco (Cal.), 33 Pac. 1111, holding street contractor who abandoned contract because assessments were illegal is not entitled to warrant for assessment thereunder.

54 Cal. 578–579, THOMAS v. ROCK ISLAND ETC. MIN. CO.

Action cannot be Maintained by Assignee of part of entire demand without express agreement of debtor.

Approved in Rogers v. Penobscot Min. Co., 154 Fed. 614, 83 C. C. A. 380, no action lies at law on part of entire demand, but assignee may maintain suit in equity.

54 Cal. 579–581, MONTGOMERY AVE. CASE.

Selection of Interested Person to assess benefits from improvements. See note, 16 L. R. A. (n. s.) 292.

54 Cal. 583–584, FREDERICK v. TIERNEY.

Motion to Dismiss Appeal Denied where it does not appear from clerk's certificate that notice of appeal was served on respondent or attorneys.

Approved in Gurnen v. Garrity (Cal.), 10 Pac. 118, and Ellis v. Judson (Cal.), 10 Pac. 127, both following rule.

54 Cal. 584–585, PHILLIPS v. LOWREY.

Specifications of Insufficiency of Evidence to sustain findings are essential on appeal from order denying new trial.

Approved in McNish v. Wolven, 22 S. D. 624, 119 N. W. 1000, disregarding bill of exceptions which did not specify errors relied on on motion for new trial.

54 Cal. 588, ALVARADO v. DE CELIS.

When Nonsuit is Improperly Ordered, motion for new trial should be granted.

Reaffirmed in Bygum v. Southern Pacific Co. (Cal.), 36 Pac. 415.

54 Cal. 590, MILLER v. SHARPE.

Findings of Fact are not Subject of Appeal, no decree having been made.

Approved in Bussell v. City of Ft. Dodge, 126 Iowa, 313, 101 N. W. 1128, order refusing to direct verdict in favor of cross-defendant, as to whom case had been continued, is not appealable.

54 Cal. 590, BRADY v. KELLY.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 330.

54 Cal. 591–592, HARDENBERG v. HARDENBERG.

Findings in Divorce Considered and held insufficient to support judgment.

Approved in Sharp v. Frank (Cal.), 41 Pac. 861, holding findings too indefinite to support judgment.

54 Cal. 592–594, PEOPLE v. GREEN.

In Prosecution for Perjury Based on False Testimony given in another case, reporter's notes of defendant's testimony in other case is material.

Approved in People v. Chadwick, 4 Cal. App. 70, 87 Pac. 384, determining sufficiency of evidence in perjury case based on false testimony given in prior case.

54 Cal. 595–597, PRESTON v. HEARST.

Appeal cannot be Taken from Judgment before entry thereof.

Approved in Meysan v. Chabrie (Cal.), 7 Pac. 634, dismissing appeal from judgment when record showed no entry thereof.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 630.

54 Cal. 605–610, COX v. McLAUGHLIN.

Where Contract is Entire and Consideration to be paid in installments as work progresses, mere failure to pay installment when due is not such prevention of performance as entitles contractor to sue for whole contract price.

Approved in Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 273, 110 Pac. 955, one who contracted to sell asphalt on monthly deliveries and payments could not rescind for failure to make payment on time when course of dealing showed seller did not insist on prompt payment; Barrett v. Austin (Cal.), 31 Pac. 5, holding contractor to bore well who was to be paid on finding water or attaining a certain depth is not prevented from continuing work by acts of

other party when he stops because of accident and other party refuses to pay for work done.

Distinguished in Alderson v. Houston, 154 Cal. 13, 96 Pac. 888, holding principal in contract with agents for sale of lots prevented performance by failure to clear lots sold of street assessment liens and thus wrongfully discharged agents.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 68.

Effect of Part Performance of contract for services. See note, 24 L. R. A. 233.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 36, 61.

54 Cal. 613–615, OULD v. STODDARD.

Effect upon Mortgage Lien of Entry of judgment upon debt secured. See note, 24 L. R. A. (n. s.) 1098.

54 Cal. 616–620, ASHLEY v. OLMSTEAD.

No Appeal Lies from Order sustaining demurrer.

Approved in Hadsall v. Case, 15 Cal. App. 542, 115 Pac. 331, following rule; Litch v. Kerns, 8 Cal. App. 748, 97 Pac. 898, dismissing appeal from order sustaining demurrer when no judgment had been entered thereon.

Homestead Declaration Which Fails to estimate cash value of property is void.

Approved in Knock v. Bunnell (Cal.), 21 Pac. 961, following rule.

54 Cal. 620–625, REMINGTON v. HIGGINS.

Equity will Give Relief from Mistake of law as well as of fact.

Approved in Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 219, 84 N. E. 452, correcting mistake of fact in contract of sale of engine; Tossini v. Donahue, 22 S. D. 281, 117 N. W. 149, correcting mistake in contract in suit for specific performance.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 808.

Agreement Intended as Mortgage will be treated as mortgage in equity, though parties through mistake fail to carry out intention.

Reaffirmed in Harrigan v. Gilchrist, 121 Wis. 360, 99 N. W. 981.

54 Cal. 626–628, GREEN v. CHANDLER.

Finding Outside Issues cannot sustain judgment.

Approved in Los Angeles Brewing Co. v. Klinge, 7 Cal. App. 552, 95 Pac. 45, following rule.

Distinguished in Cummings v. Roeth, 10 Cal. App. 148, 101 Pac. 436, holding where leave was granted to file amended complaint and unverified answer thereto, but answer was not filed, and trial was had on issues, appellant cannot claim amended complaint was conclusively admitted, and that findings contrary thereto are without support.

54 Cal. 628–630, McFADDEN v. MITCHELL.

Want of Consideration for Transfer of Property is not conclusive evidence of fraud against creditors.

Distinguished in Wolters v. Rossi (Cal.), 57 Pac. 74, holding as fraud against creditors transfer of property by insolvent judgment debtor to wife without consideration after order had been made for his examination in supplementary proceedings.

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 363.

54 Cal. 635–636, CONNER v. BLUDWORTH.

Allegation of Possession Without Stating Means by which it is had is sufficient in action for replevin.

Approved in Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 416, 95 Pac. 1031, holding plaintiff in conversion may prove property acquired by third party by fraud of defendant under usual averments in conversion; Reynolds v. Fitzpatrick, 40 Mont. 596, 107 Pac. 903, allegation of ownership in conversion held to admit proof of verbal mortgage.

54 Cal. 637–638, LIVERMORE v. HODGKINS.

Staying of Execution Otherwise than by statutory proceedings. See note, 127 Am. St. Rep. 712, 714.

54 Cal. 639–640, FORSYTH v. BOWER.

Loss of Exemption Rights by abandonment of occupation. See note, 116 Am. St. Rep. 353.

Purpose for Which Horses are Used as affecting exemption under statute specifically exempting horses. See note, 3 L. R. A. (n. s.) 694.

54 Cal. 640–645, GOSS v. STRELITZ.

When Contractor Pays Money to Materialman without specifically directing application, materialman may not apply any part of it to debt existing before contract on which he furnished material.

Overruled in San Pedro Lumber Co. v. Schroeter, 156 Cal. 160, 103 Pac. 889, holding where owner gave contractor for two buildings check for balance due, without directions as to application, and contractor transfers check to materialman, latter may apply it to materials furnished for either building.

Claim of Mechanic's Lien must Comply with terms of statute creating right of lien.

Approved in Gordon Hardware Co. v. San Francisco etc. R. R. Co. (Cal.), 22 Pac. 406, holding claim of materialman's lien giving names of several persons to whom materials were furnished in different portions at different times, without stating portions furnished each, is too indefinite.

Materialman can Only Recover on Mechanic's Lien for materials furnished within dates specified in his claim of lien.

Reaffirmed in Santa Monica Lumber etc. Co. v. Hege (Cal.), 48 Pac. 71.

54 Cal. 645–654, FONTAINE v. SOUTHERN PACIFIC R. R. CO.

Company Leasing Its Railroad to Another Company remains liable for injuries to stock by trains of lessee on unfenced portion of lessor's road.

Distinguished in Johnson v. Southern Pacific Co., 11 Cal. App. 284, 104 Pac. 716, holding lessee of railroad operating same under same obligation as would be imposed on lessor to keep tracks fenced and in suitable repair.

Liability of Lessor of Railroad for injuries caused by negligence of another company using road. See note, 44 L. R. A. 756.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 349.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 55 CALIFORNIA.

55 Cal. 1–4, **ROWLAND v. COYNE.**

Filing of Demurrer is Appearance and gives jurisdiction of person.

Approved in United States v. Griefen, 72 N. J. L. 3, 60 Atl. 513, following rule.

55 Cal. 5–9, **WILSON v. MADISON.**

In Action to Quiet Title, Where Defendant Relies on title in himself, cross-complaint is not necessary.

Approved in Johnson v. Taylor, 150 Cal. 208, 119 Am. St. Rep. 181, 88 Pac. 907, 10 L. R. A. (n. s.) 818, where plaintiff answered cross-complaint and trial was had on merits without objection, and judgment given for defendant, objection that defendants could not have judgment on cross-complaint cannot be urged on appeal; dissenting opinion in Hawley v. Griffin, 121 Iowa, 704, 97 N. W. 91, holding where heirs of insane owner secure vacation of decree quieting title in grantee in tax deed on ground of insanity and want of appearance, they cannot interpose as defense to suit their right to redeem from sale.

Distinguished in Martin v. Molera, 4 Cal. App. 301, 87 Pac. 1105, holding demurrer to cross-complaint in action of ejectment seeking affirmative relief properly overruled.

One Claiming Title Under Sheriff's Deed to land, title of which is in United States, may have his title quieted as against all except United States.

Approved in Hayford v. Wallace (Cal.), 46 Pac. 295, holder of equitable title may maintain suit to quiet title as against all except holder of legal title; Johnson v. Hurst, 10 Idaho, 326, 77 Pac. 791, patentee receiving by mistake larger acreage than he paid for is entitled to be protected in his possession against all except the government; Shields v. Johnson, 10 Idaho, 481, 79 Pac. 393, quieting title to leasehold interest.

55 Cal. 20–21, **LONG v. SERRANO.**

In Action Against Several Defendants, all of whom defaulted, clerk could not enter judgment against one only.

Approved in Old Settlers' Investment Co. v. White, 158 Cal. 246, 110 Pac. 927, entry of judgment by clerk is ministerial and must closely follow forms prescribed by law.

55 Cal. 21–24, DE LA GUERRA v. NEWHALL.

Where Personal Property has Been Wrongfully Taken and converted, owner may sue in tort, or may waive tort and sue in assumpsit for reasonable value.

Reaffirmed in Fountain v. Sacramento, 1 Cal. App. 462, 82 Pac. 637.

In Assumpsit for Reasonable Value, express promise to pay need not be alleged.

Approved in Brown v. Crown Gold Milling Co., 150 Cal. 382, 89 Pac. 89, following rule; Bates v. Capital State Bank, 18 Idaho, 435, 110 Pac. 279, upholding complaint in replevin although not stating plaintiff was entitled to immediate possession of property.

Where Admission of Incompetent Evidence could do no injury, it is no ground for reversal.

Approved in Union Transportation Co. v. Bassett (Cal.), 46 Pac. 911, holding admission of hearsay was harmless error.

55 Cal. 28–31, BUTLER v. BEECH.

Partnership Books of Account as Evidence. See note, 52 L. R. A. 848.

55 Cal. 31–38, TOMPKINS v. SPROUT.

When Complaint in Action to Quiet Title alleges claim of interest of defendant and denies its validity, and answer denies all allegations except that of claim of interest, finding as to this interest cannot be disturbed on ground it was not in issue.

Distinguished in Doris v. McManus, 4 Cal. App. 150, 87 Pac. 289, holding in action to quiet title, general denial to unverified complaint merely puts in issue plaintiff's title and not averment that defendant is without interest; Hakalau Plantation Co. v. Kahuena, 14 Haw. 194, holding in action to quiet title, general denial does not act as disclaimer.

When Sale is Asked to be Set Aside as in fraud of creditors, purchaser paying liens thereon is entitled to be subrogated to lienor's rights.

Approved in Adams v. Young, 200 Mass. 591, 86 N. E. 943, rule applies to sale of whole stock of merchandise.

55 Cal. 38–42, HAYNES v. WHITE.

Agreement to Sell Land and, on Payment of purchase money, to execute good and sufficient deed therefor, requires conveyance of title to land, and is not satisfied by deed sufficient in form only.

Distinguished in Ward v. Yorba (Cal.), 54 Pac. 81, holding vendor in contract of sale of land merely agreed to convey what title he had.

Vendee cannot Maintain Action to recover purchase money from vendor, who has failed to perform, until evicted, or has surrendered possession or offered to do so.

Approved in Gervaise v. Brookins, 156 Cal. 108, 103 Pac. 331, following rule; Garvey v. Lashells, 151 Cal. 531, 91 Pac. 501, vendee in possession under contract of sale may, upon failure of vendor to

comply with contract, rescind contract, give up possession and sue for purchase money paid, or tender balance due and take such title as vendor can give; Woodbury v. King, 152 N. C. 680, 68 S. E. 224, purchase of standing timber when sued on purchase money note may prove deficiency of timber in abatement of price.

55 Cal. 42–43, DANIELWITZ v. TEMPLE.

Courts have No Jurisdiction of Contest of Right to purchase state lands unless referred to court by surveyor general or register of state land office.

Reaffirmed in Blakeley v. Kingsbury, 6 Cal. App. 710, 93 Pac. 131.

55 Cal. 43–46, THOMAS v. ANDERSON.

Entry of Record Necessary to complete judgment or order. See note, 28 L. R. A. 627.

55 Cal. 52–59, LEONIS v. LAZZAROVICH.

To Reform Deed on Ground of Mistake, evidence must be clear and convincing.

Approved in Ward v. Yorba (Cal.), 54 Pac. 82, reforming written agreement for sale of land on ground of mistake; Mills v. Driver, 72 Ark. 538, 81 S. W. 1059, equity can reform deed of married woman to her own land; Herring v. Fitts, 43 Fla. 64, 99 Am. St. Rep. 108, 30 So. 807, correcting mutual mistake in description in conveyance.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 873, 875, 918.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 939.

55 Cal. 72–78, 36 Am. Rep. 30, PEOPLE v. HODGDON.

Dying Declarations are Inadmissible unless declarant believed death was impending.

Approved in People v. Abbott (Cal.), 4 Pac. 770, holding declarations were made under sense of impending death and therefore admissible; Bilton v. Territory, 1 Okl. Cr. 579, 99 Pac. 168, and State v. Gianfala, 113 La. 484, 37 So. 37, both holding declarations inadmissible as dying declarations where declarant had some slight hope of recovery.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 660, 664; 56 L. R. A. 400.

55 Cal. 79–81, PEOPLE v. BRITE.

Office Becomes Vacant, Ipso Facto, when incumbent ceases to be an inhabitant of district for which he was elected or within which duties are to be discharged.

Approved in McKannay v. Horton, 151 Cal. 717, 121 Am. St. Rep. 146, 91 Pac. 600, 13 L. R. A. (n. s.) 661, holding office of mayor became vacant ipso facto upon conviction of incumbent of felony.

Distinguished in Bergerow v. Parker, 4 Cal. App. 174, 87 Pac. 250, holding arrest and detention of incumbent on felony charge does not create vacancy in office.

Abandonment of Public Office. See note, 113 Am. St. Rep. 518.

55 Cal. 87–90, **ESTATE OF BARTON.**

Upon Contest of Administration, estate should not bear expense of losing party.

Approved in Bowman v. Bowman, 27 Nev. 419, 76 Pac. 636, holding attorney's fees for procuring letters of administration cannot be allowed out of estate. See note, 1 Cof. Prob. 4.

Administration of Estate is Entirety, and claim of each of successive administrators to compensation must be considered with reference to rights of each and all others.

Approved in In re Leavitt, 8 Cal. App. 761, 97 Pac. 918, holding waiver of compensation by preceding trustees cannot increase commissions on income accounted for by successors whose compensation must have reference to rights of predecessors, whether asserted by them or not.

Commissions of Successive Administrators cannot be apportioned till close of estate.

Approved in Estate of Tessier, 2 Cof. Prob. 368, following rule.

55 Cal. 91–94, **TRACY v. CRAIG.**

Finding in Favor of Defendant in allegation of complaint which he did not deny is erroneous.

Approved in California Ins. Co. v. Schindler (Cal.), 1 Pac. 476, holding decision erroneous for finding made outside case made out by plaintiff.

55 Cal. 94–98, **MANLY v. HOWLETT.**

In Suit for Recovery of Land After Issuance of patent, statute of limitations cannot be held to have commenced running prior to date of patent.

Distinguished in Packard v. Johnson (Cal.), 4 Pac. 636, where, under act of 1858, certificate of purchase of land is issued reciting full payment, person acquires perfect equity as against state, and is entitled to benefit of statute of limitations from date of certificate.

55 Cal. 98–103, **BAKERSFIELD TOWN HALL ASSOCIATION v. CHESTER.**

What Constitutes a Corporation De Facto. See note, 118 Am. St. Rep. 259.

Adverse Possession by Donee under parol gift. See note, 35 L. R. A. 835.

55 Cal. 103–105, **JOHNSON v. SQUIRES.**

Constitutional Provision for Granting Lands to actual settlers only operates on applications made before Constitution took effect.

Approved in Messenger v. Kingsbury, 158 Cal. 616, 112 Pac. 67, mere application for purchase of state lands gives no right that cannot be devested by withdrawal of land from sale.

55 Cal. 106–109, **CURTIS v. PARKS.**

Volunteer Paying Money for Use of Another does not thereby become creditor of him for whose use it was paid.

Approved in Donovan-McCormick Co. v. Sparr, 34 Mont. 243, 85 Pac. 1030, reaffirming rule; Keifer v. Myers, 14 Cal. App. 341, 111 Pac. 1039, tender of amount due under pledge is performance of obli-

gation at date of tender, and voluntary payments made thereafter cannot be added to such amount; Union Collection Co. v. Snell, 5 Cal. App. 161, 89 Pac. 860, arguendo.

55 Cal. 115–116, BUSTAMENTE v. STEWART.

Amount Recoverable on Account of Attorney's Fees in action on injunction bond is limited to fees paid counsel for procuring dissolution of injunction, and does not extend to fees paid for defending entire case.

Approved in Miller v. Donovan, 13 Idaho, 744, 92 Pac. 994, following rule; Hooper v. Patterson (Cal.), 32 Pac. 514, in action by administrator on injunction bond, attorney's fees paid by intestate in procuring dissolutions of injunction cannot be recovered, when such fees have not been paid, and no claim for them filed against estate; Spooner v. Cady (Cal.), 44 Pac. 1020, holding plaintiff in trover could not recover as damages gross sum paid to attorney for services and expenses of pursuit of property.

Recovery on Injunction Bond of Attorney's Fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 55, 66.

55 Cal. 117–119, HELLMAN v. LEVY.

Effect of Possession of Real Property, as notice. See notes, 104 Am. St. Rep. 354; 13 L. R. A. (n. s.) 68, 78, 88, 91.

55 Cal. 119–123, FLETCHER v. MOWER.

Vendor can Demand Specific Performance of contract of sale upon proffer of title such as parties had in contemplation when making agreement.

Approved in Haynes v. White, 55 Cal. 41, agreement to sell land requires vendor upon payment of purchase money to execute deed that will pass title to the land, not merely deed good in form but conveying no title, because vendor has none.

55 Cal. 123–125, GILMORE v. LYCOMING FIRE INS. CO.

Where Party Relies in His Complaint upon written contract and it affirmatively appears that all terms thereof are not set forth in haec verba, nor stated in legal effect, but that material portion is omitted, such complaint is insufficient.

Approved in Cross v. Home Ins. Co., 154 Fed. 680, holding defective, complaint on fire insurance policy not setting out necessary terms and conditions of policy; Naftzger v. Gregg (Cal.), 31 Pac. 614, holding defective, complaint on notes as not setting out full contract, where answer admitted allegations, and set up contract for deed in consideration of notes.

Distinguished in Hegard v. California Ins. Co. (Cal.), 11 Pac. 597, upholding complaint on insurance policy not setting forth all conditions, when answer of defendant supplied omission and alleged their breach.

55 Cal. 126–129, LUCAS v. PICO.

Validity of Contracts to Furnish Evidence. See notes, 97 Am. St. Rep. 148; 19 L. R. A. 372.

Liability of Indorser of Non-negotiable Instrument. See note, 97 Am. St. Rep. 987.

55 Cal. 136, AMES v. ELDRED.

Declaration of Homestead must Contain Estimate of actual cash value of property.

Approved in Knock v. Bunnell (Cal.), 21 Pac. 961, following rule.

55 Cal. 137–142, GUARDIANSHIP OF CARDWELL.

When Guardian Invests Money of Ward without order of court, he does so at his own risk.

Approved in Estate of Wood, 159 Cal. 469, 114 Pac. 993, holding guardian liable for deposit made without court order lost by failure of bank; In re Averill's Estate (Cal.), 66 Pac. 15, loan by guardian of money of ward on sale credit of borrower requires him to show he acted in good faith and with due prudence.

Common-law Powers of Guardians. See note, 89 Am. St. Rep. 292.

Liability of Executors, Trustees, etc., for compound interest. See note, 29 L. R. A. 646.

55 Cal. 143–148, PHENIX ETC. MIN. CO. v. LAWRENCE.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 404.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 768.

55 Cal. 159–164, LOTHIAN v. WOOD.

Knowledge of Fact Concerning Business Affairs of corporation, acquired by director or other agent, is not notice to corporation, unless acquired in management or conduct of its business.

Approved in Tafft v. Presidio & Ferries R. Co. (Cal.), 22 Pac. 487, holding knowledge of fraud in transfer of stock on books is not imputed to corporation, unless transfer was made at request of director, who was also attorney in fact of owner of stock with power of sale.

Power of Lessee or Vendee to Subject Owner's Interest to mechanics' liens. See note, 23 L. R. A. (n. s.) 618.

55 Cal. 165–176, PORTER v. PICO.

Sheriff's Deed Given on Execution Sale under levy of attachment takes effect from levy of attachment.

Approved in Martinovich v. Marsicano, 150 Cal. 600, 119 Am. St. Rep. 254, 89 Pac. 333; San Domingo Co. v. Grand Pacific Co., 10 Cal. App. 418, 102 Pac. 549, and Robinson v. Thornton (Cal.), 31 Pac. 936, all following rule; Purser v. Cady (Cal.), 49 Pac. 181, where judgments are rendered foreclosing liens for labor, liens relate back to time labor was commenced, and deeds executed in pursuance thereto take effect by relation at time liens attached.

Attachment Proceedings are Merely Auxiliary to main action.

Approved in Bailey v. Aetna Indemnity Co., 5 Cal. App. 745, 91 Pac. 418, holding main action goes forward whether sheriff holds attached property or undertaking for its release.

Where Regularity of Levy of Attachment was question and recital in return conflicts with statement of officer levying same, decision of court on this conflict of evidence will not be disturbed by appellate court.

Approved in Bailey v. Aetna Indemnity Co., 5 Cal. App. 745, 91 Pac. 418, holding decision of court as to disputed correctness of recitals in attachment bond would not be disturbed if evidence were conflicting.

Sheriff's Sale of Land on Execution against grantor of holder of legal title casts cloud on title and will be enjoined.

Approved in Austin v. Union Paving etc. Co., 4 Cal. App. 612, 613, 88 Pac. 732, following rule.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 127.

Return upon Mesne Process That Officer duly levied same is defective in not stating acts done in making service, but is prima facie evidence of due execution.

Approved in Green v. Coit, 81 Ohio St. 286, 135 Am. St. Rep. 784, 90 N. E. 795, return on attachment held insufficient.

55 Cal. 176-179, LOS ANGELES WATER CO. v. LOS ANGELES.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 72.

55 Cal. 185-191, PEOPLE v. SMALLMAN.

Supreme Court has Appellate Jurisdiction in criminal cases on questions of law alone, and where verdict is complained of as being contrary to evidence, it is question of law only when there is no evidence to establish charge.

Reaffirmed in People v. Caulfield, 7 Cal. App. 658, 95 Pac. 667.

Power to Reverse Conviction for insufficiency of evidence. See note, 17 L. R. A. 484.

Receiving Money to Invest for Another with intent to convert to receiver's use is larceny.

Approved in Flohr v. Territory, 14 Okl. 488, 78 Pac. 569, upholding indictment for grand larceny charging property was taken by fraud and stealth.

55 Cal. 193-197, EX PARTE COHN.

Obedience by Executor or Administrator to decree of court may be enforced by contempt proceedings.

Approved in Estate of Treweek, 1 Cof. Prob. 134, reaffirming rule; Estate of Wittmeier, 118 Cal. 256, 50 Pac. 393, holding executrix properly committed for refusal to obey decree; Meeks v. State, 80 Ark. 581, 98 S. W. 379, failure by party to suit to comply with order for payment of funds in his hands is contempt, though decree was erroneous. See note, 1 Cof. Prob. 134.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 183.

Constitutionality of Imprisonment for Debt. See note, 34 L. R. A. 664.

55 Cal. 199-201, CLARK v. SUPERIOR COURT.

Judgment Ordered Without Trial is Within Jurisdiction of court where it has jurisdiction of parties, and only remedy is by appeal.

Approved in Beaulieu Vineyard v. Superior Court, 6 Cal. App. 250, 91 Pac. 1018, holding prohibition did not lie to restrain condemnation proceeding; Wabaska Electric Co. v. City of Blue Springs, 84 Neb. 579, 122 N. W. 22, judgment by consent is not void, however erroneous it may be; George v. Hill, 83 Neb. 829, 120 N. W. 448, irregu-

larity in entering judgment held not to render it void, or subject to collateral attack.

Distinguished in Evans v. Willis, 22 Okl. 321, 97 Pac. 1051, 19 L. R. A. (n. s.) 1050, prohibition lies to restrain proceeding on information presented by private person.

Writ of Prohibition. See note, 111 Am. St. Rep. 957.

55 Cal. 201–203, PEOPLE v. KENNEDY.

To Arrive at Meaning of Instruction, all instructions given on same point should be considered.

Approved in Hayden v. Consolidated Min. Co., 8 Cal. App. 138, 84 Pac. 423, following rule.

55 Cal. 204–207, SARGENT v. LINDEN MINING CO.

Instruction Considered and Held to be Substantial Departure from case made by pleadings and evidence.

Approved in Belknap v. Widdison, 32 Utah, 252, 90 Pac. 935, instruction, abstractly correct, but not applying to evidence, held erroneous and prejudicial.

55 Cal. 212–230, EX PARTE KEARNY.

No Presumptions are Indulged as to regularity of proceedings in justice's court.

Approved in In re Narvaez, 5 Cal. App. 105, 89 Pac. 858, holding void second commitment in justice's court on what appeared on record to be same offense.

Where It Appears from Record of Proceedings of inferior court that a person was tried and sentenced to be punished for an act which is not a crime, judgment is void, and prisoner will be discharged on habeas corpus.

Approved in Ex parte Greenall, 153 Cal. 770, 96 Pac. 806, discharging prisoner on habeas corpus when complaint in justice court did not charge crime; Ex parte Rickey, 31 Nev. 89, 135 Am. St. Rep. 651, 100 Pac. 136, and In re Farrell, 36 Mont. 259, 92 Pac. 786, both discharging prisoner on habeas corpus when information on which he was convicted stated no offense; Ex parte Show, 4 Okl. Cr. 423, 113 Pac. 1065, information charging certain acts in refusing to allow alleged qualified elector to vote held to charge no offense.

Distinguished in Ex parte Upson, 7 Cal. App. 533, 94 Pac. 856, where accused pleaded guilty in police court without demurring to complaint and did not appeal, appellate court will not consider sufficiency of complaint on habeas corpus.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 174.

Court has Power to Examine Validity of Ordinance on habeas corpus.

Approved in In re McCoy, 10 Cal. App. 125, 101 Pac. 423, holding invalid on habeas corpus ordinance regulating sheep pasturing.

Court has Power to Review Ordinances of Supervisors and determine whether they be reasonable.

Approved in Union Transportation Co. v. Bassett (Cal.), 46 Pac. 910, holding court can review orders of harbor commissioners as to reasonableness.

55 Cal. 230–236, PEOPLE v. ALVISO.

Where Body of Victim of Alleged Murder has been destroyed, corpus delicti may be proved by circumstances.

Approved in People v. Wilkins, 158 Cal. 536, 111 Pac. 615, and Schwantes v. State, 127 Wis. 181, 106 N. W. 245, both following rule, corpus delicti proved by circumstances; State v. Williams, 46 Or. 297, 80 Pac. 659, fragments of bodies of victims positively identified held to establish corpus delicti.

Indictment for Murder Charging Defendants "did feloniously and unlawfully, and of malice aforethought, kill and murder," held good.

Approved in Molina v. Territory, 12 Ariz. 16, 95 Pac. 103, upholding indictment for homicide which did not allege means or instrument by which wound was inflicted.

Defendant in Criminal Case is not Entitled to bill of particulars of evidence relied on to sustain judgment.

Approved in Mathis v. State, 45 Fla. 59, 34 So. 290, granting bill of particulars to defendant is in discretion of court.

55 Cal. 236–238, PEOPLE v. MITCHELL.

Instruction That Possession of Stolen Property by defendant recently after theft raised presumption of guilt is in violation of constitutional provision which prohibits court from charging jury with reference to matters of fact.

Approved in People v. Elster (Cal.), 3 Pac. 888, holding erroneous instruction in regard to inference of guilt from refusal to give account of possession of property recently stolen.

Possession of Recently Stolen Property as evidence of burglary. See note, 12 L. R. A. (n. s.) 200.

55 Cal. 242–254, DESMOND v. DUNN.

Special Charters of Cities and Towns in force prior to adoption of Constitution of 1879 are not abrogated by its adoption, but continue in force until majority of electors of corporation determine to organize under general laws.

Approved in Boise City Nat. Bank v. Boise City, 15 Idaho, 802, 100 Pac. 96, holding special charters were continued in force after adoption of Constitution.

Distinguished in People v. City of Wilmington, 151 Cal. 652, 91 Pac. 524, upholding special act repealing act for incorporation of particular town under which no organization was ever effected.

Act Known as McClure Charter Does not Apply to San Francisco until majority of electors of corporation, voting at a general election, shall so determine.

Approved in People ex rel. Dougherty v. Board of Election Commrs. (Cal.), 3 Pac. 412, following rule.

55 Cal. 254–256, GRUM v. BARNEY.

In Action to Recover Personal Property complaint alleged ownership and taking by defendant, and defendant in answer denied ownership and justified the taking under execution against another person. Held, defendant not bound to anticipate claim of plaintiff as vendee of execution debtor, and answer put in issue all material issues.

Approved in Eaton v. Metz (Cal.), 40 Pac. 948, following rule.

Change of Possession or Sale of Personal Property must be so manifest as to give evidence to world of claims of owner.

Approved in Kennedy v. Conroy (Cal.), 44 Pac. 796, where father leased ranch to son living with him and gave him bill of sale to stock thereon, but both continued living together as before, such sale of stock was void as to creditors.

55 Cal. 257–262, **MYERS v. SPOONER.**

Gain or Loss of Title by Abandonment, not including questions under statute of limitations. See note, 135 Am. St. Rep. 892, 901.

Abandonment and Forfeiture of Mining Claims. See note, 87 Am. St. Rep. 404, 413.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 856, 877.

55 Cal. 263–265, **PEOPLE v. ALIVTRE.**

Threats of Murder, Although Uncommunicated, are admissible in behalf of defense on murder trial on issue as to who commenced affray, as tending to show deceased had attempted to fulfill his threat.

Approved in State v. Jackman, 29 Nev. 409, 91 Pac. 144, holding uncommunicated threats of deceased against defendant admissible on question of self-defense.

Evidence of Threats in Prosecution for homicide. See notes, 89 Am. St. Rep. 709; 3 L. R. A. (n. s.) 526.

55 Cal. 265–267, **ASTELL v. PHILLIPPI.**

In Action to Recover Specific Personal Property, value of property determines jurisdiction, and not damages demanded.

Reaffirmed in Graves v. Thompson, 35 Wash. 285, 77 Pac. 384.

55 Cal. 267–272, **CHANDLER v. CHANDLER.**

Freehold to Begin in Futuro cannot be Created by bargain and sale deed.

Overruled in Ripperdan v. Weldy, 149 Cal. 674, 87 Pac. 279, holding future estates may be granted under section 767, Civil Code.

Statute of Uses in United States. See note, 16 L. R. A. (n. s.) 1150.

55 Cal. 273–277, **CROWLEY v. GENESEE MINING CO.**

Contract of Employment Made With President is binding on corporation.

Approved in Scott v. Monte Cristo Oil etc. Co., 15 Cal. App. 458, 115 Pac. 66, holding corporation liable for services of physician employed by its president for care of injured employee; Smith v. Sinbad Development Co., 15 Cal. App. 170, 113 Pac. 702, holding corporation liable for services of person employed by manager; Brown v. Crown Gold Milling Co., 150 Cal. 387, 89 Pac. 91, holding contract of employment made with acting manager binding on corporation, and that where majority of directors knew of employment they are deemed to have ratified it; Kelly v. Ning Yung Ben Assn., 2 Cal. App. 466, 84 Pac. 323, holding employment of attorney for corporation by its secretary shown by its conduct, and corporation estopped to dispute liability for his acts; West v. Will C. Prather & Co., 7 Cal. App. 83, 93 Pac. 893, contract of president of corporation who was also acting manager and acting within scope of apparent authority was binding; Henderson v. Western Gas Engine Co., 8 Cal. App. 249, 96 Pac. 787, holding corporation liable on contracts made by president with brokers to sell stock where president had general authority to

sell; Fisk Mining etc. Co. v. Reed, 32 Colo. 520, 77 Pac. 245, agent in charge of mine having authority to contract for drainage may bind corporation by agreement to pay for past drainage on consideration for continuance in future; Iowa Nat. Bank v. Sherman, 17 S. D. 401, 106 Am. St. Rep. 778, 97 N. W. 14, president and general manager of manufacturing and selling corporation presumed to have power to transfer its notes; dissenting opinion in Akiowa v. Kohala Sugar Co., 5 Haw. 363, majority holding defendant corporation not estopped by acts of its manager and agent.

Distinguished in Colpe v. Jubilee Min. Co., 2 Cal. App. 397, 84 Pac. 325, holding general manager of corporation did not have power to appoint superintendent and fix his compensation; Black v. Harrison Home Co., 155 Cal. 129, 99 Pac. 498, holding president of corporation could not bind it by contract for sale of its real estate where by-law limits his power to signing such contracts as had been approved by board of directors.

Powers of President and Vice-president of corporation. See note, 14 L. R. A. 357.

Agent may Make Contract for corporation without use of seal.

Approved in Second Nat. Bank v. Snoqualmie Trust Co., 83 Neb. 648, 120 N. W. 183, upholding note of corporation in hands of bona fide purchaser, though not under seal.

Corporation Which Suffers Appearances to exist and its agents to so act as to give one dealing with agent reason to believe agent has authority to act for it, becomes liable for acts of agent.

Approved in Edson & Foulke Co. v. Winsell, 160 Cal. 787, 118 Pac. 245, discussing question of effect of acts and conduct of corporation's ditch-tender as imparting notice to corporation.

55 Cal. 277–279, EDDELBUTTEL v. DURRELL.

Specifications in Statement on Motion for New Trial that "first finding is not sustained by evidence," are insufficient.

Approved in Robson v. Colson, 9 Idaho, 220, 72 Pac. 952, and Smith Table Co. v. Madsen, 30 Utah, 317, 84 Pac. 892, both reaffirming rule; Love v. Anchor Raisin Vineyard Co. (Cal.), 45 Pac. 1046, specification of insufficiency of evidence to support finding considered and held insufficient.

55 Cal. 285–286, DICKENSON v. BOLYER.

Where All Work was Done upon one and same piece of property, though on different portions of it, lien claimant need not designate amount due on each piece.

Approved in Kritzer v. Tracy Engineering Co., 16 Cal. App. 292, 116 Pac. 702, in absence of other lien claimants, lien for work and labor on mine and mill-site as one plant is proper.

55 Cal. 286–290, PEOPLE v. MAHONEY.

In Proceeding to Enforce Collection of Tax, description of land must be certain in itself, and not require evidence aliunde to render it certain.

Approved in Commercial Nat. Bk. v. Schlitz, 6 Cal. App. 182, 91 Pac. 753, holding description in tax deed so uncertain as to avoid it; Baird v. Monroe, 150 Cal. 573, 89 Pac. 357, holding description sufficiently definite where abbreviations used clearly designated land; Stough v. Reeves, 42 Colo. 439, 95 Pac. 960, holding description insufficient to identify property.

55 Cal. 290–299, 36 Am. Rep. 32, PEOPLE v. REDINGER.

Person Charged With Crime cannot have Counsel appear for him when he is not in actual or constructive custody.

Approved in In re Shortridge, 5 Cal. App. 379, 90 Pac. 481, holding contempt proceedings did not lie against attorney for addressing court when prisoner was in custody.

Appeal will be Dismissed Where Accused escapes pending appeal.

Approved in Tyler v. State, 3 Okl. Cr. 184, 104 Pac. 921, and State v. Scott, 70 Kan. 693, 79 Pac. 126, both following rule.

Effect of Escape on Appeal from conviction. See note, 26 L. R. A. (n. s.) 923.

Effect of Failure to Give Accused Opportunity to plead. See note, 13 L. R. A. (n. s.) 814.

55 Cal. 302–304, IN RE BAKER.

When Act Which has Received Judicial Interpretation is re-enacted in same terms, that construction must be presumed to have been intended by legislature.

Approved in Lewis v. State, 58 Tex. Cr. 362, 127 S. W. 813, applying rule to liquor laws.

55 Cal. 304–307, PEOPLE v. GARDNER.

In Action on Official Bond of One as Surveyor General, neither he nor his sureties are liable for his malfeasance in office of register.

Distinguished in Milwaukee v. United States Fidelity etc. Co., 145 Wis. 607, 129 N. W. 787, holding clerk of municipal court liable on bond for failure to perform duties as clerk of district court on ground duties of latter were included in former.

55 Cal. 308–310, NELSON v. McCALLAHAN.

Declaration of a Testator to Sustain Defect or aid in the construction of his will. See note, 4 Cof. Prob. 525.

55 Cal. 310–316, ESTATE OF BOLAND.

Petition for Sale of Real Estate under sections 1530 and 1537, Code of Civil Procedure, must set forth condition of property, and, under latter section, be verified.

Approved in Matter of Hughes, 159 Cal. 365, 113 Pac. 687, reaffirming rule; Burris v. Kennedy (Cal.), 38 Pac. 972, holding on collateral attack on probate sale of realty, where petition recited that petitioner duly made and returned into said court true inventory and appraisement of all estate of deceased, it will be assumed statute was complied with; Plains Land & Imp. Co. v. Lynch, 38 Mont. 280, 129 Am. St. Rep. 645, 99 Pac. 849, holding petition too indefinite to support order for sale to pay debts.

Purchaser of Property of Estate is Party Aggrieved so as to be entitled to appeal from order directing resale of same property.

Approved in Wash. County Abstract Co. v. Stewart, 9 Idaho, 381, 74 Pac. 957, party whose property rights are affected by judgment is "party aggrieved," and may appeal, though not named party to action.

Right to Appeal as a Party Interested or injured. See note, 119 Am. St. Rep. 760.

55 Cal. 316–320, LOWELL v. LOWELL.

Appeal is Well Taken if Notice is Filed within the year, and undertaking filed within statutory time, though not within year.

Approved in Perkins v. Cooper (Cal.), 24 Pac. 377, holding appeal taken when notice is served and filed.

Effect of Divorce on Homestead Rights. See note, 23 L. R. A. 240.

Partition of Homestead. See note, 4 L. R. A. (n. s.) 786.

55 Cal. 322–331, BANK OF CALIFORNIA v. SHABER.

Claim Against San Francisco for Injury caused by mob need not be presented to supervisors before suit brought thereon.

Distinguished in Gregg v. Commissioners of Lake County, 32 Colo. 361, 362, 76 Pac. 377, 378, under act of 1887, claim of county treasurer for difference between salary under act of 1891, and as reduced by act of 1899, based on invalidity of latter act, must be presented to commissioners before suit thereon.

Mandamus to Compel Payment of municipal debt. See note, 14 L. R. A. 777.

Liability for Property destroyed by mob. See note, 24 L. R. A. 595.

55 Cal. 331–337, PEOPLE ex rel. BECKWITH v. OAKLAND BOARD OF EDUCATION.

Adoption of Text-books for public schools. See note, 36 L. R. A. 279.

55 Cal. 337–340, HEMME v. HAYS.

Frivolous Answer is One Which Sets Up no defense and denies no material averment in pleadings, and when such answer is filed, judgment may be asked on pleadings.

Approved in dissenting opinion in Crew v. Hutcheson, 115 Ga. 531, 42 S. E. 24, reaffirming rule, majority opinion not touching point.

55 Cal. 340–344, HARLAN v. ELY.

Parol Evidence by Maker of Instrument, who appears by its terms to be a principal, to show he is in fact a surety, is admissible, except as against those who have acted on faith of his apparent character as principal.

Approved in National Bank of Commerce v. Schirm, 3 Cal. App. 699, 86 Pac. 983, holding parol evidence to show principal debtor was surety improperly excluded.

Finding as to Allegations of Answer considered and held insufficient.

Approved in Holt Mfg. Co. v. Collins, 154 Cal. 276, 97 Pac. 520, holding insufficient general finding that "all material denials and averments of answer are true and all material averments of complaint in intervention are true"; Perkins v. West Coast Lumber Co. (Cal.), 48 Pac. 983, holding concluding finding that "all other averments in pleadings herein and in issue not comprised and passed upon in these findings are not true," is improper, but not reversible error when preceding findings clearly cover all material issues; Dillon Implement Co. v. Cleaveland, 32 Utah, 6, 88 Pac. 671, holding findings did not cover all issues raised.

Distinguished in Chatfield v. Continental Bldg. etc. Assn., 6 Cal. App. 668, 92 Pac. 1042, holding where answer consists of denials only, general finding that all allegations of complaint are true is sufficient.

55 Cal. 350–351, TAYLOR v. WARNAKY.

Grant of Land Having No Access to Highway except over other lands of grantor carries with it right of way over such lands.

Approved in Grayham v. Olson, 116 Mo. App. 279, 92 S. W. 730, following rule.

Creation and Conveyance of easements appurtenant. See note, 136 Am. St. Rep. 699.

Grant of Easements by implication. See note, 122 Am. St. Rep. 209.

Easements Created by Severance of Tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 352.

55 Cal. 352–359, MONTGOMERY v. SPECT.

Where Deed is Claimed to be Mortgage, determining fact is existence of debt at time of transaction and continuation of relation of debtor and creditor.

Approved in Schultz v. McLean (Cal.), 25 Pac. 429, holding an interest in land cannot be mortgage in absence of showing of debt to support it; Fletcher v. Northcross (Cal.), 32 Pac. 329, holding deed to property when there was no implied or express promise to pay debt not a mortgage; Meeker v. Shuster (Cal.), 47 Pac. 582, holding grantee of deed absolute on face cannot maintain ejectment when his grantor only held title as security for debt which grantee paid.

Right to Foreclose Mortgage and Right to redeem are coexistent.

Approved in Allen v. Allen (Cal.), 27 Pac. 32, following rule.

55 Cal. 359–365, 36 Am. Rep. 40, DAVIS v. ROCK CREEK ETC. CO.

One Who Acts in Fiduciary Capacity cannot deal with himself in his individual capacity.

Approved in Moore v. Gould, 151 Cal. 728, 91 Pac. 618, holding payee of notes and mortgage who had already transferred it could act as attorney of maker to renew it, although such renewal might release him as guarantor; The Telegraph v. Lee, 125 Iowa, 22, 98 N. W. 366, treasurer of corporation could not secretly purchase claim against it for less than face and then pay himself full amount therefor from treasury; Hunter Realty Co. v. Spencer, 21 Okl. 164, 95 Pac. 760, 17 L. R. A. (n. s.) 622, contract requiring exercise of discretion made by person acting as agent for both parties is void.

Distinguished in Burnes v. Burnes, 137 Fed. 790, 70 C. C. A. 357, holding transfer of stock from corporation to trustee for benefit of majority of its directors and others by votes of that majority is voidable at instance of stockholders injured thereby; dissenting opinion in Blake v. Ray, 110 Ky. 717, 62 S. W. 535, majority holding valid assignment of a note by a corporation to its president if made to reimburse assignee for money advanced to corporation.

Powers of President and Vice-president of corporation. See note, 14 L. R. A. 359.

55 Cal. 365–367, HEARST v. EGGLESTONE.

Proceedings in Nature of Assessing Property for taxation and laying and collecting taxes are in invitum and must be stricti juris.

Approved in Guptill v. Kelsey, 6 Cal. App. 43, 91 Pac. 412, holding tax deed invalid on ground of irregularity in proceedings of sanitary district in controlling collection of tax.

55 Cal. 373-375, COLUSA COUNTY v. DE JARNETT.

Allowance and Settlement by Supervisors of Claim against county is conclusive adjudication thereof.

Approved in Placer Co. v. Campbell (Cal.), 11 Pac. 602, following rule; County of Yolo v. Joyce, 156 Cal. 433, 105 Pac. 127, holding conclusive allowance by supervisors of claims of district attorney for expenses in criminal prosecutions; Cahill v. Colgan (Cal.), 31 Pac. 617, holding approval of claim against state by board of examiners, and appropriation of money to pay it by legislature is conclusive as to validity of claim as against controller; Lewis v. Colgan (Cal.), 44 Pac. 1083, holding decision of state board of examiners conclusive, unless reversed on appeal; Kelley v. Sersanous (Cal.), 46 Pac. 300, holding in action to compel county treasurer to pay warrant, allegation of allowance of claim by supervisors, and drawing of warrant by auditor make out prima facie case.

Distinguished in County of Tehama v. Sisson, 152 Cal. 174, 92 Pac. 67, holding warrant issued by supervisors to be without authority of law when issued to further plan which involved payment of expenses of one year out of revenues of next.

55 Cal. 375-377, PEOPLE v. FRESHOUR.

Where Witness Discloses Part of a Transaction, with which he was criminally concerned, without claiming his privilege, he must disclose the whole.

Approved in Ex parte Hedden, 29 Nev. 364, 90 Pac. 740, when accused testifies in chief on his own behalf he cannot defeat cross-examination on ground answers would tend to incriminate him.

Effect of Agreement for Immunity of accomplice testifying for prosecution. See note, 24 L. R. A. (n. s.) 443.

55 Cal. 377-379, GOODHUE v. KING.

When Discharge of Principal in Bankruptcy will release surety on bond given in action at law. See note, 14 L. R. A. (n. s.) 510.

55 Cal. 379-381, BANK OF WOODLAND v. TREADWELL.

Findings Considered and Held Insufficient to sustain judgment.

Approved in Chatfield v. Continental Bldg. etc. Assn., 6 Cal. App. 668, 92 Pac. 1042, where answer consists of denials only, general finding that all allegations of complaint are true is sufficiently definite and certain; Perkins v. West Coast Lumber Co. (Cal.), 48 Pac. 983, where preceding findings clearly cover all material issues, concluding finding that "all other averments and pleadings herein and in issue not comprised and passed on in these findings are not true," is improper, but not reversible error.

In Action to Foreclose Mortgage Providing for Attorney's Fees, where plaintiff's attorney is on salary, and plaintiff has paid him no special fee in case, such fees cannot be recovered.

Distinguished in Hewett v. Dean (Cal.), 25 Pac. 756, allowing counsel fees for foreclosure of mortgage providing for such fee, without averment of expense actually incurred.

55 Cal. 381, GEE v. TERRIO.

Bill of Exceptions Settled upon by Attorneys but not signed by judge is insufficient on appeal.

Reaffirmed in Paull v. Paull, 30 R. I. 256, 74 Atl. 1017.

55 Cal. 382–383, COFFEY v. GREENFIELD.

Any Interest in Matter in Litigation entitles party to intervene.

Approved in Faricy v. St. Paul Inves. & Sav. Soc., 110 Minn. 317, 125 N. W. 678, holding in suit to recover on bonds, receiver of loan association claiming bonds entitled to intervene; Walker v. Landers, 103 Minn. 127, 123 Am. St. Rep. 276, 114 N. W. 650, in action by grantor to set aside deed on ground of fraud, grantee of same land by warranty deed given after suit was commenced may intervene.

That Party Seeking to Intervene has Another Remedy is no ground for denying right.

Approved in Potlatch Lumber Co. v. Runkel, 16 Idaho, 200, 161 Pac. 398, 23 L. R. A. (n. s.) 536, following rule.

Discretion of Court to Grant Intervention. See note, 123 Am. St. Rep. 288.

55 Cal. 384–389, ELLIOTT v. WOHLFROM.

When Estoppel Exists Against Urging invalidity of void or voidable divorce. See note, 133 Am. St. Rep. 434, 451.

Right of Party Obtaining or Consenting to divorce to contest its validity. See note, 60 L. R. A. 304.

Validity of Decree of Divorce obtained on publication or service out of state where defendant did not appear. See note, 19 L. R. A. 816.

Effect of Appearance of Nonresident to give jurisdiction of divorce case. See note, 23 L. R. A. 289.

Conflict of Laws on Divorce. See note, 59 L. R. A. 186.

55 Cal. 389–392, SPARKS v. BUTTE COUNTY GRAVEL ETC. CO.

Materialmen Furnishing Materials for construction of building under contract with owner, and persons directly employed by him to work on building are not "original contractors" within meaning of sections 1187, 1194, Code of Civil Procedure.

Approved in California Powder Works v. Blue Tent etc. Gold Mines (Cal.), 22 Pac. 392, reaffirming rule.

55 Cal. 395–396, WHITTLA v. RENNER.

Attorney on Whom Notice of Appeal must be served is attorney of record.

Approved in dissenting opinion in Hines v. Shumaker, 95 Miss. 492, 50 So. 564, majority holding notice to one of firm of attorneys shown of record to have represented parties, that reporter's notes are on file, is notice to all.

55 Cal. 396–400, MEDLEY v. ROBERTSON.

Title to State Land Does not Vest in state until plat of survey of township has been approved by United States surveyor general, and application to purchase made before such approval is void.

Approved in Gilson v. Robinson (Cal.), 7 Pac. 430, holding void certificate of purchase of state land issued before plat of survey had been approved and filed; Clemmons v. Gillette, 33 Mont. 326, 114 Am. St. Rep. 814, 83 Pac. 880, grant by federal government to state of school lands by section numbers vests no title to any specific portion until survey is made.

55 Cal. 400–406, PERKINS v. ECKERT.

Passing of Title to Property by Delivery to carrier for transportation to consignee of vendee. See note, 22 L. R. A. 416.

55 Cal. 406–407, PIERCE v. SCHADEN.

Motion for New Trial on Ground of insufficiency of evidence is addressed to discretion of court, and order granting new trial will not be reversed unless there has been manifest abuse of discretion.

Approved in Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486, Nelson v. Floyd (Cal.), 4 Pac. 106, Kerr v. Kerr (Cal.), 13 Pac. 655, and Austin v. Gagan (Cal.), 30 Pac. 790, all following rule.

55 Cal. 408–419, SHUGGART v. LYCOMING FIRE INS. CO.

Limitation, in Provisions of Insurance Policy, on power of agent to waive any of its conditions, is valid.

Approved in Cayford v. Metropolitan Life Ins. Co., 5 Cal. App. 718, 91 Pac. 267, holding assured chargeable with knowledge of limitations of agent's power recited in policy.

Distinguished in Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 449, 119 Am. St. Rep. 234, 89 Pac. 106, holding stipulations in policy against waiver does not preclude waiver by conduct of authorized agents in regard to future operations of company.

Waiver of Provisions of Nonwaiver or written waiver of conditions and forfeitures in policies. See note, 107 Am. St. Rep. 146.

Liability of Policy Issued by Domestic Corporation upon life of nonresident to local transfer tax. See note, 10 L. R. A. (n. s.) 1089.

Formation of Partnership or Change in personnel of firm as affecting change of title or ownership within provision of policy. See note, 21 L. R. A. (n. s.) 444.

55 Cal. 419–420, BRONNER v. WETZLAR.

Motion for New Trial, on Ground of Insufficiency of evidence, is addressed to sound discretion of trial court, and order granting new trial will not be reviewed unless there has been manifest abuse of discretion.

Approved in Kerr v. Kerr (Cal.), 13 Pac. 655, Nelson v. Floyd (Cal.), 4 Pac. 106, and Gutierrez v. Brinkerhoff (Cal.), 1 Pac. 486, all following rule.

55 Cal. 421–426, 36 Am. Rep. 43, HAYES v. CAMPBELL.

What Contracts will Support Maritime Lien. See note, 70 L. R. A 369.

55 Cal. 431–442, SIGOURNEY v. ZELLERBACH.

Miscellaneous.—Cited in Cross v. Zellerbach (Cal.), 8 Pac. 714, 715, on another appeal.

55 Cal. 443–453, SOWDEN v. IDAHO QUARTZ MIN. CO.

Question Whether Witness Offered is Expert is for trial court, and ruling thereon will not be reviewed.

Approved in Bird v. Utica Gold Min. Co., 2 Cal. App. 678, 84 Pac. 258, following rule.

Practical Miner Who has Used Blasting powder for years can be asked his opinion based on experience as to safety of certain powder he had largely used.

Approved in Hammer v. Janowitz, 131 Iowa, 24, 108 N. W. 110, expert may testify as to safe method of constructing traveling crane in action for injury caused by its fall.

Duty of Mine Owners to Prevent Injury to employees. See note, 87 Am. St. Rep. 573.

55 Cal. 453–459, SACRAMENTO ETC. R. R. CO. v. SUPERIOR COURT.

Provision in Mortgage to Secure Bonds that upon default for one year trustees should take possession and apply net income to payment of bonds, upheld by appointment of receiver at suit of trustees.

Approved in Union Trust Co. v. General Electric Co., 152 Mich. 577, 116 N. W. 383, similar contract considered and default alone held not to authorize court to appoint receiver, but danger of ultimate loss to bondholders must control; Moncrieff v. Hare, 38 Colo. 232, 87 Pac. 1086, 7 L. R. A. (n. s.) 1001, where real estate mortgage pledged rents and profits as security, equity could appoint receiver when mortgagor was insolvent and rents were inadequate.

55 Cal. 459–462, FITZ v. BYNUM.

Where Consideration for Note Fails in Part, maker must offer to rescind contract and return consideration received to escape liability on note.

Approved in Iowa Nat. Bank v. Sherman, 23 S. D. 14, 119 N. W. 1013, following rule.

55 Cal. 462–463, PEOPLE v. GALLAGHER.

Code of Civil Procedure, Section 215, is continued in force by virtue of schedule in constitution.

Approved in People v. Richards, 1 Cal. App. 574, 82 Pac. 694, upholding Code of Civil Procedure, section 204, in so far as it empowers superior judges to draw jurors in counties having over 100,000 inhabitants.

Organization of Grand Jury. See note, 27 L. R. A. 783.

55 Cal. 463–464, PEOPLE v. BOJORQUEZ.

Admissibility in Criminal Trial of testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 873.

55 Cal. 465–466, FREEMAN v. BROWN.

Court has Discretion to Set Aside Default due to inadvertence of attorney.

Approved in Cabanne v. Macadaras, 91 Mo. App. 74, following rule.

55 Cal. 469, CREDITORS v. WELCH.

Where Order of Lower Court on Question of Fact is based on conflicting evidence, it will not be reversed on appeal.

Approved in Doak v. Bruson, 152 Cal. 19, 91 Pac. 1002, and Conlon v. Gardner (Cal.), 32 Pac. 565, both following rule.

Miscellaneous.—Cited in Nicholson v. Nicholson, 16 Cal. App. 755, 117 Pac. 1039, discussing question of residence for purpose of venue.

55 Cal. 476–477, WILSON v. HIS CREDITORS.

Meeting of Creditors on Thirtieth Day from First publication of notice is valid in pursuance of order to meet "not less than thirty days" from first publication.

Approved in Petition of Los Angeles Trust Co., 158 Cal. 608, 112 Pac. 58, holding publication from July 27th to August 24th is for four

weeks; Bank of Lemoore v. Fulgham, 151 Cal. 238, 90 Pac. 937, upholding tax sale on twenty-first day from publication of notice where statute prescribed not less than twenty-one nor more than twenty-eight days from first publication; Greenwood v. Hassett (Cal.), 61 Pac. 173, holding requirement of two days' posting of notice on door of council chamber before posting along line of work of street improvement satisfied by posting along line on second day from posting on door.

55 Cal. 483–485, BERRYMAN v. PERKINS.

Mandamus Does not Lie to Compel specific action by one vested with discretion in performance of his duty.

Approved in Sullivan v. Gage, 145 Cal. 767, 79 Pac. 540, denying mandamus to compel board of examiners to allow attorney's fees for corporation for which void appointment of receiver was made in action for dissolution by state; Van Vleck v. Board of Dental Examiners (Cal.), 48 Pac. 225, denying mandamus to compel board of dental examiners to indorse diploma of dental college.

Mandamus to Governor. See note, 6 L. R. A. (n. s.) 772.

55 Cal. 488–489, STATE LIBRARY TRUSTEES v. KENFIELD.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 61.

55 Cal. 489–501, EARLE v. BOARD OF EDUCATION OF SAN FRANCISCO.

Act Relating to Salaries of School Teachers in one county only held to be local law.

Approved in Henderson v. Koenig, 168 Mo. 374, 68 S. W. 77, 57 L. R. A. 659, holding law providing for salary of probate judge in counties of over three hundred thousand is local law.

Power of Legislature to Enact or Amend a code or compilation of laws by a single statute. See note, 55 L. R. A. 840.

Miscellaneous.—Cited in Mitchell v. Board of Education, 137 Cal. 375, 70 Pac. 181, to point that board of education of San Francisco is not exempt from law requiring filing of bond on appeal.

55 Cal. 501–503, ECK v. HOFFMAN.

If Contract is not Made in State, there must be express stipulation for payment within state to authorize issuance of attachment in action upon it.

Approved in Drake v. De Witt, 1 Cal. App. 618, 82 Pac. 982, and Atwood v. Little Bonanza etc. Co., 13 Cal. App. 596, 110 Pac. 345, both following rule.

Where Statute Which has Received Judicial Interpretation is substantially re-enacted, legislature is presumed to have intended such construction to apply to new statute.

Approved in Lewis v. State, 58 Tex. Cr. 362, 127 S. W. 813, applying rule to laws relating to attachment on contract made out of state.

55 Cal. 504–505, WREDEN v. SUPERIOR COURT.

Writ of Prohibition cannot be Used to prescribe what court shall or shall not consider in a matter before it and within its jurisdiction.

Approved in Lange v. Superior Court, 11 Cal. App. 5, 103 Pac. 909, holding wrong decision as to pleading or evidence cannot be con-

sidered on application for writ of prohibition; Beaulieu Vineyard v. Superior Court, 6 Cal. App. 250, 91 Pac. 1018, denying writ to restrain condemnation proceeding of which court had jurisdiction; Raine v. Lawlor, 1 Cal. App. 487, 82 Pac. 689, holding prohibition did not lie to prevent setting aside erroneous order appointing special administrator; State v. Morse, 27 Utah, 341, 75 Pac. 741, writ does not lie to restrain criminal proceedings on ground statutory requirements were not complied with by committing magistrate.

Writ of Prohibition. See note, 111 Am. St. Rep. 957.

55 Cal. 505–507, JONES v. CHALFANT.

Setting Off One Judgment against another. See note, 109 Am. St. Rep. 147.

55 Cal. 508–515, McLERAN v. McNAMARA.

Plaintiff Obtaining Judgment by Violation of written stipulation on file dismissing action may be restrained from enforcing it.

Approved in Thomas v. Jones, 98 Va. 329, 36 S. E. 384, annulling tax deed obtained in absence of plaintiff who had been lulled into security by promise of clerk and actions of defendant.

Attorney for Plaintiff has Power to Dismiss Action by virtue of his general retainer.

Approved in Bacon v. Mitchell, 14 N. D. 458, 106 N. W. 130, 4 L. R. A. (n. s.) 244, following rule.

Implied Authority of Attorney in conducting litigation. See notes, 132 Am. St. Rep. 162; 4 L. R. A. (n. s.) 245.

Previous Rejection by Benefit Association as declination or refusal of insurance within meaning of application for life insurance. See note, 4 L. R. A. (n. s.) 247.

55 Cal. 531–543, ELDRIDGE v. WRIGHT.

Where Land Sold Under Judgment is Embraced in one sale, a redemptioner, having lien on part of land, can only redeem by redeeming whole of it; in such case he succeeds to the whole interest of purchaser.

Approved in Emerson v. Yosemite Gold Min. etc. Co., 149 Cal. 57, 85 Pac. 125, holding successors in interest to one of several co-owners of property sold under foreclosure could only redeem by redeeming whole property; Wemple v. Yosemite Gold Min. Co., 4 Cal. App. 87, 87 Pac. 283, holding judgment and receipt of redemption money from debtor discharges foreclosure, sets aside all proceedings thereunder, and places parties in same position as before suit, except that debt is paid.

Redemption is Virtually Transfer of Certificate of sale, under Code of Civil Procedure, section 703.

Approved in White v. Costigan (Cal.), 63 Pac. 1077, redemptioner who pays redemption money to sheriff takes virtually assignment of purchaser's interest.

55 Cal. 544–550, DOWNING v. GRAVES.

Either Ultimate Fact must be Found or facts from which ultimate fact is necessarily deducible.

Approved in Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, in action to determine adverse claim to realty, finding

that plaintiff is owner and entitled to possession and defendant has no claim, are findings of ultimate fact and support judgment for plaintiff; Dillon Implement Co. v. Cleaveland, 32 Utah, 6, 88 Pac. 671, reversing judgment in absence of finding on some material issues.

55 Cal. 550–553, 36 Am. Rep. 47, EX PARTE WESTERFIELD.

Act of April 16, 1880, Regulating Bakeries on Sunday, is void.

Approved in State v. Dolan, 13 Idaho, 717, 92 Pac. 1002, 14 L. R. A. (n. s.) 1259, upholding Sunday act of March 12, 1907; Armstrong v. State, 170 Ind. 192, 84 N. E. 4, 15 L. R. A. (n. s.) 646, holding void act to close barber-shops on Sunday; State v. Miksicek, 225 Mo. 572, 135 Am. St. Rep. 597, 125 S. W. 510, holding void act regulating bakeries.

Constitutionality of Sunday Law. See note, 22 L. R. A. 723.

Special Penalty for Violation of Sunday closing act. See note, 15 L. R. A. (n. s.) 649.

Constitutionality of Statutes Restricting Contracts and business. See note, 21 L. R. A. 791.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 455.

55 Cal. 554–555, JACOBI v. BAUR.

Section 7, Act of 1872, "Concerning Actions for libel and slander," does not give plaintiff recovering judgment any costs beyond amount allowed by general law in Code of Civil Procedure.

Approved in McKinney v. Roberts (Cal.), 8 Pac. 4, holding counsel fees not recoverable by defendant in action for slander in whose favor judgment was rendered, unless such fees were included in bill of costs.

55 Cal. 555–563, HARPENDING v. MEYER.

Right of Action Accrues in Favor of Owner of Goods as soon as they are wrongfully taken from his possession, or wrongfully converted by one who rightfully came into possession of them.

Approved in Havird v. Lung, 19 Idaho, 794, 115 Pac. 931, applying rule under Revised Codes, section 405, subdivision 3.

Principal may Recover Value of His Own Property from third person to whom it had been transferred by agent in violation of duty to principal.

Distinguished in Wilcox-Rose Construction Co. v. Evans, 9 Cal. App. 121, 98 Pac. 84, holding principal may not recover when agent had apparent authority to dispose of property.

55 Cal. 564–567, HOAG v. HOWARD.

Word "Instrument," as Used in Codes, means some written paper or instrument signed and delivered by one person to another, transferring title to, or giving lien upon, property, or giving right to debt or duty.

Approved in Wolfe v. Langford, 14 Cal. App. 362, 112 Pac. 204, neither attachment nor judgment is "instrument" within meaning of Civil Code, section 1107; De Wolfskill v. Smith, 5 Cal. App. 184, 89 Pac. 1004, holding notice of claim of water right not an "instrument" within recording acts; Abbott v. Campbell, 69 Neb. 372, 95 N. W. 592, holding word "instrument" imports a writing; In re McIntosh, 150

Fed. 548, 80 C. C. A. 250, unrecorded mortgage is valid, under section 1217, Civil Code.

55 Cal. 567–569, **WINANS v. CHENEY.**

Location of Boundaries. See note, 129 Am. St. Rep. 1011.

55 Cal. 570–574, 36 Am. Rep. 50, **BLAND v. SOUTHERN PACIFIC R. R. CO.**

Where Passenger Without Ticket Offered Ticket Fare, but refused to pay excess, conductor has no right to eject him without returning money paid.

Affirmed in Weber v. Southern Ry. Co., 65 S. C. 378, 43 S. E. 896, holding conductor ejecting passenger for refusal to pay cash fare in excess of ticket fare bound to admit passenger upon tender of excess.

Validity of Extra Charge for Passenger Fare when paid upon train. See note, 20 L. R. A. 483.

Right to Pay Fare After Train Begins to stop for purpose of ejecting passenger. See note, 16 L. R. A. 53.

55 Cal. 574–588, **ESTATE OF CROSBY.**

Probate Court may Refuse Order of Sale of real estate on ground of delay in making application.

Cited in In re Tuohy's Estate, 33 Mont. 247, 83 Pac. 491, arguendo.

Instance Where Allowance of Claim by Court contested upon hearing of application to sell real property of estate to pay claims.

Cited in Haub v. Leggett, 160 Cal. 494, 117 Pac. 557, allowance in part of claim against estate of decedent is no bar to action for whole claim; Estate of Coryell, 16 Idaho, 213, 101 Pac. 727, order of probate judge allowing claim against estate upon ex parte showing is not final, and heirs may contest claim after allowance.

55 Cal. 588–593, **PEOPLE v. FERRIS.**

Whenever Actual Existence of Particular Intent is necessary element to constitute any particular species or degree of crime, jury may take into consideration intoxication of accused at time, in determining intent with which he committed act.

Approved in State v. Trapp, 56 Or. 592, 109 Pac. 1096, reaffirming rule; State v. Johnny, 29 Nev. 223, 87 Pac. 9, approving instruction in regard to consideration of drunkenness of accused in determining intent.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 465.

55 Cal. 593–599, **JAMISON v. SAN JOSE ETC. R. R. CO.**

Where Facts Showing Negligence are undisputed, question is one of law for court.

Approved in Wardlaw v. California Ry. Co. (Cal.), 42 Pac. 1076, holding contributory negligence shown as matter of law when passenger attempted to board train by climbing on coupler between cars.

Distinguished in Johnson v. Thomas (Cal.), 43 Pac. 579, holding question of contributory negligence properly left to jury, although facts tending to show it were undisputed.

Common Carriers of Passengers are Bound to utmost degree of care to prevent accidents to passengers.

Approved in Kline v. Santa Barbara etc. Ry. Co., 150 Cal. 746, 90 Pac. 127, instruction in regard to burden of proof on common car-

rier in action for injury to passenger held equivalent to rule of utmost care and diligence; Maxwell v. Fresno City Ry. Co., 4 Cal. App. 747, 89 Pac. 367, holding street railroad company liable for injury to passenger alighting when car was stopped at unsafe place.

Passenger Asked by Conductor to Walk Across Trestle undergoing repairs continues to be passenger while so doing.

Reaffirmed in Bugge v. Seattle Elec. Co., 54 Wash. 491, 103 Pac. 828.

55 Cal. 604–606, LEWIS v. COUNTY CLERK OF SANTA CLARA COUNTY.

Relation of Bankrupt Law to Assignments and insolvent proceedings under state laws. See note, 45 L. R. A. 187.

55 Cal. 606–607, GOLDEN GATE PACKING CO. v. FARMERS' UNION.

Contract to Give Exclusive Agency does not prevent principal from selling direct.

Approved in Ingold v. Symonds, 125 Iowa, 85, 99 N. W. 714, holding agent under such contract not entitled to commission when sale was made by principal.

Broker's Right to Make Sale as exclusive of owner's. See note, 24 L. R. A. (n. s.) 280.

55 Cal. 608–611, SULLIVAN v. BEARDSLEY.

Rights of Tenants and Reversioners of property taken by eminent domain. See note, 21 L. R. A. 216.

55 Cal. 611, McGREW v. SAN JOSE.

Who are Public Officers. See note, 17 L. R. A. 249.

55 Cal. 612–627, PEOPLE v. HOGE.

It is the Intention of Sections 8, 13 and 14, Article XI, Constitution, to emancipate municipal governments from control formerly exercised over them by legislature.

Approved in In re Pfahler, 150 Cal. 87, 88 Pac. 277, 11 L. R. A. (n. s.) 1092, holding initiative and referendum by people of municipality is not within provisions of section 13, article XI, Constitution, prohibiting delegation of power to special commissions to perform legislative functions.

Section 8, Article XI, Constitution, Relating to City Charters, is self-executing.

Approved in State v. Scales, 21 Okl. 689, 97 Pac. 586, applying rule to section 3, article XVIII, Constitution.

Self-executing Constitutional Provisions. See note, 16 L. R. A. 281.

55 Cal. 633–641, ALTSCHUL v. DOYLE.

Effect of Judgment Against Tenant as res judicata. See note, 112 Am. St. Rep. 24.

55 Cal. 642–651, BOARD OF EDUCATION v. KEENAN.

Objection to Whole of Complex Mass of Evidence is not well taken if any part is admissible.

Approved in Thornton-Thomas Co. v. Bretherton Co., 32 Mont. 93, 80 Pac. 13, applying rule to series of documents.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 56 CALIFORNIA.

56 Cal. 1–4, LEONARD v. JANUARY.

Power of Legislature to Enact or Amend a code or compilation of laws, by a single statute. See note, 55 L. R. A. 836, 842, 853.

56 Cal. 4–7, PEOPLE v. JENKINS.

Continuance will not be Granted to obtain evidence which is merely cumulative.

Approved in State v. Hasty, 121 Iowa, 513, 96 N. W. 1117, upholding refusal to grant continuance on account of absence of witnesses whose testimony was cumulative.

The Court may at Any Time while the jury is under its control see that the verdict is amended as may be required.

Approved in State v. Miles, 199 Mo. 557, 98 S. W. 32, holding court properly refused to receive an incorrect verdict and directed jury to retire for its correction.

Correction of Verdict in Criminal Cases. See note, 23 L. R. A. 723.

56 Cal. 8–10, SAN JOSE v. FREYSCHLAG.

Dedication of Property for Street Renders condemnation proceedings therefor improper.

Distinguished in Northern Light etc. Co. v. Stacher, 13 Cal. App. 419, 109 Pac. 899, holding in action to condemn certain riparian rights, allegation in complaint of plaintiff's ownership of water flowing in creek did not prevent relief prayed for.

56 Cal. 11–15, FARMER v. UKIAH WATER CO.

An Artificial Watercourse Through Which Water Passes to land, where it is used for domestic and irrigation purposes, is appurtenant to the land and passes by conveyance of the land.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 724, 93 Pac. 862, 15 L. R. A. (n. s.) 359, holding right to flow of water from canal through ditch on adjoining land for irrigation is appurtenant to land irrigated and passes by deed of that land.

Record of Deed is Constructive Notice of conveyance of appurtenances to the land conveyed.

Cited in Rubio Canyon etc. Assn. v. Everett, 154 Cal. 34, 96 Pac. 813, arguendo.

56 Cal. 15–26, KNIGHT v. ROCHE.

A Judgment Based upon Findings which do not determine all issues is a decision against the law for which new trial may be had.

Approved in Cargnani v. Cargnani, 16 Cal. App. 99, 116 Pac. 307, Brown v. Macey, 13 Idaho, 455, 90 Pac. 340, 341, and Dillon Implement Co. v. Cleveland, 32 Utah, 4, 88 Pac. 671, all reaffirming rule; Southern Cal. R. Co. v. Slauson (Cal.), 68 Pac. 108, holding question whether findings sustain judgment given cannot be examined on appeal from order denying motion for new trial; Williams v. Pratt, 10 Cal. App. 628, 103 Pac. 153, holding where court failed to find upon a material issue, the judgment was unsupported, and would be reversed on appeal from judgment alone; Millard v. Supreme Council American Legion of Honor (Cal.), 21 Pac. 825, and Aydelotte v. Billing, 8 Cal. App. 674, 97 Pac. 699, both holding judgment based on findings which do not determine all material issues is a decision "against law," and can be assailed on motion for new trial; Hamilton v. Murray, 29 Mont. 85, 86, 74 Pac. 76, holding responsiveness of verdict to issues might be determined on appeal from order denying new trial, though there was no appeal from judgment.

In Ejectment Where Complaint Alleges Seisin in plaintiff, a finding of prior possession by defendant does not meet the issue as to title.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, holding finding of ultimate facts controls where they are not necessarily inconsistent with probative facts included in findings.

56 Cal. 26–36, GOODALE v. FIFTEENTH DISTRICT COURT.

Courts of Equity may Appoint a Receiver in partition suit.

Approved in Heinze v. Butte etc. Min. Co., 126 Fed. 8, 61 C. C. A. 63, where court appointed receiver in partition suit, the ownership of one of the interests being in dispute.

56 Cal. 36–43, PEOPLE v. CROWEY.

Number of Grand Jurors Necessary or proper to act. See note, 27 L. R. A. 848.

56 Cal. 43–51, PFISTER v. WADE.

Interpleader is Allowed Only When Same Thing, debt, or duty is claimed by several, without independent liability of plaintiff to either, or personal interest.

Approved in Northwestern etc. Ins. Co. v. Kidder, 162 Ind. 388, 390, 70 N. E. 491, 66 N. E. 89, holding where insurance company had delivered check on a policy to insured, who was manager of an insolvent corporation, and creditors of the corporation claimed proceeds of check on ground that premiums on policy had been paid with corporate assets, the insurance company could not require creditors and insured to interplead; Love v. Hartford Life Ins. Co., 153 Mo. App. 149, 150, 132 S. W. 336, 337, where insured and beneficiary assigned policy to creditor, and insured assented thereto, insurer

claiming original beneficiary was asserting part of proceeds could interplead in action on contract by assignee after death of insured.

Interpleader by One Having Contractual Relation with one claimant. See note, 10 L. R. A. (n. s.) 759.

56 Cal. 55–61, CHURCHILL v. ANDERSON.

Patent not Void upon Its Face is not subject to collateral attack by one claiming no higher title.

Approved in dissenting opinion in Williams v. San Pedro, 153 Cal. 51, 94 Pac. 237, majority holding in action to quiet title defendant, though claiming no interest in the land, may, under denial of plaintiffs' title, show his certificate of purchase, though valid on its face, was in fact void.

56 Cal. 61–65, McKIERNAN v. LENZEN.

General Managing Agent of a Corporation may do, in transaction of ordinary business, all that corporation may do.

Approved in Dollar v. International Banking Corp., 13 Cal. App. 340, 109 Pac. 503, holding managing agent of corporation payee of non-negotiable instrument presumed to have authority to assign it in satisfaction of a debt of corporation; Preston v. Central Cal. etc. Irr. Co., 11 Cal. App. 200, 104 Pac. 466, holding assignments of claims in favor of a corporation made in its name by its general manager are at least prima facie evidence of authority of general manager to execute same; Laidlaw v. Pacific Bank (Cal.), 67 Pac. 899, holding bank liable for money expended by creditor for its use and benefit and at its request; Cook v. American Tubing etc. Co., 28 R. I. 67, 65 Atl. 651, 9 L. R. A. (n. s.) 193, holding where a loan was made by corporate officers in its name, but fraudulently for the benefit of one of them, the lender not being charged with notice of the fraud could enforce the claim against corporate assets.

56 Cal. 65–69, 38 Am. Rep. 48, TURPEN v. BOOTH.

A Grand Juror is not Responsible in a civil suit for his action on the grand jury.

Approved in Wyatt v. Arnot, 7 Cal. App. 225, 94 Pac. 88, holding superior judge not liable to party in damages for willful and intentional omission to perform his duty as judicial officer; Moon v. Flack, 74 N. H. 143, 65 Atl. 831, holding where a committee is appointed under the rules of a fraternal order to try a member charged with improper conduct, the members of such committee were judicial officers, and not responsible in damages for their acts in investigating such charges, though they were irregular and reprehensible; Black v. Linn, 17 S. D. 336, 96 N. W. 697, commissioners of soldiers' home are personally liable in damages for wrongfully and maliciously expelling a member.

Personal Liability of Judicial Officers. See note, 137 Am. St. Rep. 49.

56 Cal. 77–83, PEOPLE v. NELSON.

If the Charge is Harmonious as a Whole and fairly presents the law, judgment will not be reversed because separate instructions do not contain all limitations that may be gathered from entire text.

Approved in People v. Cain, 7 Cal. App. 168, 93 Pac. 1039, holding instruction on circumstantial evidence not erroneous when considered in connection with other portions of charge.

In Larceny, Possession of One from Whom Property is taken raises presumption of ownership.

Approved in State v. Howard, 30 Mont. 528, 77 Pac. 54, reaffirming rule; State v. Tillett, 173 Ind. 135, 89 N. E. 590, applying rule and holding agent, trustee, bailee, executor or administrator in possession may be alleged to be owner; State v. Pigg, 80 Kan. 488, 103 Pac. 123, holding title may be laid either in the owner or the person from whom the property was taken.

Distinguished in People v. Cleary, 1 Cal. App. 52, 53, 81 Pac. 754, holding as a matter of pleading an indictment cannot be aided by such presumption.

Proof That Person Alleged to be Owner had special property supports allegation of ownership in indictment for robbery.

Approved in Montgomery v. State, 169 Ala. 16, 53 So. 992, under indictment for robbing minor, proof that title to property was in father of minor is not material variance.

56 Cal. 83–84, McCONKY v. SUPERIOR COURT.

In Section 978, Code of Civil Procedure, word "or" is to be read "and," and in all cases the undertaking for costs on appeal is essential.

Approved in Swem v. Monroe, 148 Cal. 743, 83 Pac. 1075, Bergevin v. Wood, 11 Cal. App. 649, 105 Pac. 938, and Graves v. Superior Court (Cal.), 4 Pac. 200, all following rule; Wilson v. Doyle, 12 Idaho, 297, 85 Pac. 928, affirming similar rule under Idaho statute.

Explained in Edwards v. Superior Court, 159 Cal. 712, 713, 714, 715, 115 Pac. 650, 651, under Code of Civil Procedure, section 978, undertaking on appeal from justice's court from judgment for payment of money, in sum of more than one hundred dollars, conditioned for payment of costs on appeal, gives superior court jurisdiction, though it also purports to stay execution.

Distinguished in Jones v. Superior Court, 151 Cal. 592, 91 Pac. 506, holding an undertaking on appeal from justice's court, under Code of Civil Procedure, section 978, was sufficient, and the condition for payment of "all costs" included costs on appeal.

To What Courts or Tribunals writ of prohibition may issue. See note, 111 Am. St. Rep. 935.

56 Cal. 85–88, MARCH v. McKOY.

Owner of Personal Property in possession of another who was not party to a suit to foreclose mechanic's lien thereon was not affected by the foreclosure sale.

Approved in Holt Mfg. Co. v. Collins, 154 Cal. 272, 97 Pac. 518, holding where lien acquired by a laborer upon a threshing machine while being operated by a person not the owner is foreclosed, the owner, who was not a party to foreclosure, is not bound by the judgment.

Distinguished in McGrillis v. Cole, 25 R. I. 162, 105 Am. St. Rep. 875, 55 Atl. 199, holding where owner of land agreed to build a mill thereon and sell land and mill to third person, who was to furnish part of materials and later purchased an engine and boiler

on conditional sale and placed them in mill, as between owner who did not know of conditional sale and conditional vendor, former was entitled to engine and boiler.

56 Cal. 89–94, MOORE v. MOORE.

Where There is Great Mental Weakness of Party executing conveyance and consideration is grossly inadequate, equity will set it aside.

Approved in Swan v. Talbot, 152 Cal. 145, 146, 94 Pac. 239, 17 L. R. A. (n. s.) 1066, rescinding contract in equity where drunken party had been induced to give bill of sale of property valued at about twelve thousand dollars for two hundred dollars paid to him in cash; Dunlap v. Plummer, 1 Cal. App. 428, 82 Pac. 446, holding such right of rescission includes the defensive right, if the other party sues to enforce the contract, to set up such matters as would justify a decree of rescission; Apahu v. Feary, 6 Haw. 526, setting aside a deed where it appeared that the grantor, an aged Hawaiian woman, was of feeble mind and that the grantor unduly influenced her.

56 Cal. 95–114, BARTON v. KALLOCH.

The Provisions of Section 10, Article XXII, of Constitution, apply only to officers who derive their office from the Constitution.

Approved in People v. Nye, 9 Cal. App. 165, 98 Pac. 247, holding under the Constitution the term of the controller begins on the first Monday after the first day of January following his election.

56 Cal. 117–119, PEOPLE ex rel. LEE LIN TAI v. HEWILL.

Mandamus Lies to Compel Judge to sign bill of exceptions.

Approved in Matter of Ford, 160 Cal. 346, 116 Pac. 762, granting mandamus to compel judge to dismiss criminal case when it has been arbitrarily continued beyond statutory period.

56 Cal. 119–121, PEOPLE v. AH YUTE.

Where Indorsement on Notice of Appeal shows it to have been filed on a certain day, and underneath this indorsement there is an admission of service, it will be presumed that service was made on the day of filing.

Approved in People v. Schmitz, 7 Cal. App. 343, 94 Pac. 409, holding it immaterial whether a notice of appeal in criminal case is served or filed first, where both are done within the required time.

Testimony of Reporter, Based on Notes, is incompetent to prove testimony of foreign witness at former trial who testified through an interpreter.

Approved in People v. Petruzo, 13 Cal. App. 574, 110 Pac. 326, holding an attending physician at time of dying declaration of deceased, who talked with him through an interpreter, was not competent witness; State v. Turline, 23 R. I. 539, 91 Am. St. Rep. 650, 51 Atl. 208, holding in prosecution for perjury, where defendant's alleged false testimony was given in foreign language, interpreted by court official, testimony of witness who did not understand the foreign language as to what was said was hearsay.

Admissibility of Evidence Given through interpreter. See note, 17 L. R. A. 814.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 366.

56 Cal. 122–124, LANE v. PFERDNER.

In Action to Try Right of Contestants to purchase state lands, the burden rests upon either party to establish his own right.

Distinguished in Bieber v. Lambert, 152 Cal. 564, 565, 93 Pac. 97, holding in such contest, where facts admitted by plaintiff show prior application by defendant and certificate of purchase issued to him, burden is on plaintiff to overcome the presumption that such certificate was regular and valid.

56 Cal. 128–130, MARTIN v. SPLIVALO.

Action of Unlawful Detainer cannot be maintained without first terminating the tenancy and then giving three days' notice to surrender possession.

Approved in Diggs v. Porteus (Cal.), 33 Pac. 448, holding notices sufficient to authorize action in unlawful detainer.

Unlawful Detainer. See note, 120 Am. St. Rep. 43.

Distinguished in Berryman v. Gibson, 7 Cal. App. 682, 95 Pac. 672, holding in unlawful detainer the notice requiring tenant to pay the amount of rent due or deliver up possession of the premises is sufficient in form, though it does not state in terms that the rent must be paid within three days.

56 Cal. 133–134, PURDY v. SINTON.

Delegation of Municipal Power as to license, franchise, and buildings. See note, 20 L. R. A. 723.

56 Cal. 136–138, WILD v. ODELL.

Malicious Prosecution Defined as to **Requisite** of malice and want of probable cause.

Approved in Fleischhauer v. Fabens, 8 Cal. App. 33, 96 Pac. 18, holding in action for malicious prosecution, requested instruction on malice properly refused.

Advice of Counsel as Defense to Action for malicious prosecution. See note, 18 L. R. A. (n. s.) 59.

56 Cal. 143–151, SANTA CRUZ v. SANTA CRUZ R. R. CO.

License Tax cannot be Collected by civil action in absence of ordinance providing for its collection in that manner.

Approved in Territory v. Kenney, 11 Ariz. 358, 95 Pac. 94, reaffirming rule; dissenting opinion in Sluder v. St. Louis Transit Co. 189 Mo. 193, 88 S. W. 673, 5 L. R. A. (n. s.) 186, majority not discussing rule.

Proceedings for Violations of ordinances as prosecutions for crime. See note, 33 L. R. A. 36.

56 Cal. 157–159, WOOD v. ORFORD.

Sureties on Appeal Bond are Liable, though the judgment is affirmed as to one of defendants only.

Approved in Shreeder v. Davis, 43 Wash. 135, 86 Pac. 199, holding in action against two or more persons for a tort committed by their employee, a judgment against defendants may be reversed as to one appealing and remain in force as to one not appealing.

56 Cal. 159–162, FABIAN CO. v. CALLAHAN.

No Particular Form of Acknowledgment to certificate of partnership under section 2468, Civil Code, is required.

Approved in Meyer v. Lovdal, 6 Cal. App. 374, 92 Pac. 324, holding affidavit of publication of certificate of copartnership showing a signed certificate followed by words, "Duly acknowledged," on a specified date before a designated notary public, sufficiently shows compliance with statute.

As to When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 577.

56 Cal. 165–171, DAVIS v. SCOTT.

Right of Pre-emption cannot be Acquired by intrusion and trespass upon lands in actual possession of others.

Approved in Gragg v. Cooper, 150 Cal. 586, 89 Pac. 346, and Bishop v. Glassen (Cal.), 12 Pac. 258, both following rule.

56 Cal. 173–175, PIEPER v. CENTINELLA LAND CO.

On Motion for Change of Venue on ground of residence of moving parties, all defendants must join.

Cited in Cochrane v. McDonald, 4 Cof. Prob. 542, 545, denying motion for change of venue made by part of defendants because basis of action is fraud and one of defendants is resident of forum and is necessary party.

56 Cal. 175–177, SMITH v. TUNSTEAD.

Motion for Change of Venue on Ground of convenience of witnesses must be joined in by all defendants.

Distinguished in Pittman v. Carstenbrook, 11 Cal. App. 226, 104 Pac. 700, where action is brought in county other than residence of personal defendants, fact that a foreign corporation defendant did not unite with them in demand for change of venue did not affect their rights to such change.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See notes, 80 Am. St. Rep. 265; 96 Am. St. Rep. 108; 27 L. R. A. (n. s.) 858.

56 Cal. 178–184, MEREDETH v. SANTA CLARA MIN. ASSN.

Parol Evidence is Inadmissible to Show that matters outside the issues were submitted and passed upon.

Approved in Maftzger v. Gregg (Cal.), 31 Pac. 614, holding former judgment not res adjudicata as to an issue which the record showed was not raised or tried in that action; dissenting opinion in Gulling v. Washoe County Bank, 29 Nev. 271, 273, 89 Pac. 30, 31, majority holding where pleadings on their face and judgment-roll did not show the issues tried and determined, extrinsic evidence was admissible for the purpose.

Under Plea of Nonassumpsit, any defense showing there was no subsisting cause of action at time suit brought is admissible.

Approved in Hogan v. Klabo, 13 N. D. 324, 100 N. W. 849, holding in action on contract for threshing, where general denial is pleaded, defendant could prove terms of an agreement under which the threshing was done.

56 Cal. 194–208, WELLS, FARGO & CO. v. STATE BOARD OF EQUALIZATION.

State Board of Equalization Equalizes Values as between counties and county board as between different parcels or articles of property within the county.

Approved in Bank of Jonesboro v. Hampton, 92 Ark. 496, 123 S. W. 755, and Hacker v. Howe, 72 Neb. 401, 101 N. W. 261, both reaffirming rule; Poe v. Howell (N. M.), 67 Pac. 66, holding under statute of territory of New Mexico prescribing duties and authority of territorial board of equalization, such board could not increase the aggregate valuation of the property of the territory above that returned by county assessors.

56 Cal. 217-219, WOODS v. FRANKS.

Mortgagees' Right of Action Against Third Persons for invasion of their rights. See note, 109 Am. St. Rep. 450.

56 Cal. 229-241, KALLOCH v. SUPERIOR COURT.

Examination and Commitment by a Magistrate, as provided in section 872 of Penal Code, is prerequisite to proceedings by information.

Approved in People v. Toal (Cal.), 23 Pac. 203, holding information invalid where the police court which had committed defendant was not a legally established court.

Pendency of Former Indictment, or information, for same offense constitutes no ground of abatement.

Approved in State v. Vinso, 171 Mo. 585, 71 S. W. 1036, holding pendency of former information does not prevent prosecuting attorney from filing a new information charging same offense.

Constitution, Section 1, Article VIII, providing for proceeding in criminal cases by information, is not in conflict with section 1, article XIV, Constitution of United States.

Approved in In re McNaught, 1 Okl. Cr. 537, 99 Pac. 244, and State v. Stimpson, 78 Vt. 138, 62 Atl. 18, 1 L. R. A. (n. s.) 1153, both reaffirming rule.

"Due Process of Law" and "Law of the Land" defined.

Approved in Primm v. Superior Court, 3 Cal. App. 212, 84 Pac. 788, holding section 946 of Code of Civil Procedure, allowing continuance in force of an attachment pending an appeal by plaintiff, does not deprive defendant of property without due process of law; Mix v. Nez Perce County Commrs., 18 Idaho, 709, 112 Pac. 219, defining term, "the law of the land," as used in city charter authorizing ordinances not contrary thereto; dissenting opinion in Smith v. State, 54 Tex. Cr. 317, 113 S. W. 298, majority holding statute relating to drawing of jurors in counties having a city or cities of thirty thousand inhabitants is a general law within Constitution, article III, section 56.

56 Cal. 242-248, LIEBRAND v. OTTO.

On Breach of Condition Subsequent, grantor may either maintain a suit for a reconveyance or to remove cloud from title.

Approved in Pollack Min. & Mill. Co. v. Davenport, 31 Mont. 453, 78 Pac. 768, holding in suit to determine adverse claim under similar statute, allegation in complaint that plaintiff is in possession and claims to be the owner shows sufficient right in plaintiff to maintain the action; Blakemore v. Roberts, 12 N. D. 401, 96 N. W. 1031, holding an executor could bring an action to determine adverse claims to property belonging to estate of deceased.

Distinguished in Womble v. Womble, 14 Cal. App. 744, 113 Pac. 355, holding personal covenant on behalf of grantee of deed to do certain things did not amount to a condition subsequent.

Laches in Bringing Action to Remove Cloud from title is not imputable to party in possession.

Approved in Harris v. Defenbaugh, 82 Kan. 769, 109 Pac. 683, where holder of legal title brings suit to quiet title, defendant, whose claim rests on defective tax title less than five years old, cannot avail himself of defense of laches.

56 Cal. 251-257, PEOPLE v. TRAVIS.

Evidence of Past Threats of Deceased are admissible in connection with the homicide to show apprehensions of personal danger from deceased.

Approved in People v. Lamar, 148 Cal. 574, 83 Pac. 997, holding in prosecution for murder, where self-defense is relied on, evidence of reputation of deceased as being a violent, turbulent and dangerous man was admissible; State v. Hennessy, 29 Nev. 340, 90 Pac. 226, holding in trial for murder, where it is contended that defendant acted in defense of himself and another, threats made against the life of that other by decedent and communicated to defendant were admissible.

Evidence of Threats in Prosecution for homicide. See notes, 89 Am St. Rep. 700; 3 L. R. A. (n. s.) 526, 527.

Where Defendant's Brother Struck Deceased and latter drew pistol, believing himself in danger of death or serious injury, and defendant killed him, defendant is guilty.

Approved in State v. Cook, 78 S. C. 258, 125 Am. St. Rep. 788, 59 S. E. 863, 15 L. R. A. (n. s.) 1013, following rule.

Self-defense Set Up by Accused, who began conflict. See note, 45 L. R. A. 688, 704.

56 Cal. 257-261, HOSMER v. DUGGAN.

No Right of Pre-emption can be Acquired in land which is in actual possession of another.

Approved in Bishop v. Glassen (Cal.), 12 Pac. 258, following rule.

56 Cal. 262-264, McCORD v. SEALE.

Complaint Showing Contract Made by plaintiffs in their individual capacities not supported by proof of partnership contract.

Distinguished in Baker & Hamilton v. Lambert, 5 Cal. App. 711, 91 Pac. 341, in action on common counts, where defendant did not raise objection of nonjoinder of his partner, evidence of partnership indebtedness is admissible in support of complaint against one partner individually; Wilson v. Yegen Bros., 38 Mont. 510, 100 Pac. 615, action on quantum meruit for materials furnished and work done may be brought in individual names of those interested without alleging that cause accrued to them as copartners.

56 Cal. 266-296, CHAPMAN v. QUINN.

Patent Procured by Fraud is Voidable at the suit of the government, or any person in privity with the paramount source of title.

Approved in Horner v. Ellis, 75 Kan. 678, 121 Am. St. Rep. 446, 90 Pac. 276, holding one of several tenants in common may recover in ejectment the entire possession of the property from one who has no title.

56 Cal. 307–316, 38 Am. Rep. 54, HOLMES v. RICHET.

Materialman has No Lien for Materials furnished for building unless materials were actually used in building.

Approved in California etc. Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 701, 118 Pac. 107, under Code of Civil Procedure, section 1200, fact that some of materials were manufactured expressly for building is immaterial if they had not been used on building on stoppage of structure by owner.

Character of Answer as a Cross-complaint will be determined by the court whether it is so designated or not.

Approved in Haight v. Tryon (Cal.), 34 Pac. 714, holding a pleading designated a cross-complaint to be merely an answer.

Provision in Contract, for Payment of such sum as arbitrators shall award, is condition precedent.

Approved in Davisson v. East Whittier Land etc. Co., 153 Cal. 84, 96 Pac. 89, holding where contract provides that in case of dispute the value of extra work shall be determined by arbitrators, such valuation or an attempt to procure it is condition precedent to suit by contractor for same; Coplew v. Durand, 153 Cal. 279, 95 Pac. 38, 16 L. R. A. (n. s.) 791, holding where work is to be done to satisfaction of a person evidenced by certificate of architect, the production of such certificate or facts excusing such production is condition precedent to right of action on contract; Seebach v. Kuhn, 9 Cal. App. 489, 99 Pac. 725, holding where building contract contained clause providing that in case of destruction by fire or earthquake owner should lose installments paid and contractor should lose installments not then due, contractor could not recover though only an expense of thirty-nine dollars was required to complete building when it was so destroyed; Burke v. Dittus, 8 Cal. App. 178, 96 Pac. 332, but holding complaint did not show that any dispute had arisen which under the contract would require arbitration; Wyman v. Hooker, 2 Cal. App. 40, 83 Pac. 81, but holding, in suit by contractor against owner, he cannot defeat contractor's right of recovery by wrongfully withholding the final certificate; Soudan Planting Co. v. Stevenson, 94 Ark. 611, 128 S. W. 579, and Southern Home Ins. Co. v. Faulkner, 57 Fla. 197, 131 Am. St. Rep. 1098, 49 So. 543, both holding arbitration and award conditions precedent to right of action in insurance policy; New Telephone Co. v. Foley, 20 Ind. App. 419, 63 N. E. 57, holding determination of certain facts by third persons as provided in a contract was condition precedent to action thereon.

Agreements to Arbitrate. See note, 15 L. R. A. 143.

56 Cal. 317–320, TAYLOR v. NORTH PACIFIC COAST R. R. CO.

Measure of Damages for Failure to perform contract to construct fences is amount it would reasonably cost to construct them.

Approved in Summons v. Wittmann, 113 Mo. App. 366, 370, 88 S. W. 794, 796, applying rule in action for breach of building contract; Bacigalupi v. Phoenix Bldg. etc. Co., 14 Cal. App. 638, 112 Pac. 894, action for damages for breach of building contract, where contract had been abandoned, was not prematurely brought because brought before the building completed; Fabian v. Lammers, 3 Cal. App. 113, 84 Pac. 434, where two adjoining land owners contracted to build a connecting levy at expense of each on his own land, in an action by one to recover expense of completing levy on land of the other upon his failure to do so, measure of damages is cost of such construction.

Distinguished in Hays v. Street Ry. Co., 204 Pa. 491, 54 Atl. 323, where railroad obtained right of way under similar agreement but abandoned the location and built no track, owner may recover only nominal damages.

56 Cal. 321-322, CRAWFORD v. MORGAN.

Where Infant Sues by Guardian ad Litem, complaint must allege due appointment of guardian.

Distinguished in Estate of Harris, 3 Cof. Prob. 6, arguendo.

56 Cal. 322-327, ESTATE OF WOOTEN.

Prior Right to Letters of Administration may be asserted at any time against one who had obtained letters by virtue of a secondary right.

Approved in Clough v. Borello (Cal.), 48 Pac. 330, holding guardian of minor children entitled to letters of administration in preference to public administrator.

56 Cal. 327-330, PEOPLE v. McGARVEY.

Under Statute an Order Changing Place of Trial on ground of disqualification of judge was without jurisdiction and void.

Approved in People v. Ebey, 6 Cal. App. 771, 93 Pac. 380, holding judge who is disqualified by relationship to attorney for defendant in criminal case has power, under section 8 of article VII of Constitution, to select another judge to try the case.

Distinguished in Gage v. Downey (Cal.), 19 Pac. 119, judgment rendered after transferring of case to another county not open to collateral attack because county was not nearest one to which it might have been transferred.

56 Cal. 330-335, WILLIAMS v. LERCH.

When Third Party in Possession of Goods Sold agrees to retain them for the vendee, there is sufficient change of possession to satisfy section 3440, Civil Code.

Approved in Bunting v. Salz (Cal.), 22 Pac. 1134, reaffirming rule; Cameron v. Calberg (Cal.), 31 Pac. 531, holding upon sale of a mare which was in possession of third person, there was sufficient compliance with Civil Code, section 3440.

Sufficiency of Selection or Designation of Goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 28, 49.

56 Cal. 339-341, SANTA CRUZ BANK v. COOPER.

Homestead Exemption Ceases on Death of wife and arrival of children at age of maturity.

Approved in Fullerton v. Sherrill, 114 Iowa, 513, 87 N. W. 420, homestead exemption ceases when dependent member of family marries and moves away.

Continuance of Family as Condition of continuance of homestead where a condition of inception. See note, 16 L. R. A. (n. s.) 114.

Disapproved in Palmer v. Sawyer, 74 Neb. 114, 103 N. W. 1090, and Weaver v. First Nat. Bank of Chicago, 76 Kan. 547, 123 Am. St. Rep. 155, 94 Pac. 275, 16 L. R. A. (n. s.) 110, both holding that when homestead has been selected by head of family, it cannot be defeated by death or abandonment of home by other members of family.

What Constitutes "Family" under homestead and exemption laws. See note, 4 L. R. A. (n. s.) 377.

56 Cal. 342-344, WELLS v. HARTER.

Mortgage Lien Barred by Statute of Limitations is not renewed by renewal of note secured.

Approved in Kern Valley Bank v. Koehn, 157 Cal. 239, 107 Pac. 112, applying rule as to conveyance absolute in form but in fact a mortgage; Sanford v. Bergin, 156 Cal. 51, 52, 103 Pac. 336, holding in such case original contract is practically extinguished and suit can only be maintained upon the new express promise.

Distinguished in Dern v. Olsen, 18 Idaho, 365, 110 Pac. 166, holding written acknowledgment or promise to pay debt before it is barred by the statute of limitations merely sets new date from which statute begins to run.

Extension of Mortgage Lien by renewal of secured debt. See note, 55 L. R. A. 676, 689, 691.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 555.

56 Cal. 350-369, BRADY v. BARTLETT.

Private Agreement Between Contractor for street work and an owner that the owner was to be given special price for work rendered assessment void.

Approved in Rider v. Parker Washington Co., 144 Mo. App. 70, 128 S. W. 227, reaffirming rule.

56 Cal. 370-373, WITHERS v. LITTLE.

Facts Held to Show Second Mortgagee without notice was mere volunteer and subject to prior mortgage.

Approved in Austin v. Pulschen (Cal.), 39 Pac. 800, holding upon facts mortgagee did not take without notice of prior vendor's lien.

Distinguished in Valley Lumber Co. v. Wright, 2 Cal. App. 289, 84 Pac. 59, prior recorded trust deed to secure note of owner to loan society in consideration of loan to amount of note, to be paid toward construction of building, to be further security for loan, is prior to mechanic's lien on building.

Discharge of Antecedent Debt as Consideration entitling bona fide purchaser or encumbrancer to protection of recording acts. See note, 27 L. R. A. (n. s.) 621.

56 Cal. 374-383, BIDDEL v. BRIZZOLARA.

The Writing Relied on to Renew an Obligation after running of statute of limitations must contain an express promise or an acknowledgment of the debt from which a promise may be inferred.

Approved in Visher v. Wilbur, 5 Cal. App. 570, 90 Pac. 1068, writing containing conditional statement that if there is valid claim against writer that he will pay if he ever gets money is not sufficient to revive debt barred by limitation; Succession of Slaughter, 108 La. 494, 32 So. 379, 58 L. R. A. 408, expression of ability on part of debtor to pay his debt followed by part payment amounts only to an acknowledgment of the existence of the debt and does not renounce an acquired prescription on it.

Findings Should be of Ultimate Facts, or of such probative facts as necessarily result in the ultimate facts.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, holding findings of ultimate facts control where they are not necessarily inconsistent with probative facts included in findings; Barry v. Beamer, 8 Cal. App. 203, 96 Pac. 374, holding fact that some of the findings of probative facts were not supported by the evidence not ground for reversal where ultimate facts found were sufficiently supported.

56 Cal. 388–396, 38 Am. Rep. 59, DURKEE v. CENTRAL PACIFIC R. R. CO.

For Injury to Child, Parent can Recover only such damages as he himself has sustained.

Approved in Bond v. United Railroads, 159 Cal. 277, 113 Pac. 369, discussing measure of damages to parent in action for death of child; Flaherty v. Butte Elec. Ry. Co., 40 Mont. 460, 135 Am. St. Rep. 630, 107 Pac. 417, holding under statute an infant may sue for personal injuries by a guardian ad litem, though he may have a general guardian.

56 Cal. 396–397, PEOPLE v. QUVISE.

Information Charging Two Separate Offenses is demurrable.

Approved in People v. Clement (Cal.), 35 Pac. 1022, information containing two counts, one for larceny and one for embezzlement of the same property, charged two distinct offenses and was demurrable.

56 Cal. 397–401, PEOPLE v. ANTHONY.

Instruction Defining Direct and Circumstantial Evidence held correct.

Approved in People v. Olsen, 1 Cal. App. 24, 81 Pac. 678, upholding similar instruction; State v. Marren, 17 Idaho, 786, 107 Pac. 1000, holding same instruction, though subject to criticism, not ground for reversal.

56 Cal. 401–402, PEOPLE v. MILES.

State cannot be Sued except when same is permitted by statute.

Approved in Hollister v. State, 9 Idaho, 13, 71 Pac. 542, but holding authority to sue state for condemnation of state land for public use is granted by section 13, Act of February 25, 1899; Kentucky Chair Co. v. Commonwealth, 105 Ky. 460, 49 S. W. 199, holding tender of state treasury warrants in payment of a debt due the state is not good.

56 Cal. 406–407, PEOPLE v. ST. CLAIR.

Indictment Charging Entry into a Stable with intent to commit "larcey" does not describe an offense.

Distinguished in People v. Brady (Cal.), 65 Pac. 824, holding general verdict finding defendant guilty of "burgulary" is valid, since designation of offense in verdict is mere surplusage.

56 Cal. 407–410, ESTATE OF KEANE.

Order Denying New Trial When Made on Motion to vacate an unappealable order is not appealable.

Approved in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 487, 114 Pac. 839, denying appeal from order refusing to vacate appointment of receiver in foreclosure suit.

Where Person Entitled to Administer waives right and another is appointed, it is not error to refuse to revoke appointment on application of one who waived right.

Approved in Estate of Carlson, 2 Cof. Prob. 278, reaffirming rule; Estate of King, 4 Cof. Prob. 18, request of executors for appointment of administrator with will annexed is not absolute renunciation; Estate of Bedell, 3 Cof. Prob. 82, where father of decedent requested appointment of administrator and his nominee applied for letters, father is estopped from withdrawing waiver.

56 Cal. 428–429, BROOKS v. RICE.

Conveyance by Mortgagor to Mortgagee does not operate as merger if there is an intervening mortgage.

Approved in Sullivan v. Saunders, 66 W. Va. 353, 66 S. E. 498, holding where trust deed creditor buys trust property and takes conveyance from debtor, his lien is not thereby so merged as to make his entire estate in the land subject to an intervening lien.

Merger of Estate. See note, 99 Am. St. Rep. 170.

56 Cal. 431–442, PRICE v. RIVERSIDE LAND ETC. CO.

A Corporation Organized as Water Company under act of May 14, 1862, has impressed upon it a public trust.

Approved in Leavitt v. Lassen Irrigation Co., 157 Cal. 89, 106 Pac. 407, holding a public service water company could not confer upon a consumer a preferential right to use of its water; Fellows v. City of Los Angeles, 151 Cal. 58, 90 Pac. 138, holding public service water company bound to distribute water at the fixed rates; Hildreth v. Montecito Creek Water Co. (Cal.), 70 Pac. 673, holding a water company had appropriated water to public use and it was obliged to supply premises of plaintiff; Lowe v. Yolo County etc. Water Co., 8 Cal. App. 174, 96 Pac. 382, holding water company liable in damages for failure to deliver water to plaintiff for purposes of irrigation.

Liability of Water Companies. See note, 81 Am. St. Rep. 488, 489.

Mandamus is Proper Remedy to enforce duty of water company to supply water to plaintiff.

Approved in South Pasadena v. Pasadena Land etc. Co., 152 Cal. 588, 93 Pac. 494, holding mandamus proper remedy against public service water company to compel it to continue supply of water.

Distinguished in State v. Washington Irr. Co., 41 Wash. 286, 111 Am. St. Rep. 1019, 83 Pac. 309, holding a person having a contract with an irrigation company binding it to furnish him with water for irrigation has adequate remedy at law, and cannot enforce it by mandamus.

Duties, Performance of Which may be compelled by mandamus. See note, 125 Am. St. Rep. 515.

Before Application for Mandamus, demand must be made on defendant to perform the act sought to be enforced by the writ.

Approved in Fox v. Workman, 155 Cal. 205, 100 Pac. 248, holding under statute, in order to impose duty on city treasurer to sell land subject to lien of street assessment, it was necessary to make demand on him; Shirley v. Board of Trustees of Cottonwood School Dist. (Cal.), 31 Pac. 366, holding mandamus would not lie to compel school trustees, who had wrongfully dismissed a teacher, to issue an order for payment of her salary for full term, where no demand had been made; Ferguson v. Board of Education, 7 Cal. App. 570, 95 Pac. 166, holding in mandamus, the finding that no sufficient demand had been made would be presumed to have been supported by evidence

taken; Cozzens v. North Fork Ditch Co., 2 Cal. App. 414, 84 Pac. 346, holding in mandamus to compel ditch company to supply plaintiff with water for irrigation, complaint, which does not allege that there was quantity of water sufficient to supply plaintiff and all others equally entitled thereto, is insufficient.

56 Cal. 442–445, PEOPLE v. FERRIS.

To Constitute Forgery, the Instrument Forged must be one which, if genuine, may injure another.

Approved in People v. Monroe (Cal.), 33 Pac. 777, holding though an assignment by public school teacher of salary not yet earned is void, if it also contains a guaranty of payment by the assignor, it it a subject for forgery.

56 Cal. 446–453, SHORB v. BEAUDRY.

Corporation Created for Purposes of partnership holds its property in trust as partnership assets.

Approved in Baldwin v. Miller and Lux, 152 Cal. 457, 463, 92 Pac. 1033, 1034, holding where members of dissolved partnership formed a corporation which took over the firm assets for purpose of liquidation, its stock being divided among such members, corporation took only legal title in trust for such purpose; Western Lumber etc. Co. v. Merchants' Amusement Co., 13 Cal. App. 11, 108 Pac. 894, holding in suit to foreclose mechanic's lien an averment of ownership by an individual owner, and of a lease to a corporation which constructed the building on his property, is not inconsistent with finding upon evidence that the owner merely used the corporation as an agency for constructing the building; Kelly v. Ning Yung Ben. Assn., 2 Cal. App. 463, 84 Pac. 322, holding upon evidence in action for services rendered finding that auxiliary corporation of defendant, to whom services were rendered, was merely an agency of defendant was justified and defendant was liable; Turner v. Fidelity Loan Concern, 2 Cal. App. 131, 83 Pac. 66, holding where the directors of a corporation were the sole beneficiaries, a previous agreement between them when incorporating that stock was to be issued for services to be rendered could not be objected to on account of the interest of the directors; Raley v. Loma Vista Ranch Co., 1 Cal. App. 491, 82 Pac. 688, holding where a warehouse corporation was virtually an incorporated partnership of which its secretary is the managing partner, he was authorized, upon his storing hay in the warehouse, to issue warehouse receipts to himself individually; Hildreth v. Montecito Creek Water Co. (Cal.), 70 Pac. 674, holding where a corporation took the waters of a creek for the purpose of distributing it to those entitled thereto, it was a mere agency of the parties entitled thereto and could not deprive them of it.

Where Corporation is Defectively Formed and acquires property, share of incorporators in property is proportional to his original contribution.

Distinguished in Jacobson v. McCullough, 113 Minn. 337, 129 N. W. 761, holding rule inapplicable under facts.

Liability of Stockholders in Case of Defective or illegal incorporation. See note, 17 L. R. A. 554.

56 Cal. 453–461, PICO v. PICO.

A Defendant in Replevin cannot have Judgment for a return of the property, or its value, unless he has claimed a return in his answer.

Distinguished in Ulrich v. McConaughey, 63 Neb. 12, 86 N. W. 151, holding it not necessary for defendant's answer to contain a prayer for return in order to sustain judgment for return of the property or its value.

56 Cal. 466–469, **KELLER v. LEWIS.**

Court Below has No Authority to Enter a different judgment or pursue a different course from that directed in remittitur.

Approved in Galbreath v. Wallrich, 48 Colo. 131, 139 Am. St. Rep. 263, 109 Pac. 418, holding where supreme court reversed judgment of trial court with directions to enter judgment for plaintiff, it was error to thereafter allow defendant to file supplemental answer and cross-complaint; Hall v. Blackman, 9 Idaho, 559, 75 Pac. 609, holding after remittitur trial court could not hear further evidence contrary to directions of appellate court; State v. District Court, 32 Mont. 24, 79 Pac. 411, holding after affirmance of a judgment on appeal the trial court has no authority to make an order allowing certain costs not previously allowed.

In Action to Foreclose Rights of Vendee of Land, decree should fix a day within which defendant should pay or be forever foreclosed.

Approved in Odd Fellows' Savings Bank v. Brander, 124 Cal. 257, 56 Pac. 1110, holding in such action it is proper for court to fix time within which vendee must pay or be foreclosed and it is not necessary that a sale be ordered.

Right to Amend Pleadings after final decision on appeal. See note, 18 L. R. A. (n. s.) 264.

56 Cal. 470–476, **ESTATE OF CARTERY.**

Before Court can Admit a Will to probate it must require proof of all acts requisite to execution of valid will.

Approved in In re Tyler's Estate (Cal.), 50 Pac. 928, holding where will does not on its face show that testatrix subscribed it in presence of witness, or declared it to be her will, or that witness signed at her request or in her presence, the law will not presume such acts to have been done.

Comparison of Handwriting. See note, 62 L. R. A. 836.

56 Cal. 476–478, 38 Am. Rep. 65, **HEWITT v. ANDERSON.**

Offer of Reward for Apprehending Criminal, to be binding, must have elements of a contract.

Approved in Smith v. Vernon County, 188 Mo. 513, 107 Am. St. Rep. 324, 87 S. W. 953, 70 L. R. A. 59, holding one who apprehends a felon before the offer of reward and delivers him to the authorities without knowledge of the offer is not entitled to such reward.

Right to Go Behind Judgment against county or municipality on mandamus to enforce. See note, 9 L. R. A. (n. s.) 1057.

56 Cal. 478–481, **CARPENTERIA SCHOOL DISTRICT v. HEATH.**

Enforcement or General Bequest for charity or religion. See note, 14 L. R. A. (n. s.) 109.

56 Cal. 481–484, **LAKE v. TEBBITS.**

Miscellaneous.—Cited in Kaufman v. All Persons, 16 Cal. App. 401, 117 Pac. 591.

56 Cal. 484–486, **HIRSHFIELD v. CENTRAL PACIFIC R. R. CO.**

When Carrier's Liability is Reduced to that of warehouseman. See notes, 97 Am. St. Rep. 92; 17 L. R. A. 694.

56 Cal. 489–492, LIVERMORE v. WEBB.

Amended Pleading Appearing in Judgment-roll is presumed on appeal to have been regularly served.

Approved in Carter v. Paige (Cal.), 20 Pac. 730, holding on appeal from judgment on judgment-roll alone court would not consider matters not a part of roll.

Order Granting Leave to Amend Answer need not be entered on judgment-roll.

Reaffirmed in Segerstrom v. Scott, 16 Cal. App. 260, 116 Pac. 692.

56 Cal. 493–498, SIMMONS v. HAMILTON.

That the Court Misapplied the Law to the findings is ground for new trial.

Approved in Swift v. Occidental M. & P. Co. (Cal.), 70 Pac. 471, holding specification of error in motion for new trial that the decision is against the law for any reason appearing on the judgment-roll can only be considered on appeal from the judgment; Hayford v. Wallace (Cal.), 46 Pac. 302, holding error, in that judgment is not supported by findings, can be considered only on appeal from judgment and is not a "decision against the law" for which a new trial should be granted; Caldwell v. Wells, 16 Idaho, 463, 101 Pac. 813, holding insufficiency of evidence to justify the judgment not ground of motion for new trial; Johnson Bros. v. Glaspey, 16 N. D. 340, 113 N. W. 604, holding verdict not responsive to issues was not in law a verdict.

What Special Verdict must Contain. See note, 24 L. R. A. (n. s.) 66.

Accord and Satisfaction by part payment. See note, 20 L. R. A. 786.

56 Cal. 499–508, O'CONNOR v. FRASHER.

Decision of Land Office is Conclusive as to all facts upon which validity or authority to issue patent depends as against collateral attack by persons not claiming paramount title.

Approved in dissenting opinion in Williams v. San Pedro, 153 Cal. 51, 94 Pac. 237, majority holding in suit to determine adverse claims to land defendants had not shown sufficient interest to entitle them to attack validity of surveyor general's certificate of sale of tide lands held by plaintiff.

56 Cal. 508–513, SCHUMACKER v. TOBERMAN.

An Order of City Council for Assessment for street improvement on L street "to R street" did not include property on line of R street.

Approved in Maynes v. Gray, 69 Kan. 49, 76 Pac. 443, holding where a party was allowed to the 15th of March to make and serve a case for the court, a service on March 15th was not within the time.

Distinguished in Bates v. Hadamson, 2 Cal. App. 578, 84 Pac. 53, holding where assessment was at uniform rate, fact that superintendent of streets had assessed a lot for too great an amount did not show invalidity of assessment on its face, and error should have been corrected by appeal to city council.

Injunction Lies at Suit of Taxpayer to restrain any illegal action which would increase the burden of taxation.

Distinguished in Morse v. Jacky, 34 Mont. 169, 85 Pac. 884, holding injunction would not lie at suit of a taxpayer to restrain trus-

tees of a free county high school, acting under a void election, from presenting to county commissioners estimates of tax rate, since they could not levy the tax.

Mortgagee is not Necessary Party in proceeding for condemnation of land for street improvement.

Approved in Baldwin v. Moroney, 173 Ind. 583, 91 N. E. 7, holding provision for service of notice on owner of land to be affected by a drain does not authorize or require service on mortgagee; Richmond v. Williams, 102 Va. 741, 47 S. E. 846, holding creditors secured by deed of trust are not owners of the land within meaning of act of February 19, 1892, providing that owners shall be given notice before assessments for improvements.

Rights of Mortgagee of Premises taken by eminent domain. See note, 18 L. R. A. 117.

56 Cal. 513–522, 38 Am. Rep. 67, MEEKS v. SOUTHERN PACIFIC R. R. CO.

Duty of Railroad Toward Trespassing Child on track discussed.

Approved in Chicago etc. Ry. Co. v. Pritchard, 168 Ind. 416, 79 N. E. 513, holding railroad liable where engineer failed to stop after notice of danger; York v. Pacific etc. Ry. Co., 8 Idaho, 585, 69 Pac. 1045, holding railroad liable where child went upon an unprotected turntable near a public place and was injured.

Distinguished in Palmer v. Or. Short Line R. R. Co., 34 Utah, 483, 98 Pac. 696, holding on facts railroad not liable for failure to keep lookout ahead by which danger might have been foreseen.

Duty of Trainmen, upon Perceiving Unknown Object, in fact a trespasser helpless on track. See note, 2 L. R. A. (n. s.) 499.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 517, 523, 524, 550, 555.

Negligence on Part of Plaintiff does not release defendant from liability unless it immediately or approximately contributed to result.

Distinguished in Tobin v. Omnibus Cable Co. (Cal.), 34 Pac. 127, holding defendant liable where plaintiff was allowed to alight from a car after it had started; Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, and Williams v. Southern Pac. R. Co. (Cal.), 9 Pac. 157, both holding railroad not liable where drunken man went to sleep on track and was injured by train.

Doctrine of "Last Clear Chance." See note, 55 L. R. A. 431.

Decision upon Former Appeal, being upon different state of facts, held not to apply.

Reaffirmed in Adams v. Thornton, 5 Cal. App. 458, 90 Pac. 714.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 345.

56 Cal. 522–523, DOUGHERTY v. HAGGIN.

Verdict Deciding Water Rights That Plaintiff was entitled to "forty inches, miner's measurement," held too uncertain.

Approved in Rogers v. Overacker, 4 Cal. App. 340, 87 Pac. 1110, holding judgment enjoining diversion of water to injury of plaintiff was fatally uncertain in not specifying amount of water due to plaintiff; Diggs v. Porteus (Cal.), 33 Pac. 449, holding judgment in unlaw-

ful detainer too uncertain as to rent recoverable; Gardner v. Wright, 49 Or. 637, 91 Pac. 297, defining miner's inch of water.

56 Cal. 524-527, AUCKER v. McCOY.

Claimant must Actually Reside on Premises when declaration of homestead is filed.

Approved in Hanley v. Hanley, 4 Cof. Prob. 474, and Maloney v. Hefer (Cal.), 15 Pac. 764, both reaffirming rule.

56 Cal. 527-533, HUBBELL v. CAMPBELL.

Requirements of Statute as to Tax Deed must be strictly pursued or deed will be void.

Approved in Baird v. Monroe, 150 Cal. 564, 89 Pac. 353, reaffirming rule but holding defective tax deed validated by curative act of 1903.

56 Cal. 533-538, 38 Am. Rep. 73, PEOPLE v. RAMIREZ.

A Witness is not Incompetent to Act as interpreter at the examination of other witnesses in case before grand jury.

Approved in People v. Salas, 2 Cal. App. 539, 84 Pac. 296, holding upon evidence interpreter for witness was properly allowed; De Baca v. Pueblo of Santo Domingo, 10 N. M. 39, 60 Pac. 73, holding appointment of an interpreter is in the discretion of the court and is not appealable.

Confession, Though Made While under influence of liquor given him with consent of officer having him in charge, held admissible.

Approved in People v. Wilkins, 158 Cal. 534, 111 Pac. 614, admitting statements of defendant who, when taken handcuffed and shown body of deceased in grave where found, said he buried her, but, in answer to question, denied killing; People v. Siemsen, 153 Cal. 397, 95 Pac. 867, holding facts showed confession sufficiently voluntary to be admissible.

As to When Confession Voluntary. See note, 18 L. R. A. 797, 843.

Instruction That if, After Deceased was Killed, if killed at all, defendant fled from neighborhood where deceased was slain, etc., held not to assume deceased was killed.

Approved in People v. Wilkins, 158 Cal. 536, 111 Pac. 615, instruction that to make killing murder, death must occur within year and day after blow, does not assume there was a killing, against defense of suicide.

Admissibility of Evidence Given through interpreter. See note, 17 L. R. A. 813.

Right to Testify to Character from personal knowledge. See note, 22 L. R. A. (n. s.) 656.

56 Cal. 539-554, CO-OPERATIVE ASSOCIATION v. PHILLIPS.

Equity will not Enforce a Contract unless it is complete and certain as to terms.

Approved in Jules Levy & Bro. v. Mautz, 16 Cal. App. 669, 117 Pac. 937, applying rule to contract for purchase of goods for period of years, where price and terms of sale were to be ascertained by future agreement and terms were never agreed upon; Phelan v. Neary, 22 S. D. 270, 117 N. W. 145, holding specific performance will be denied unless the minds of the parties met and mutually agreed.

56 Cal. 559–562, **WILKINSON v. MERRILL.**

Decision of Court on Former Appeal is law of case.

Approved in People v. Bennett (Cal.), 50 Pac. 704, holding supreme court could not, on a second appeal in same case, review its former decision.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 338.

56 Cal. 563–567, **BRODRIB v. BRODRIB.**

Decree Settling Account of Guardian is Binding on both guardian and sureties.

Approved in Bell v. Wilson, 159 Cal. 64, 112 Pac. 1103, final judgment in proceeding by assignee of distributee to compel agent for nonresident distributee to account is binding on agent and his sureties.

Effect Against Surety of Judgment against officer. See note, 52 L. R. A. 188.

56 Cal. 571–581, **OSGOOD v. EL DORADO WATER ETC. CO.**

The Principle of Prior Appropriation of Water in California, which has been recognized and sanctioned by local custom and decisions, was expressly recognized by act of Congress of July 26, 1866.

Approved in Bradley v. Fallbrook Irr. Dist., 68 Fed. 957, but holding taking of private property within an irrigation district under state law for purpose of furnishing water to land owners alone and not for general use of all inhabitants is not a public use such as will justify power of eminent domain.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 672.

If a Person has Acquired a Vested Right to appropriate water on public land, this right is reserved in a patent issued to another for the land.

Approved in Wutchumna Water Co. v. Pogue, 151 Cal. 111, 90 Pac. 364, and Lux v. Haggin (Cal.), 4 Pac. 925, 926, 934, both reaffirming rule.

Rights of an Appropriator on Completion of Work relate back at least to commencement of work.

Approved in Miocene Ditch Co. v. Jacobsen, 146 Fed. 682, 77 C. C. A. 106, reaffirming rule; McFarland v. Alaska Perseverance Mining Co., 3 Alaska, 334, 336, stating what constitutes a valid appropriation of water.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 267.

56 Cal. 582–588, **SHELDON v. GUNN.**

Relief Which may be Granted on Intervention. See note, 123 Am. St. Rep. 312.

56 Cal. 588–592, **REAVIS v. COWELL.**

When No Venue is Stated in Affidavit, presumption is that it was taken within the jurisdiction of officer taking it.

Approved in County Bank of San Luis Obispo v. Jack, 148 Cal. 441, 113 Am. St. Rep. 285, 83 Pac. 706, holding an affidavit of service of summons which is silent as to venue of notary will be presumed to have been made in the proper county.

An Attorney in a Case Who is Also a Notary may take an affidavit to be used in the case.

Approved in Genest v. Las Vegas etc. Bldg. Assn., 11 N. M. 266, 67 Pac. 746, and Hankins v. Helms, 12 Ariz. 182, 100 Pac. 461, both reaffirming rule.

Change of Venue on Ground of Convenience of witnesses is matter within discretion of court.

Approved in Bird v. Utica Gold Min. Co., 2 Cal. App. 673, 86 Pac. 509, holding order denying motion for change of venue based upon the convenience of witnesses was not error.

56 Cal. 600–606, BULLARD v. HIS CREDITORS.

An Instruction Conveying Idea That Jury is not authorized to find fraud on simple preponderance of evidence is erroneous.

Approved in Virginia F. & M. Ins. Co. v. Hogue, 105 Va. 362, 54 S. E. 10, but holding evidence of fraud when charged as a ground for rescinding a contract must be clear and satisfactory.

Where Transcript is Unnecessarily Voluminous, appellant not allowed costs.

Reaffirmed in Estate of Pease, 149 Cal. 173, 85 Pac. 152.

56 Cal. 612–615, TOWNSEND v. COPELAND.

Certiorari can Only be Used for purpose of reviewing judicial acts.

Approved in Cook v. Civil Service Commission, 160 Cal. 597, 117 Pac. 666, denying right, by certiorari, to review conducting by civil service commission of examination for promotion to battalion chief of fire department, and declaration of percentages obtained by candidates; State v. White Pine County, 31 Nev. 117, 101 Pac. 105, holding writ of certiorari would not lie to review the action of the board of county commissioners in contracting for indexing of records of county recorder.

Remedy of Lowest Bidder for Refusal to award contract. See note, 30 L. R. A. (n. s.) 130.

56 Cal. 616–619, BRYAN v. SWAIN.

An Executory Contract for Sale of Land is extinguished by the delivery and acceptance of a deed in pursuance thereof.

Approved in Horner v. Lowe, 159 Ind. 410, 64 N. E. 220, holding grantee who accepted deed could not later complain that it did not include certain lots intended to be conveyed.

56 Cal. 619–624, BEATTY v. DIXON.

Equity has Jurisdiction to Determine Boundary affecting rights of large number of persons.

Approved in Sierra County v. Nevada County, 155 Cal. 11, 99 Pac. 375, holding equity has jurisdiction of suit by a county against an adjoining county to restrain latter from exercising jurisdiction over territory alleged to be within its boundaries, but claimed by latter county.

Suit to Ascertain and Declare Boundaries. See note, 119 Am. St. Rep. 70.

56 Cal. 626–627, QUIGGLE v. TRUMBO.

A Court Commissioner has No Jurisdiction to appoint a receiver.

Approved in Jackson v. Puget Sound Lumber Co. (Cal.), 52 Pac. 839, holding court commissioner had no authority to take proof and report conclusions thereon, as to issues raised in pleading.

56 Cal. 629–630, GHIRARDELLI v. GREENE.

Failure to Serve Copy of Complaint with summons is not ground of demurrer.

Approved in Columbia Savings Assn. v. Clause, 13 Wyo. 176, 78 Pac. 710, holding, on demurrer to petition, the court cannot look at process, return of service, or other parts of record to ascertain when action was commenced.

Title or Possession of Real Estate is not put in issue in action for rent by answer denying plaintiff's title.

Approved in Ashton v. Golden Gate Lumber Co. (Cal.), 58 Pac. 3, holding where plaintiff had such title under deed of trust as enables him to execute lease for term not exceeding life of beneficiary, his tenant cannot deny his title in action to recover rents accruing after death of beneficiary, though such title ceased on the death.

56 Cal. 631–632, GLENN v. ARNOLD.

Mortgage of Personal Property not Such as may be mortgaged under Civil Code, section 2955, is not valid against attaching creditor unless mortgagee has taken possession.

Approved in Old Settlers' Investment Co. v. White, 158 Cal. 240, 110 Pac. 924, reaffirming rule; Bank of Ukiah v. Gibson (Cal.), 39 Pac. 1070, 1071, holding a chattel mortgage on property other than that authorized to be mortgaged by Civil Code, section 2955, is, as a common-law mortgage, valid against all persons except subsequent creditors and bona fide purchasers.

56 Cal. 642–646, WEDEKIND v. CRAIG.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 794.

56 Cal. 647, PEOPLE v. WILLIAMS.

Reclamation Districts are Public Corporations.

Approved in People v. San Joaquin Valley Agr. Assn., 151 Cal. 805, 91 Pac. 744, holding a district agricultural association organized under the act of April 15, 1880, is a public agency of the state; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 405, 105 Pac. 280, holding reclamation districts may be created by special acts; Whipple v. Tuxworth, 81 Ark. 402, 99 S. W. 90, holding improvement district of a city to be a corporation; Mound City Land etc. Co. v. Miller, 170 Mo. 256, 94 Am. St. Rep. 727, 70 S. W. 726, 60 L. R. A. 190, applying rule to drainage districts.

56 Cal. 648–649, PEOPLE v. BOGGS.

Survey of Boundary Line Between Two Counties approved by surveyor general, under section 3872, Political Code, is conclusive.

Distinguished in Sierra County v. Nevada County, 155 Cal. 12, 14, 99 Pac. 376, 377, holding county could maintain suit in equity to restrain an adjoining county from exercising jurisdiction over territory alleged to be within its boundaries but claimed by latter county, though no official survey has been made.

56 Cal. 649–655, EWING v. OROVILLE MINING CO.

Corporation cannot Issue Stock except for money paid, labor done, or property actually received.

Approved in Turner v. Fidelity Loan Concern, 2 Cal. App. 131, 83 Pac. 66, holding issuance of stock of corporation to incorporators held to be in consideration of services and paid-up stock.

The First Clause of Article XII, Section 11, of the Constitution is self-executing; the last clause is not.

Approved in Ex parte McNaught, 23 Okl. 292, 1 Okl. Cr. 266, 100 Pac. 29, holding section 17, article II of the Constitution of Oklahoma, providing that no person shall be prosecuted otherwise than by presentment or indictment or by information, is self-enforcing.

Self-executing Constitutional Provisions. See note, 16 L. R. A. 282.

Power to Increase Capital Stock of corporation. See note, 38 L. R. A. 618.

Miscellaneous.—Cited in Speer v. Stephenson, 16 Idaho, 722, 102 Pac. 370, holding act of March 11, 1909, which provides for a contest of a water permit issued and vests power in state engineer to cancel such permit, does not vest such officer with judicial power.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 57 CALIFORNIA.

57 Cal. 3–7, 40 Am. Rep. 107, HENDY v. DINKERHOFF.

Personal Property Annexed to Realty retains its character as such, if parties so intended in annexing it, unless so merged in realty that its identity is lost, or it cannot be removed without practical destruction.

Approved in Western Union Tel. Co. v. Modesto Irr. Co., 149 Cal. 665, 87 Pac. 192, telegraph line on railroad right of way through irrigation district not taxable as realty by irrigation district; Best Manufacturing Co. v. Cohn, 3 Cal. App. 659, 660, 86 Pac. 830, mining machinery sold to lessee of mine on conditional sale not subject to foreclosure by lessor for nonpayment of purchase price of mine; Cartwright v. Widemann, 9 Haw. 690, holding milling machinery not fixtures as between tenant and landlord, who distrained for rent.

Fixtures Retaining by Agreement the character of personal property. See notes, 84 Am. St. Rep. 900; 19 L. R. A. 443.

Distinguished in Miller v. Waddingham (Cal.), 25 Pac. 690, holding houses built on mudsills resting on undisturbed soil are affixed to soil, and cannot be removed therefrom by vendee who built them to pay contractor during work; McGrillis v. Cole, 25 R. I. 162, 105 Am. St. Rep. 875, 55 Atl. 199, owner of land entitled to engine placed in mill by third party upon agreement with one in possession under contract for purchase of land, that title to engine was to remain in seller until paid for, owner not knowing of such agreement, and purchaser of land having defaulted on his contract.

57 Cal. 15–19, SWEENEY v. CENTRAL PACIFIC R. R. CO.

Servant Voluntarily Entering upon Employment, dangers and hazards of which are known to him, assumes risks.

Approved in Brown v. Central Pac. R. Co. (Cal.), 12 Pac. 513, holding railroad liable for death of conductor on theory his negligence, which was shown, did not proximately contribute to accident; Magee v. North Pac. Coast R. Co. (Cal.), 20 Pac. 712, holding railway brakeman assumed risk of injury from collision with cattle on tracks when he knew of defective fences and frequency of cattle on track.

Distinguished in Poli v. Numa Block Coal Co., 149 Iowa, 109, 127 N. W. 1107, 33 L. R. A. (n. s.) 646, miner does not assume risk of injury from notorious disregard by owner of statutory duty to maintain proper cover over cage.

Verdict is "Against Law" When Jury Disregards law given, or finds wholly contrary to evidence.

Approved in Gagnier v. City of Fargo, 12 S. D. 226, 96 N. W. 843, holding specification of error that verdict is "against law" does not raise question of sufficiency of evidence to justify verdict.

Obligation of Railroad to Employees as to fencing track. See note, 25 L. R. A. 321.

57 Cal. 19–20, SHELDON v. DALTON.

Appeal Taken After Death of one of adverse parties and before substitution of his successor will be dismissed as premature.

Approved in McCormick v. Shaughnessy, 19 Idaho, 468, 114 Pac. 22, following rule; Deiter v. Kiser, 158 Cal. 262, 110 Pac. 922, attorney cannot give notice of appeal after death of party without authority from his successor.

57 Cal. 20–40, BEESON v. GREEN MOUNTAIN GOLD MIN. CO.

One to Whom Employer Gives Charge of his business, with power to choose assistants, to control and discharge them, is not fellow-servant with those employed under him so as to relieve employer from liability for his negligence either for personal acts or in choosing such servants.

Distinguished in Schwind v. Floriston Pulp and Paper Co., 5 Cal. App. 203, 89 Pac. 1069, holding yard foreman fellow-employee of workmen employed in pulp-mill.

Vice-principalship as Determined with reference to character of act causing injury. See note, 54 L. R. A. 38.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 561, 563.

Loss of Society of Husband is Element of damage in action by wife for wrongful death.

Approved in Peters v. Southern Pac. Co., 160 Cal. 70, 116 Pac. 409, Simoneau v. Pacific Electric Ry., 159 Cal. 505, 115 Pac. 326, Ruppel v. United Railroads, 1 Cal. App. 670, 82 Pac. 1074, and Mize v. Rocky Mt. Bell Tel. Co., 38 Mont. 535, 129 Am. St. Rep. 659, 100 Pac. 974, all following rule; Bond v. United Railroads, 159 Cal. 278, 283, 113 Pac. 370, 371, damages to mother for wrongful death of robust son, earning good wages, not confined to value of his services to time of his majority, but jury should consider their relations and probability of continued support; Hale v. San Bernardino Valley Traction Co., 156 Cal. 716, 106 Pac. 85, applying rule in action by wife for wrongful death of husband; Clark v. Tulare Lake Dredging Co., 14 Cal. App. 434, 112 Pac. 572, jury should consider loss of comfort, society, and protection of son as element affecting damages to mother; Anderson v. Great Northern Ry. Co., 15 Idaho, 520, 99 Pac. 92, 93, upholding refusal to strike out allegation of injury to "welfare, comfort, and happiness" of parents by wrongful death of child.

Measure of Recovery for Death caused by negligence. See note, 17 L. R. A. 71.

Servant Assumes All Ordinary Risks of employment, except from negligence of employer.

Approved in Hardesty v. Largy Lumber Co., 34 Mont. 164, 86 Pac. 33, holding risk of injury from fall of pile of lumber carelessly piled under direction of vice-principal not assumed by employee.

Duty of Mine Owners to Prevent Injury to employees. See note, 87 Am. St. Rep. 559, 572, 573, 577, 580.

Miscellaneous.—Cited in Alder Co. v. Fleming, 159 Fed. 597, 86 C. C. A. 419, referring to principal case as instance of action brought under statute giving right of action for wrongful death.

57 Cal. 44–47, PARKS CANAL ETC. CO. v. HOYT.

Appropriator of Water by Means of Ditch leading from natural stream owns water as personal property after it reaches his ditches, but water above diversion point is part of realty.

Approved in Calkins v. Sorosis Fruit Co., 150 Cal. 431, 88 Pac. 1096, holding water withdrawn from natural stream is personal property of appropriator; Duckworth v. Watsonville Water etc. Co., 150 Cal. 525, 89 Pac. 341, holding appropriator has no title in water in natural stream before it reaches point of diversion.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 674.

Water Conducted into Natural Stream, which is used as conduit, is personal property.

Approved in Miller v. Wheeler, 54 Wash. 437, 103 Pac. 644, 23 L. R. A. (n. s.) 1065, party conducting water into stream used as conduit can take out only amount turned in.

57 Cal. 48–49, ROOT, NEILSON & CO. v. BRYANT.

Mechanic's Lien Acquired Between Execution and recording of mortgage held subject to mortgage unless mechanic had no notice of existence of mortgage.

Approved in Pacific States Savings etc. Co. v. Dubois, 11 Idaho, 326, 83 Pac. 515, holding lien of mortgage prior to later acquired mechanics' liens.

Distinguished in dissenting opinion in Pacific States Savings etc. Co. v. Dubois, 11 Idaho, 334, 83 Pac. 517, majority holding lien of mortgage prior to later acquired mechanics' liens.

57 Cal. 49–51, McBETH v. McINTYRE.

Where Plaintiff Gives Indemnity Bond to Constable to protect him upon sale of property owned by others than execution debtor, and, after sale, owners recover judgment against constable, assignment of bond to them and release of constable does not release obligors on bond.

Approved in Stephens v. Pennsylvania Casualty Co., 135 Mich. 194, 97 N. W. 688, holding liability of insurer of street railway company against loss by injuries, who agrees to defend damage suits, becomes fixed when judgment is had against company although judgment has not been paid.

57 Cal. 51–56, LADDA v. HAWLEY.

Contract of Pre-emptor of Public Land, before payment, to cut timber on land is void, unless cutting is to enable him to cultivate land or for use of navy.

Approved in Glass v. Basin & Bay State Min. Co., 31 Mont. 31, 77 Pac. 304, holding void contract for sale of stock by company in con-

sideration of owners being made officers of company; Combs v. Miller, 24 Okl. 579, 103 Pac. 591, holding void note given for right of possession to Indian lands to trespassers thereon; McLaughlin v. Ardmore L. & T. Co., 21 Okl. 177, 95 Pac. 781, holding void note given in consideration of deed to land held in violation of federal statute.

Right to Cut Timber on Public Land. See note, 70 L. R. A. 892, 896.

57 Cal. 56–64, **HILLMAN v. NEWINGTON.**

Parties Severally Diverting Water from Stream so as to reduce amount available for use of plaintiff, to which he was entitled, may be joined in action to restrain continuance of diversion.

Approved in Crawford Co. v. Hathaway, 67 Neb. 370, 108 Am. St. Rep. 647, 93 N. W. 796, 60 L. R. A. 889, upholding suit in equity to determine rights of large number of persons claiming right to divert waters of stream.

Criticised in Draper v. Brown, 115 Wis. 369, 91 N. W. 1003, holding party drawing water from lake and two others controlling dam and lock on streams flowing into lake properly joined in action to maintain lake level.

Disapproved in Sun Company v. Wyatt, 48 Tex. Civ. 353, 107 S. W. 935, holding three oil companies severally laying pipes in front of plaintiff's premises improperly joined in action for damages to premises.

Actions Against Two or More Persons creating or maintaining a nuisance. See note, 118 Am. St. Rep. 878.

Pollution of Stream by Mining. See note, 24 L. R. A. 65.

57 Cal. 65–68, **LORD v. SAWYER.**

Possession of Land may be Adverse to all others, though held subject to claim of United States.

Approved in Blumer v. Iowa R. R. Land Co., 129 Iowa, 39, 113 Am. St. Rep. 444, 105 N. W. 344, holding possession under timber culture claim to be adverse to another claimant to same land; Boe v. Arnold, 54 Or. 66, 102 Pac. 294, one claiming by adverse possession as against all except United States, and seeking to obtain patent, may assert adverse possession against one claiming to be owner under prior grant.

Effect of Warranty Deed to Prevent Assertion of title by adverse possession subsequently initiated. See note, 25 L. R. A. (n. s.) 129.

57 Cal. 78–80, 40 Am. Rep. 110, **GRIDLEY v. DORN.**

Wager on Result of Horserace is unenforceable as being against public policy.

Approved in Union Collection Co. v. Buckman, 150 Cal. 161, 119 Am. St. Rep. 164, 88 Pac. 709, 9 L. R. A. (n. s.) 568, holding void as contra bonos mores gambling debt as consideration for note; McGinley v. Cleary, 2 Alaska, 276, holding property transferred in consideration of gambling debt could not be recovered in equity.

Defenses to Notes and Other Obligations given for gambling debts. See note, 119 Am. St. Rep. 174.

Legality of Wagers. See note, 18 L. R. A. 861.

57 Cal. 81–82, **ESTATE OF KELLY.**

Public Administrator has Better Right to letters than nominee of married daughter of intestate.

Distinguished in Estate of Bergin, 3 Cof. Prob. 291, public administrator is not entitled to letters with will annexed, as against resident devisee in foreign will who files authenticated copy thereof and of its foreign probate, with petition for letters.

Right of One First Entitled to administration to nominate third person. See note, 22 L. R. A. (n. s.) 1163.

57 Cal. 83–85, 40 Am. Rep. 112, PEOPLE v. CARLTON.

In Trial for Manslaughter, Evidence of statements of deceased, made before meeting accused, to effect that he did not intend to assault him, are inadmissible.

Approved in People v. Driggs, 12 Cal. App. 246, 108 Pac. 64, holding inadmissible, in trial for forgery, hearsay declarations of owner of land in whose name lease was forged, made outside hearing of defendant and not part of res gestae.

57 Cal. 88–91, PEOPLE v. CUMMINGS.

Error in Spelling Word in Forged Instrument held not to be such variance from correctly spelled copy set forth in indictment as to exclude original from jury in forgery trial.

Approved in People v. Crane, 4 Cal. App. 146, 87 Pac. 240, holding insertion of word "signed" before signature of forged check in copy set forth in information not such variance from original as to preclude its admission in evidence.

57 Cal. 92–93, EX PARTE AH TOY.

City may Pass Ordinance for License Tax as police regulation, in absence of statutory prohibition.

Approved in John Rapp & Son v. Kiel, 159 Cal. 707, 115 Pac. 653, holding void provision for license tax in ordinance intended solely for purposes of regulation.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 276.

57 Cal. 94–96, EX PARTE WOLFF.

Unlawful Killing must be Accompanied with clear and deliberate intent to take life in order to constitute murder in first degree.

Approved in People v. Quimby, 6 Cal. App. 488, 92 Pac. 496, criticising instruction as to intent necessary to constitute murder in first degree.

57 Cal. 102–104, PEOPLE v. CAR SOY.

Party has Right to Put Questions to juror to show not only that there exist grounds for challenge for cause, but to elicit facts to enable party to decide whether or not he will make peremptory challenge.

Approved in Richards v. United States, 175 Fed. 932, 99 C. C. A. 401, holding it within discretion of court to exclude question to juror by defendant as to whether he would consider it fraudulent to loan homestead applicant money to pay fees and commissions, in trial for conspiracy to obtain public lands by fraud.

Counsel's Right to Examine Juror on his voir dire to determine whether to exercise right of peremptory challenge. See note, 109 Am. St. Rep. 566.

57 Cal. 104–107, PEOPLE v. TISDALE.

Constitutional Guaranty Existing at Time of commission of offense cannot be taken away by legislature.

Approved in dissenting opinion in Halloak v. United States, 185 Fed. 426, 429, majority holding act reducing number of peremptory challenges violated no right of defendant, whose offense was committed before passage of act.

Statute Which Changes Elements of Existing Statutory Offense or punishment therefor operates as repeal pro tanto of former statute.

Approved in Morgan v. United States, 148 Fed. 193, 78 C. C. A. 323, holding United States Compiled Statutes of 1901, pages 1529, 1530, repeal by implication so much of section 2461, Revised Statutes, as related to cutting or removing timber from public lands with intent to export same together with penalty; State v. Smith, 56 Or. 25, 107 Pac. 981, arguendo.

Distinguished in People v. McNulty (Cal.), 28 Pac. 822, 823, 825, holding Laws of 1891, page 272, amending sections 1217, 1227, 1229, Penal Code, ex post facto as regards prisoners awaiting execution.

After Repeal of Statute Requiring That Violator should be proceeded against by indictment, information cannot be sustained for offense committed prior to repeal.

Approved in State v. Smith, 56 Or. 27, 107 Pac. 982, where statute punishing assault with dangerous weapon and robbery was repealed at time of trial and repealing act then in force was inapplicable to accused, no penalty could be imposed on accused.

57 Cal. 108–111, PEOPLE v. WILLIAMS.

Proof of Corpus Delicti. See note, 68 L. R. A. 67.

57 Cal. 115–130, PEOPLE v. IAMS.

Character and Appearance of Witnesses, and consistency and reasonableness of their statements, may be considered in determining credibility, weight, effect, and sufficiency of testimony.

Approved in People v. Waysman, 1 Cal. App. 250, 81 Pac. 1088, following rule.

Character and Reputation of Deceased as affecting homicide. See note, 3 L. R. A. (n. s.) 368.

Where Court had Defined Two Degrees of Murder, a following instruction, beginning, "From these definitions the jury will see," does not leave jury in doubt as to what previous definitions were referred to.

Reaffirmed in People v. McRoberts, 1 Cal. App. 30, 81 Pac. 736.

It is Enough to Constitute Murder that party deliberate before act, that he premeditate the purpose to slay before giving fatal blow.

Approved in People v. Ye Foo, 4 Cal. App. 739, 89 Pac. 453, approving instruction as to intent in murder.

Charge as to Duty of Defendant in Homicide to retreat to wall considered and approved.

Approved in Foster v. Territory, 6 Ariz. 243, 56 Pac. 739, approving similar charge.

Instruction as to Apparent Necessity for killing to justify homicide considered and approved.

Approved in Wilson v. Territory, 7 Ariz. 51, 60 Pac. 698, holding error, if any, in instruction as to absolute necessity of killing to jus-

tify homicide cured by later instruction in regard to reasonable ground for apprehension of injury.

Evidence of Antecedent Threats on trial for homicide. See notes, 17 L. R. A. 656; 3 L. R. A. (n. s.) 527.

57 Cal. 130–132, PEOPLE v. SMITH.

Presumption of Continuance of Insanity. See note, 35 L. R. A. 118.

57 Cal. 145–147, PEOPLE v. HURLEY.

Presumption Against the Destroyer (spoliator) of evidence. See note, 34 L. R. A. 587.

57 Cal. 142–143, CLARK v. FOWLER.

Note Given by Partner to Copartners not in course of partnership dealings may be sued on in action at law.

Approved in Simpson v. Miller, 51 Or. 235, 94 Pac. 568, action at law lies to recover price agreed on between copartners for transfer of interest after complete accounting.

57 Cal. 150–151, BROWNELL v. FISHER.

In Action for Trespass, Admission in answer that defendant entered and did injury, though claiming to act as agents of swamp land district, when such district could not have entered without license, justifies verdict for plaintiff.

Approved in McRae v. Blakely, 3 Cal. App. 172, 84 Pac. 680, holding, in action to enjoin maintenance of ditch, finding for plaintiff sustained by evidence of his ownership and admission by defendant that he constructed ditch.

57 Cal. 152, BURNETT v. FISHER.

That Party Cutting Down Plaintiff's Trees to make way for levee acted as agent for defendant, a reclamation district, held inferable by jury from testimony.

Approved in Showers v. Zanone (Cal. App.), 85 Pac. 858, holding relation of agent between owner of land who received benefit of drainage ditch and person who authorized work on her account, inferable from evidence.

57 Cal. 157–160, SMITH v. FARGO.

Bond to Release Attachment is not void for want of conformity to requirements of statute, which, while prescribing one form, does not prohibit another.

Approved in Kanouse v. Brand, 11 Cal. App. 671, 106 Pac. 121, holding return of execution unsatisfied not prerequisite to fix liability on common-law bond to release attachment; Matheson v. F. W. Johnson Co., 16 S. D. 348, 92 N. W. 1084, and Dackich v. Barich, 37 Mont. 501, 97 Pac. 935, both upholding bond to release attachment as common-law bond.

Whatever Obligor Recites in Bond to be true may be taken as true against him, and need not be averred in complaint on such bond, or proved on trial.

Approved in Bailey v. Aetna Indemnity Co., 5 Cal. App. 744, 91 Pac. 418, holding conclusive against defendant recitals in bond, not in statutory form, given by him to release attachment.

57 Cal. 160–179, **OMNIBUS R. R. CO. v. BALDWIN.**

No Forfeiture of Street Railway Franchise can occur unless work is neither commenced within one year nor completed in three years.

Cited in Santa Rosa etc. R. Co. v. Central St. Ry. Co. (Cal.), 38 Pac. 989, arguendo.

Under Section 499, Civil Code, Ordinance granting right of way to street railway for more than five blocks over street over which another road has franchise, is void.

Criticised in San Jose-Los Gatos etc. Ry. Co. v. San Jose Ry. Co., 156 Fed. 457, 458, 84 C. C. A. 265, upholding franchise giving right of way over street for five blocks to broad gauge road when street is already occupied by narrow gauge.

57 Cal. 180–184, **PACKARD v. JOHNSON.**

Findings of Probative Facts are Sufficient if ultimate fact flows as necessary conclusion therefrom.

Approved in Barry v. Beamer, 8 Cal. App. 203, 96 Pac. 374, following rule; Bryan v. Tormey (Cal.), 21 Pac. 726, holding in quiet title suit force of finding of ownership in plaintiff not destroyed by finding of certain probative facts tending to show title in defendant.

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 614, 623, 624, 626.

57 Cal. 197–200, **SEATTLE COAL ETC. CO. v. THOMAS.**

Relation of Bankrupt Law to assignments and insolvent proceedings under state laws. See note, 45 L. R. A. 186.

57 Cal. 205–208, **HARNEY v. APPELGATE.**

Lien for Street Assessment cannot be enforced in absence of one of parties in interest.

Approved in Milliken v. Houghton (Cal.), 4 Pac. 915, following rule.

57 Cal. 208–210, **WOOD v. CURREY.**

When Misconduct or Negligence constitute cause of action, statute of limitations begins to run from time when defendant had been guilty of such misconduct or negligence.

Approved in Smith's Cash Store v. First Nat. Bank, 149 Cal. 34, 84 Pac. 664, 5 L. R. A. (n. s.) 870, holding action for injury to credit caused by refusal to pay checks barred in two years after such refusal.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 471.

57 Cal. 215–220, **THOMAS v. MOODY.**

Contract of Defendant With Third Party to purchase wool held to constitute third party agent for defendant in dealing with plaintiff.

Approved in Rand v. Columbian Realty Co., 13 Cal. App. 447, 110 Pac. 324, holding on substantially similar facts judgment must be reversed for inconsistent findings; McKee v. Cunningham, 2 Cal. App. 688, 689, 84 Pac. 262, 263, holding husband, who became owner of goods ordered by wife, must pay therefor; Larson v. O'Hara, 98 Minn. 75, 116 Am. St. Rep. 342, 107 N. W. 823, where owner refused to convey land upon unenforceable contract, return of earnest-money to her agent did not relieve her from liability.

57 Cal. 221-224, ZIMMLER v. SAN LUIS WATER CO.

Recital in Deed That Grantee is About to Divert Waters of stream flowing through grantor's land, followed by grant of right of way to conduct water over land of grantor, does not estop grantor from denying right of grantee to divert water.

Approved in Duckworth v. Watsonville Water & Light Co., 158 Cal. 218, 110 Pac. 932, when owner conveyed riparian and water rights belonging to land, and subsequently conveyed to third person, such grantee is estopped to claim riparian rights.

57 Cal. 224-226, GONZALES v. BROAD.

Broker's Right to Commission on Sale cannot be defeated by defect in vendor's title.

Approved in Justy v. Erro, 16 Cal. App. 522, 117 Pac. 576, Denis v. Tilton, 120 La. 230, 45 So. 113, and Little v. Fleishman, 35 Utah, 569, 101 Pac. 985, all following rule; Clark v. Thompson & Son Co., 75 Conn. 164, 52 Atl. 721, holding broker entitled to commission for loan although lender declined on account of cloud on title of security; Bell v. Stedman, 88 Neb. 627, 130 N. W. 258, broker's right to commissions cannot be defeated by reason of refusal of vendor's wife to join in deed.

Real Estate Broker's Commissions as affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 609.

Performance by Real Estate Broker of contract to find purchaser or effect exchange. See note, 44 L. R. A. 603, 605, 614.

57 Cal. 226-232, O'NEIL v. DONAHUE.

Cost Bill Filed More Than Five Days after notice of decision is too late.

Approved in State v. District Court, 33 Mont. 533, 85 Pac. 368, refusing costs where memorandum was not served on party to be charged therewith.

57 Cal. 234-237, DYER v. BROGAN.

Power of Appellate Court, upon Reversing Judgment for plaintiff on verdict, to direct judgment for defendant without remanding for new trial. See note, 2 L. R. A. (n. s.) 364.

57 Cal. 238-242, ESTATE OF PAGE.

Property of Estate When Recovered by suit must be inventoried as assets and sold for payment of debts in same manner as if decedent had died seised thereof.

Reaffirmed in Shiels v. Nathan, 12 Cal. App. 622, 108 Pac. 41.

Judgment-roll on Appeal from Order Settling account of executor consists of petition and accounts, and accompanying reports, objections and exceptions thereto, findings of court, and order settling account.

Approved in In re Smith's Estate (Cal.), 38 Pac. 951, and In re Dougherty's Estate, 34 Mont. 342, 86 Pac. 40, both following rule; Estate of Thayer, 1 Cal. App. 105, 81 Pac. 659, refusing to take notice of exception to order settling account of executor on appeal therefrom when order settling account was only essential part of judgment-roll presented.

Administrator cannot Make Contract with attorney to give him interest in property of estate for services in recovering it.

Approved in Estate of Lund, 1 Cof. Prob. 154, following rule; In re Davis' Estate, 31 Mont. 424, 78 Pac. 705, administrator could not charge estate with attorney's fees for advice in regard to claims antagonistic to heirs, when he knew such counsel represented antagonistic interests; Besancon v. Wegner, 16 N. D. 242, 112 N. W. 965, executor liable for attorney's services rendered estate at his request.

Liability of Estate to Attorney employed by executor or administrator. See note, 25 L. R. A. (n. s.) 72, 75.

Compensation of Attorney for Services rendered in behalf of estate is within exclusive jurisdiction of probate court.

Approved in Estate of Chittenden, 1 Cof. Prob. 2, counsel fees incurred by executor in applying for letters are charge against estate though he renounced trust before letters issued.

Mere Statement in Bill of Exceptions that party excepted to decision, unaccompanied by objection and grounds, is not available on appeal.

Approved in Estate of Parsons, 159 Cal. 428, 114 Pac. 571, where record contained no bill of exceptions, only question considered is whether record sustained decree; Coghlan v. Quartararo, 15 Cal. App. 665, 115 Pac. 666, court cannot review sufficiency of evidence where evidence is embodied in bill of exceptions, which contains no specifications of particulars in which evidence is insufficient to support findings.

57 Cal. 242–244, NASH v. HARRIS.

Party Excepting to Decision must take proper steps to have bill of exceptions settled showing matters on which decision was made.

Approved in Smith Table Co. v. Madsen, 30 Utah, 315, 84 Pac. 892, reaffirming rule; Estate of Thayer, 1 Cal. App. 106, 81 Pac. 659, refusing to consider parts of attempted appeal not included in bill of exceptions.

Unauthorized Papers in Transcript in which there is no bill of exceptions constitute no part of record which can be considered on appeal.

Distinguished in Williams v. Southern Pac. R. Co. (Cal.), 9 Pac. 153, where statement on motion for new trial is certified according to law and filed, it becomes part of record, and will be considered on appeal, if notice of motion for new trial specifies motion based on such statement.

57 Cal. 245–246, HARKER v. CLARK.

A Personal Right of Action Dies with person.

Distinguished in Fowden v. Pacific Coast Steamship Co., 149 Cal. 153, 86 Pac. 179, holding rule does not apply where death of plaintiff occurs after judgment in his favor which has not been vacated.

57 Cal. 247–250, AVERY v. SUPERIOR COURT.

Mandamus Lies to Compel Superior Court to proceed with trial of cause of which it has jurisdiction but refuses to try.

Approved in Golden Gate Tile Co. v. Superior Court, 159 Cal. 478, 114 Pac. 980, writ lies to compel trial of appeal from justice's court, when superior court had erroneously determined it was without jurisdiction.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 36, 108.

57 Cal. 251-254, 40 Am. Rep. 115, TECK v. ANDERSON.

Provisions of Section 636, Penal Code, providing for forfeiture of tackle used in illegal fishing and sale or destruction thereof without hearing, are void, as taking property without due process of law.

Approved in Modern Loan Co. v. Police Court, 12 Cal. App. 589, 108 Pac. 59, holding void provisions of sections 1408, 1409, so far as made applicable by section 1536, Penal Code, as authorizing ex parte determination of title to property taken from third party; Wing Wo Chan & Co. v. Hawaiian Government, 7 Haw. 503, holding void provisions of Laws of 1888, chapter 67, in regard to forfeiture without hearing of unlabeled liquors in domestic shipment; McConnell v. McKillip, 71 Neb. 718, 115 Am. St. Rep. 614, 99 N. W. 508, 65 L. R. A. 610, statute providing for forfeiture of property used for unlawful purpose held void so far as it authorizes forfeiture without hearing; Berry v. De Maris, 76 N. J. L. 310, 70 Atl. 340, under statute providing for confiscation of booth and goods of person selling certain articles in vicinity of place of religious worship, owner cannot be deprived of property without judicial hearing; Daniels v. Homer, 139 N. C. 253, 51 S. E. 1004, 3 L. R. A. (n. s.) 997, person whose nets are seized for fishing in violation of law is entitled to contest question in replevin, or by injunction to prevent sale, or in action for damages.

Distinguished in Mullen v. Moseley, 13 Idaho, 466, 121 Am. St. Rep. 277, 90 Pac. 989, 12 L. R. A. (n. s.) 394, upholding statute providing for summary seizure and destruction of gambling devices.

Confiscation of Nets Found in illegal use. See note, 3 L. R. A. (n. s.) 997.

Right to Compensation for Property Destroyed in abating public nuisance. See note, 19 L. R. A. 197.

Governmental Control Over Right of Fishery. See note, 39 L. R. A. 590.

57 Cal. 254-256, RAVENTAS v. GREEN.

Crops as Personalty for Purpose of levy and sale. See note, 23 L. R. A. 261.

Mode of Levying on Growing Crop. See note, 16 L. R. A. (n. s.) 1048.

57 Cal. 257-260, ESTATE OF HOLBERT.

There can be No Estoppel by Verdict or findings until judgment thereon is entered.

Approved in Gann v. Dearborn Mfg. Co., 129 Mo. App. 429, 107 S. W. 16, following rule.

57 Cal. 261-267, DOLAN v. SCANLAN.

Commission of Broker is Earned by finding sufficient purchaser ready and willing to enter into valid contract of purchase, and fact that owner negotiates sale does not deprive him of his commission.

Approved in Hill v. McCoy, 1 Cal. App. 162, 165, 81 Pac. 1016, 1018, following rule; Beougher v. Clark, 81 Kan. 253, 106 Pac. 40, holding broker who introduced purchaser entitled to commission when principal, knowing facts, completed purchase through another broker.

Distinguished in Shanks & March v. Michael, 4 Cal. App. 555, 88 Pac. 597, holding broker's commission for exchange of lands not earned by receiving oral consent of wife, when contract was executed

by her husband as her agent but without written authority and in her absence.

As to When Real Estate Broker is considered as procuring cause of sale or exchange. See note, 44 L. R. A. 321, 322, 333, 344.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 593, 599, 613, 619, 630.

Owner Employing Broker to Sell Land may make sale himself, and if done without agency of broker, he is not liable for commission.

Approved in Wallace v. Figone, 107 Mo. App. 367, 81 S. W. 492, sale by owner revokes agency, and broker cannot thereafter recover though he complies with contract.

57 Cal. 270–272, URTON v. PRICE.

In Action Against Two Persons for Damages for personal injury, satisfaction from one precludes recovery from other.

Distinguished in Louisville etc. Mail Co. v. Barnes, 117 Ky. 870, 111 Am. St. Rep. 273, 79 S. W. 262, 64 L. R. A. 574, receipt by injured party of money in part satisfaction and in consideration of release of one of two joint tort-feasors does not preclude recovery against other.

Release of One Joint Tort-feasor as affecting liability of others. See notes, 92 Am. St. Rep. 874; 58 L. R. A. 294.

Accord and Satisfaction. See note, 100 Am. St. Rep. 402.

57 Cal. 274–280, ESTATE OF GHARKY.

Where Grounds of Contest of Will Embrace conclusions of law, as menace, duress or the like, facts relied on to show such conclusions must be pleaded.

Approved in Estate of Goodspeed, 2 Cof. Prob. 149, and In re Murphy's Estate, 43 Mont. 361, 116 Pac. 1005, both following rule; Estate of Harris, 3 Cof. Prob. 10, applying rule where forgery and fraud charged; Estate of Sheppart, 149 Cal. 221, 85 Pac. 313, dismissing petition for revocation of probate on ground of undue influence where facts were not pleaded.

Subscribing Witness Who has No Recollection of execution of will, but who recognizes signatures, may be asked whether it was his belief will was executed as therein stated.

Approved in Estate of Williams, 5 Cof. Prob. 9, discussing sufficiency of acknowledgment of signature to will.

Distinguished in In re Tyler's Estate (Cal.), 50 Pac. 928, holding will not presumed legally executed when attesting clause does not show on face it was signed in presence of witness, or acknowledged to him, or declared to be will of testatrix.

It is Sufficient to State as Ground of contest of will that deceased at time of making was not of sound and disposing mind.

Approved in Estate of Kilborn, 158 Cal. 595, 112 Pac. 53, upholding sufficiency of allegation that testator was not "of sound mind and memory, or in any respect capable of making will."

Effect of Intoxication on Want of legal capacity. See note, 1 Cof. Prob. 405, 532.

Drunkenness as Affecting Testamentary Capacity. See note, 39 L. R. A. 222.

57 Cal. 282–283, ESTATE OF KIDDER.

Lost or Destroyed Wills and Proceedings for their probate. See notes, 110 Am. St. Rep. 449; 2 Cof. Prob. 429.

Evidence to Establish Lost or destroyed wills. See note, 38 L. R. A. 433.

Miscellaneous.—Cited in Estate of Blythe, 4 Cof. Prob. 159, as to whether "adoption paper" was will.

57 Cal. 285–292, GREENBAUM v. TURRILL.

Verified Answer Setting Up Sufficient Defense cannot be stricken out as sham whether it sets up affirmative defense or consists of denials.

Approved in Pacific Mill Co. v. Inman, 50 Or. 25, 90 Pac. 1100, truth of verified amended pleading cannot be tried out on affidavits.

Sham Pleadings and Relief against them. See note, 113 Am. St. Rep. 640, 647.

57 Cal. 292–293, OAKLAND GASLIGHT CO. v. DAMERON.

Order Granting New Trial will not be Reviewed on appeal, where motion was made on minutes of court, and record contains no statement.

Reaffirmed in Davis v. Jacobson, 13 N. D. 432, 101 N. W. 314.

57 Cal. 293–297, O'CONNOR v. FLYNN.

Executor Who Buys Realty, Sold Under Order of court, from purchaser before sale thereof is confirmed and takes deed after confirmation, takes as trustee for heirs, and in such case accounting should be decreed between executor and heirs.

Approved in Estate of Richards, 154 Cal. 494, 497, 98 Pac. 535, 536, 537, holding where third party purchased realty for executor, sale is only voidable by those interested, and executor cannot avoid it without returning purchase money paid.

Who may not Purchase at judicial, execution and other compulsory sales. See note, 136 Am. St. Rep. 796.

57 Cal. 306–308, COBURN v. PEARSON.

In Action on Undertaking Given to prevent levy of attachment, consideration for undertaking must be alleged.

Approved in People v. Bellafont, 11 Cal. App. 493, 105 Pac. 426, holding complaint in action on criminal bail bond sufficiently alleges consideration therefor; McNamara v. Hammerslag (Cal.), 2 Pac. 393, in action on undertaking given to prevent levy, where complaint states it was given to release levy, variance is not material.

57 Cal. 316–317, PEOPLE v. JACKSON.

Oral Statement of Judge to Jury that it had nothing to do with extent of punishment is not error.

Approved in Sturgis v. State, 2 Okl. Cr. 407, 102 Pac. 75, oral statement to jury with reference to form or character of verdict, and containing no instruction as to law involved in trial, held not to constitute error.

57 Cal. 320–322, PANCOAST v. PANCOAST.

What is Community Property. See note, 4 Cof. Prob. 44.

57 Cal. 323–325, McNEIL v. POLK.

Purchaser of Realty is not Chargeable with notice of unknown equities against title by knowledge of actual possession by one who does not hold in hostility to title about to be purchased.

Approved in Sanguinetti v. Rossen, 12 Cal. App. 633, 107 Pac. 564, holding possession of grantor consistent with record title not sufficient to put purchaser on inquiry as to rights claimed in hostility to deed.

Effect of Possession of real property as notice. See notes, 104 Am. St. Rep. 337; 13 L. R. A. (n. s.) 69.

Effect of State Constitutions and Statutes upon inheritance by or from alien. See note, 31 L. R. A. 87.

57 Cal. 325–326, McDONALD v. McCONKEY.

Order Dismissing Motion for New Trial made after judgment is erroneous and is appealable.

Approved in Freeman v. Brown, 4 Cal. App. 109, 87 Pac. 205, order denying motion for leave to amend statement on motion for new trial by inserting specifications excusably omitted is appealable.

Distinguished in Desmond v. Faus (Cal.), 33 Pac. 458, holding order denying motion for new trial properly made on hearing of motion to dismiss for failure to prosecute; Descalso v. Duane (Cal.), 33 Pac. 328, upholding order both denying and dismissing motion for new trial for failure to prosecute, though inconsistent.

In Action for Conversion, Where Complaint alleged attorney's fees as element of damages, allegation may be disregarded as surplusage and jury will be presumed to have disregarded it.

Approved in Spooner v. Cady (Cal.), 44 Pac. 1019, where note given to attorney for gross sum for costs and services in proposed suit is only evidence of money expended in pursuit of property wrongfully converted, it is not allowable as element of drainage.

57 Cal. 327–330, KELLOGG v. PACIFIC BOX FACTORY.

Protest is Unnecessary in Order to fix indorser's liability on note.

Approved in Stanley v. McElrath (Cal.), 22 Pac. 675, in action against maker of note for amount paid thereon by indorser, it is no defense that indorser paid without proper demand and notice.

57 Cal. 335–336, HACKETT v. BANK OF CALIFORNIA.

Complaint cannot be Amended to change action ex delicto to one ex contractu.

Disapproved in Z. J. Fort Produce Co. v. S. W. Grain etc. Co., 26 Okl. 18, 108 Pac. 388, action for damages for breach of contract amended to include action for fraud.

57 Cal. 337–344, MOULTON v. HOLMES.

Executors have Legal Right to Compound and discharge debts due to testators.

Approved in Olston v. Oregon Water Power & Ry. Co., 52 Or. 348, 96 Pac. 1096, 20 L. R. A. (n. s.) 915, following rule.

Compromise or Release by Personal Representatives of claim due estate. See note, 14 L. R. A. 414.

Measure of Recovery for Death caused by negligence. See note, 17 L. R. A. 74.

57 Cal. 348, BYRNE v. BYRNE.

Notice of Motion to Change Place of Trial is not demand.

Approved in Anderson v. Arpin Hardwood Lumber Co., 131 Wis. 41, 110 N. W. 792, demand for change of venue held insufficient.

57 Cal. 349–353, PEOPLE v. BUDD.

Appearance by Counsel on Charge of Misdemeanor as satisfying condition of bail bond or recognizance. See note, 27 L. R. A. (n. s.) 944.

57 Cal. 356–357, MIX v. MILLER.

In Action on Quantum Meruit, when certain sum is found due on certain day, plaintiff is entitled to interest from that day.

Approved in Courteney v. Standard Box Co., 16 Cal. App. 615, 117 Pac. 784, allowing interest from commencement of action where contract for sale of goods was for agreed price less freight to be advanced by defendant; Mullenary v. Burton, 3 Cal. App. 267, 84 Pac. 160, holding balance due on agreement to pay reasonable value of services per month bears interest from date when due.

57 Cal. 361–363, BAUM v. RAPHAEL.

Query, Whether Subsequent Act Modifying Existing Law needs to re-enact and publish at length existing act.

Approved in Spokane Grain & Fuel Co. v. Lyttaker, 59 Wash. 78, 109 Pac. 318, and City of Oak Cliff v. State, 97 Tex. 390, 79 S. W. 3, both upholding act which disclosed fully its provisions without reference to any other act, though its effect was to enlarge or restrict operation of some other statutes; Pace v. Merrill Drug Co., 2 Ind. Ter. 225, 48 S. W. 1063, upholding act which repealed another in part without reference to it.

57 Cal. 365–366, HUNTER v. MARTIN.

In Suit Against Partnership, Where Liability of individuals is proved, proof of partnership is unnecessary.

Approved in Grangers' Union v. Ashe, 12 Cal. App. 759, 108 Pac. 534, and Testa v. Kahahawai, 12 Haw. 257, both following rule.

57 Cal. 366–368, CARROLL v. STORCK.

Party's Books of Account as Evidence in own favor. See note, 52 L. R. A. 570.

57 Cal. 368–389, JANES v. THROCKMORTON.

As Between Trustee and Beneficiary, limitations do not run until trustee denies trust in clear terms and claims estate as his own, and beneficiary has actual knowledge of such claim.

Approved in Levy v. Ryland, 32 Nev. 471, 109 Pac. 909, following rule; Felkner v. Dooly, 28 Utah, 239, 78 Pac. 366, holding trust in part barred by limitation.

To Constitute Conversion of Realty into Personalty, in absence of actual sale, it must be obligatory on trustee to sell it in any event.

Approved in Estate of Spreckels, 5 Cof. Prob. 323, following rule.

Distinguished in Estate of Skae, 1 Cof. Prob. 418, 420, if will authorizes executors to sell realty and manifest intention on part of testator is that there shall be equitable conversion of realty into personalty, conversion takes place, though power to sell is not imperative.

57 Cal. 389–393, JUDAH v. FREDERICKS.

Allegation in Complaint That Plaintiff "is duly qualified and acting executrix," is not sufficient averment of official character.

Approved in Estate of Renton, 3 Cof. Prob. 532, allegation that contestants are adopted children of decedent without averment of particular facts upon which claim of adoption rests is insufficient.

Distinguished in Gurnsey v. Northern California etc. Co., 7 Cal. App. 544, 94 Pac. 862, upholding sufficiency of averment that order granting franchise pleaded in answer was duly given or made; Decker v. Perry (Cal.), 35 Pac. 1018, complaint against officer of irrigation district held not to contain averment that district was incorporated; Wolters v. Thomas (Cal.), 32 Pac. 567, holding plea of statute of limitations by stating that claim was barred by section 359, Code of Civil Procedure, is insufficient when section has several subdivisions and section 458 requires statement of subdivision.

57 Cal. 394–395, CARR v. QUIGLEY; S. C., 16 Pac. 10.

Patent Issued to Western Pacific Railroad under act of July 2, 1864, for land within limits of Mexican grant sub judice at date of withdrawal of lands is void, and may be collaterally attacked.

Approved in Williams v. San Pedro, 153 Cal. 48, 94 Pac. 236, holding void and subject to collateral attack, certificate of purchase of tide lands within city of San Pedro.

57 Cal. 396–398, CALIFORNIA SUGAR MFG. CO. v. SCHAFER.

Promise of Subscriber to Stock of Corporation is only to pay amount of subscription upon assessment, and until then no cause of action exists.

Approved in Turner v. Fidelity Loan Concern, 2 Cal. App. 136, 83 Pac. 68, no cause of action arises in favor of creditors of corporation against stockholders on subscription liability until assessment thereon is made.

57 Cal. 399–405, DONALD v. BEALS.

Where Date of Actual Record of Mortgage on Record-book differs from date indorsed when deposited, latter must give way to former.

Approved in Watkins v. Wilhoit (Cal.), 35 Pac. 650, holding no notice is imparted by instrument until actually placed in record-book, whereupon it relates back to date of deposit with recorder.

57 Cal. 406–407, McVERRY v. BOYD.

Effect of Holidays as to Matters other than relating to negotiable paper. See note, 19 L. R. A. 319.

57 Cal. 407–408, ESTATE OF KIBBE.

Pledgee Need not Present Claim to administrator of pledgor.

Approved in Probate Court v. Williams, 30 R. I. 158, 73 Atl. 387, claimant of property held by decedent in trust is not creditor whose claim must be filed.

57 Cal. 409–412, KENTFIELD v. HAYES.

Patent Valid on Its Face cannot be Collaterally Attacked by those who show no color of title in themselves.

Reaffirmed in Williams v. San Pedro, 153 Cal. 51, 94 Pac. 237.

Equitable Defense in Ejectment should contain all elements of bill in equity.

Approved in Swanston v. Clark, 153 Cal. 303, 95 Pac. 1119, holding insufficient, in action for specific performance of contract to sell land, plea of rescission before offer to compensate plaintiff for improvements.

Amended Answer Supersedes original answer.

Approved in Lane v. Choctaw etc. R. R. Co., 19 Okl. 328, 91 Pac. 884, superseded petition cannot be considered on trial as part of record or admissions of plaintiff, unless introduced in evidence.

57 Cal. 412–414, 40 Am. Rep. 118, ROBINSON v. BLACK DIAMOND COAL CO.

Miner Depositing Refuse from Mine in such position that it was washed down by stream upon lower land is liable for injury to such land.

Approved in Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 555, 96 Pac. 294, holding placer mining company liable for injury to lower lands by wash of detritus upon them; Good v. West Min. Co., 154 Mo. App. 599, 136 S. W. 243, where defendant by discharging mill refuse into ditch caused ditch to overflow so as to deposit refuse on plaintiff's land, he is liable for injury.

Pollution of Stream by Mining. See note, 24 L. R. A. 64.

57 Cal. 431, SHARP v. MILLER.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 471.

57 Cal. 437–446, ESTATE OF MOORE.

Quitclaim Deed Made by Widow is no ground for refusal of probate court to set apart to her as homestead from separate property of deceased portion of land conveyed by her deed.

Approved in In re King's Estate (Cal.), 36 Pac. 806, following rule; Booth Mercantile Co. v. Murphey, 14 Idaho, 219, 93 Pac. 779, mortgage given by widow on property set apart as probate homestead could affect only her own independent interest therein.

Distinguished in McHarry v. Stewart (Cal.), 35 Pac. 142, wife having minor children by former deceased husband could convey to second husband sixty out of one hundred and seventy-five acres of land set apart as homestead to her and children out of estate of deceased husband.

Setting Apart Homestead is Part of probate proceedings, provided for by statute, and not right which vests either by law or equity.

Approved in Estate of Hayes, 1 Cof. Prob. 553, following rule; Estate of Kennedy, 157 Cal. 523, 108 Pac. 282, holding homestead set apart by court not subject to inheritance tax as property passing by will or by interstate laws of state; Estate of Heywood, 149 Cal. 131, 84 Pac. 834, holding right of minor child to probate homestead from estate of father is not a vested right, and is lost if application is not made therefor before majority; Hoppe v. Hoppe (Cal.), 36 Pac. 392, 393, order setting apart homestead to widow, made without notice to minor children, cannot vest title in widow alone so as to devest children's interest in homestead and in inheritable fee; Estate of Green, 1 Cof. Prob. 454, duty of court to set apart probate homestead for widow is not affected by fact that decedent disposed of his property by will.

If Applicant, at the Time of Application, has, by remarriage, ceased to be widow of deceased, she cannot have probate homestead set apart.

Approved in Estate of Goodale, 5 Cof. Prob. 290, widow loses right to apply for homestead out of first husband's estate by remarrying.

If Testator Devises His Whole Estate, his widow is still entitled to homestead.

Approved in Estate of Maxwell, 1 Cof. Prob. 128, following rule.

Not Until Homestead is Set Apart does any estate therein become vested.

Approved in Estate of Hayes, 1 Cof. Prob. 554, following rule.

Where Widow Dies Before Applying for Probate Homestead, all her right to apply is gone.

Approved in Estate of Hayes, 1 Cof. Prob. 553, following rule.

57 Cal. 447–461, THELLER v. SUCH.

Probate Court had No Power, save in certain excepted cases, to settle disputes between heirs or representatives of deceased and third persons.

Approved in Caron v. Old Reliable G. M. Co., 12 N. M. 223, 78 Pac. 66, following rule; Estate of Heeney, 3 Cal. App. 552, 86 Pac. 844, where mortgage made by deceased stood unreleased in name of one of deceased heirs and heir of a deceased brother paid half of mortgage, their rights could not be adjudicated in proceeding for settlement of administrator's account; Ward v. Du Pree, 16 S. D. 507, 94 N. W. 399, county court has not exclusive jurisdiction of action by legatee to set aside release of her share of estate to defendants, who were also legatees, on ground of fraud.

Where All Members of Partnership Die, assets, debts, and credits of partnership do not become confused with estate of last survivor, but continue separate existence, and respective rights therein can only be determined in suit in equity.

Approved in Franklin v. Trickey, 9 Ariz. 285, 80 Pac. 353, holding administrator of partner first deceased was entitled to maintain suit for accounting against administrator of surviving partner without previous demand against his estate.

57 Cal. 467–472, DINGLEY v. BANK OF VENTURA.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 187.

57 Cal. 472–475, DUNNE v. ALTSCHUL.

Use of Patented Materials may be required by contract for street improvement work.

Approved in Sarver v. Los Angeles, 156 Cal. 189, 103 Pac. 918, upholding requirement for use of patented material in construction of jail.

57 Cal. 476–479, CALLAHAN v. STANLEY.

Oral Evidence may be Introduced to show special meaning given by usage to words used in contract.

Approved in Corey v. Struve, 16 Cal. App. 319, 116 Pac. 979, construing lease of land for beet farming in accordance with customs of lessees, as requiring "beet tops" to be left on ground for fertilizer; Berry v. Kowalsky (Cal.), 27 Pac. 287, holding complaint setting forth in haec verba contract containing abbreviations not demurrable on ground of being unintelligible, since oral evidence is admissible to explain it; Miller v. Wiggins, 227 Pa. 567, 76 Atl. 712, admitting parol testimony to explain doubtful expression in contract.

Contracts by Telegraph. See note, 110 Am. St. Rep. 761.

57 Cal. 480–483, BATEMAN v. BURR.

Trust Deed to Secure Loan Considered and held to confer power of sale upon trustee to pay loan.

Approved in Roberts v. True, 7 Cal. App. 381, 94 Pac. 393, holding trustee under trust deed made to secure note had right to sell property to pay debt.

Deed to Secure Debt Given to Third Party with power of sale in case of default held to be trust deed and not mortgage.

Cited in Langmaack v. Keith, 19 S. D. 357, 103 N. W. 211, instrument reciting debt and conveying realty to third party to sell as in foreclosure of mortgage in case of default held to be mortgage; Brown v. Comonow, 17 N. D. 83, 114 N. W. 729, discussing but not deciding whether instrument was trust deed.

57 Cal. 484–493, ESTATE OF WARDELL.

Illegitimate Child Unintentionally Omitted from will of mother is entitled to share in estate in like manner as if legitimate.

Approved in Estate of De Cigaran, 150 Cal. 688, 89 Pac. 835, construing sections 1386, 1388, Civil Code, in regard to inheritance of estate of illegitimate who dies without offspring; Finley v. Brown, 122 Tenn. 332, 123 S. W. 363, adopted child of father residing in foreign state is entitled to inherit in state where property lies.

Distinguished in Brisbin v. Huntington, 128 Iowa, 177, 103 N. W. 148, bastard recognized by father in writing as his child cannot take under will giving property to lawful issue.

Pretermitted Heirs. See note, 115 Am. St. Rep. 587.

57 Cal. 493–500, ROBINS v. HOPE.

Law Requires Utmost Good Faith in all confidential or fiduciary relations.

Approved in Bacon v. Bacon, 150 Cal. 489, 89 Pac. 322, where plaintiff relying upon statement of executors, who were residuary legatees, that her legacy was two thousand dollars, failed to appear at distribution, her reliance on statements was not negligence; Hemenway v. Abbott, 8 Cal. App. 463, 97 Pac. 195, refusing to cancel deed made by grantor to one who had held his power of attorney.

57 Cal. 501–507, TREGAMBO v. COMANCHE MILL ETC. CO.

Order Refusing to Set Aside Default is not an appealable order.

Distinguished in Tuffree v. Stearns Ranchos Co. (Cal.), 54 Pac. 827, order denying motion to correct judgment, or filemark thereon, where appeal from judgment will not present all facts on which motion is based, is appealable.

Bill of Exceptions must be Presented for settlement within time limited by statute.

Approved in Van Why v. Southern Pac. Co., 31 Utah, 19, 86 Pac. 486, striking out bill of exceptions presented without notice to adverse party of time of settlement.

Trial is Examination Before Competent Tribunal, according to law, of facts or law put in issue in a cause, for purpose of determining such issue.

Approved in State v. District Court, 33 Mont. 146, 82 Pac. 791, reaffirming rule; State v. District Court, 32 Mont. 41, 42, 79 Pac. 547, argument and submission of motion for judgment on pleadings in trial.

Paper in Case is Deemed Filed when delivered to clerk for that purpose, and fees paid if demanded.

Approved in O'Connor v. Bear Lake County Commrs., 17 Idaho, 350, 105 Pac. 561, petition held filed though filing officer indorsed his name as "clerk" instead of "auditor."

57 Cal. 507–515, SHERMAN v. McCARTHY.

Conveyance Recorded Before Grantor obtained title, as notice. See note, 23 L. R. A. 563.

57 Cal. 515–520, WHITING v. TOWNSEND.

Assessments for Improvements by front-foot rule. See notes, 17 L. R. A. 331; 28 L. R. A. (n. s.) 1176.

57 Cal. 520–525, 40 Am. Rep. 120, PACIFIC BANK v. ROBINSON.

Proceedings Supplementary to Execution are intended to take place of creditor's bill.

Approved in Phillips v. Price, 153 Cal. 148, 94 Pac. 618, creditor's bill does not lie when statute provides for supplementary proceedings; McKenzie v. Hill, 9 Cal. App. 80, 98 Pac. 56, where in supplementary proceedings, judgment debtor was participant, but order entered against garnishees, who appealed therefrom, judgment debtor not entitled to notice of appeal; Bryant v. Bank of California (Cal.), 7 Pac. 130, holding statutory mode of procedure must be strictly followed in supplementary proceedings.

Equitable Remedy to Subject Choses in action to judgment after return of no property found. See note, 63 L. R. A. 690, 693.

57 Cal. 529–532, ESTATE OF JOHNSON.

Judicial Determination That Person is of unsound mind is only prima facie evidence of incapacity to make will.

Reaffirmed in In re Wheelock's Will, 76 Vt. 240, 56 Atl. 1014.

Adjudication of Insanity, or existence of guardianship, as showing want of capacity to execute contracts, make wills, and the like. See notes, 140 Am. St. Rep. 354; 1 Cof. Prob. 404.

Drunkenness Does not Necessarily Mean unsoundness of mind.

Cited in Estate of Thompson, 3 Cof. Prob. 360, arguendo.

Drunkenness as Affecting Testamentary Capacity. See note, 39 L. R. A. 220, 222, 227.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 466.

Effect of Intoxication on Legal Capacity. See note, 1 Cof. Prob. 405, 532.

Attestation and Witnessing of Wills. See notes, 114 Am. St. Rep. 235; 1 Cof. Prob. 50.

57 Cal. 535–541, PORTER v. WOODWARD.

In Action of Ejectment Where Court Found Plaintiff had no title, failure to find upon defense of limitations is immaterial.

Approved in Bradley v. Parker (Cal.), 34 Pac. 235, where findings on one issue determined case against plaintiffs, failure to find on limitation was immaterial; Lewis v. First Nat. Bank, 46 Or. 187, 78 Pac. 992, finding on issue of assignment in action by assignee unnecessary when other findings support judgment for defendant.

57 Cal. 550–554, CAMRON v. KENTFIELD.

Writ of Prohibition Does not Lie to arrest exercise of ministerial function.

Approved in Harris v. Recorder's Court, 15 Cal. App. 104, 113 Pac. 687, writ does not lie to arrest issuance of execution; Stein v. Morrison, 9 Idaho, 456, 75 Pac. 256, writ does not lie to prevent state officers from issuing and selling state bonds.

Writ of Prohibition. See note, 111 Am. St. Rep. 931, 941.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 75, 81, 108, 111.

Scope of Writ of Prohibition is not Enlarged by amendment of 1881 to section 1102, Code of Civil Procedure.

Approved in McGinnis v. San Jose, 153 Cal. 714, 96 Pac. 368, refusing mandamus to control discretion of governing body of municipality as to whether they will advertise application for street railroad franchise; Beaulieu Vineyard v. Superior Court, 6 Cal. App. 248, 91 Pac. 1017, refusing writ to prevent condemnation proceedings over which court had jurisdiction; State v. Durand, 36 Utah, 102, 104 Pac. 763, scope of writ cannot be enlarged by legislature.

Exceptions to Rule That Certiorari will not lie where there is an appeal. See note, 50 L. R. A. 799.

57 Cal. 555–557, PICKETT v. WALLACE.

Complaint Against Supreme Court for damages alleging willful and malicious commitment of plaintiff for contempt does not state cause of action.

Approved in Wyatt v. Arnot, 7 Cal. App. 225, 94 Pac. 88, holding judge of superior court not liable for damages upon failure to decide case submitted.

Personal Liability of Judicial Officers. See note, 137 Am. St. Rep. 49.

57 Cal. 559–562, PEOPLE v. CARLTON.

Enhancing Penalty for Crimes by habitual criminals or prior offenders. See note, 34 L. R. A. 404, 405.

57 Cal. 562–564, PEOPLE v. CADMAN.

What Constitutes Extortion. See note, 116 Am. St. Rep. 459, 474.

57 Cal. 567–569, PEOPLE v. CHUNG AH CHUE.

Reporter's Notes of Testimony Given at trial on former indictment for same offense by witness shown to be out of state are inadmissible in evidence.

Approved in dissenting opinion in Springfellow v. State, 42 Tex. Cr. 593, 61 S. W. 722, majority holding reporter at former trial sworn to impeach witnesses could testify from his notes.

Stenographers' Notes as Evidence and right to read them to jury. See note, 81 Am. St. Rep. 360, 362.

57 Cal. 571–574, PEOPLE v. JOHNSON.

Defendant in Felony Trial, sworn on his own behalf, may be asked if he has not been convicted of felony.

Disapproved in Lewis v. Territory, 7 Ariz. 58, 60 Pac. 696, defendant in felony trial testifying on his own behalf cannot be compelled to testify whether he had been convicted of other felonies.

Cross-examination as Proper Mode of proving conviction of crime for purposes of impeachment. See note, 30 L. R. A. (n. s.) 851.

Cross-examination of Defendant in criminal cases. See note, 15 L. R. A. 674.

Evidence and Instructions as to character of accused. See note, 20 L. R. A. 609.

57 Cal. 575–576, PEOPLE v. MESSERSMITH.

Instructions as to Proof of Insanity considered and held to be contradictory and erroneous.

Approved in People v. Maughs, 149 Cal. 261, 86 Pac. 190, reversing judgment on ground instructions were contradictory and confusing.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 740, 741.

57 Cal. 576–579, DE WITT v. WRIGHT.

Complaint in Libel or Slander must allege persons who read the writing or heard the words knew that plaintiff was meant.

Approved in Dunlap v. Sundberg, 55 Wash. 613, 133 Am. St. Rep. 1050, 104 Pac. 832, following rule; Eckert v. Van Pelt, 69 Kan. 359, 76 Pac. 910, 66 L. R. A. 266, allegation that libelous language was used of and concerning plaintiff imports it was so understood.

57 Cal. 579–587, PEOPLE v. HAGGIN.

Action to Recover Swamp Land Assessment should be begun in name of district.

Approved in Curry v. County of Gila, 6 Ariz. 54, 53 Pac. 5, county interested in payment of bond to secure taxes may sue thereon though bond was given to state; Malheur County v. Carter, 52 Or. 619, 98 Pac. 490, action on bail bond to secure attendance of one charged with larceny is properly brought by county where accused was to appear for trial.

As to Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 620.

57 Cal. 588–594, COLTON LAND ETC. CO. v. RAYNOR.

Plaintiff may Prove, Without Pleading It, affirmative matter in evidence of new matter set up in answer.

Approved in Peck v. Noee, 154 Cal. 354, 97 Pac. 866, Sarnighausen v. Scannell, 11 Cal. App. 656, 106 Pac. 119, and Baker v. Baker, 9 Cal. App. 740, 100 Pac. 894, all following rule.

57 Cal. 594–604, PEOPLE v. BADLAM.

Trust Deed Securing Debt is Interest in property and is assessable to owner, while property itself is assessable to its owner, but to prevent double taxation, value of security is deducted from value of property.

Distinguished in Bank of Willows v. Glenn County, 155 Cal. 357, 101 Pac. 15, holding contracts of security on personal property are not mortgages or trust deeds under excepting clause, section 1, article XIII, Constitution.

Franchise of Corporation may Constitute Valuable Property and is assessable as such.

Approved in Kaiser Land & Fruit Co. v. Curry, 155 Cal. 651, 103 Pac. 346, reaffirming rule; Georgia R. R. etc. Co. v. Wright, 124 Ga. 610, 53 S. E. 257, holding stock of foreign corporations whose property is located outside of state is taxable to owner residing in state.

Taxation of Franchises. See note, 131 Am. St. Rep. 877.

Franchise and All Other Property of Corporation are assessable to it, and stock therein cannot again be assessed to stockholders.

Approved in Chesebrough v. San Francisco, 153 Cal. 563, 570, 96 Pac. 289, 292, following rule; Crocker v. Scott, 149 Cal. 583, 586, 588, 589, 590, 87 Pac. 105, 107, 108, dissolving injunction restraining sale of national bank shares for nonpayment of tax by shareholder; Stroh v. City of Detroit, 131 Mich. 113, 117, 90 N. W. 1031, 1032, holding as double taxation, tax on shares of stock held by residents in foreign corporation, property of which is situated in state; San Francisco Nat. Bank v. Dodge, 197 U. S. 76, 93, 25 Sup. Ct. 384, 49 L. Ed. 673, 680, discrimination against national and in favor of state banks results from taxation of national bank shares under California Political Code, sections 3608-3610, at market value, while in taxing state banks intangible elements forming part of market value not included.

Distinguished in Wright v. Louisville etc. R. Co., 195 U. S. 221, 222, 223, 25 Sup. Ct. 16, 49 L. Ed. 168, holding shares of stock in foreign corporation held by domestic corporation taxable as property of latter.

Taxation of Capital Stock of corporations. See note, 58 L. R. A. 563, 593.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 367.

57 Cal. 604-612, 40 Am. Rep. 125, IN RE MAGUIRE.

Power of Municipality to Regulate Dealing in intoxicating liquors. See note, 114 Am. St. Rep. 301.

Discrimination Against Women in police regulations. See note, 49 L. R. A. 112, 113.

Power to Exclude Women from Saloons. See note, 18 L. R. A. (n. s.) 658.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 455, 456.

57 Cal. 612-614, UNIVERSITY OF CALIFORNIA v. BERNARD.

Where There is Reasonable Doubt whether act of legislature is repugnant to Constitution, its constitutionality should be affirmed.

Approved in In re Spencer, 149 Cal. 400, 117 Am. St. Rep. 137, 86 Pac. 897, sustaining child labor act of 1905; Ex parte Dietrich, 149 Cal. 107, 84 Pac. 770, 5 L. R. A. (n. s.) 873, holding void act of 1905 in regard to durable marking of packages of butter; People v. Richards, 1 Cal. App. 574, 82 Pac. 694, upholding section 204, Code of Civil Procedure, relating to drawing of juries by superior judges in counties of over one hundred thousand population; In re Finley, 1 Cal. App. 200, 81 Pac. 1042, upholding section 246, Penal Code, imposing death penalty upon life prisoner, who commits assault with deadly weapon.

57 Cal. 614–617, SAN JOSE GAS CO. v. JANUARY.

Franchises are Property to be Taxed in proportion to value.

Approved in Southwestern etc. Tel. Co. v. San Antonio, 32 Tex. Civ. App. 102, 73 S. W. 860, following rule; Lake City E. Light Co. v. McCrary, 132 Iowa, 627, 110 N. W. 20, upholding assessment which took into consideration, in assessing plant, value of franchise of electric light company.

In Assessing Franchise of Corporation, value may be determined by deducting from aggregate market value of shares value of tangible property.

Approved in Crocker v. Scott, 149 Cal. 592, 87 Pac. 109, following rule; San Francisco Nat. Bank v. Dodge, 197 U. S. 83, 25 Sup. Ct. 384, 49 L. Ed. 669, holding it is duty of assessor to include in assessment of franchise of state corporation all elements of value which form part of market or selling value of shares of stock.

Courts will not Revise Judgment of assessors and boards of equalization on assessments.

Approved in Chicago etc. Ry. Co. v. Babcock, 204 U. S. 598, 27 Sup. Ct. 326, 51 L. Ed. 636, refusing to consider, in suit to declare assessment void, complaints as to results reached by state board of assessors except those based on fraud or on adoption of fundamentally wrong principle.

Injunction Against Collection of Tax on excessive assessment. See note, 16 L. R. A. (n. s.) 808.

If Any Part of Tax Complained of be legal, that part must be paid before party will be heard to complain of illegal portion.

Distinguished in Hotchkiss v. Hansberger, 14 Cal. App. 610, 115 Pac. 960, owner suing to quiet title against void tax deed need not pay defendant taxes paid by him.

Miscellaneous.—Cited in San Joaquin etc. Irr. Co. v. Merced Co., 2 Cal. App. 598, 599, 84 Pac. 287, 288, to point that franchise to collect water rates belonging to corporation is distinct from its creative or corporate franchise and taxable as such.

57 Cal. 617–620, McCOURTNEY v. FORTUNE.

Judgment will not be Reversed for want of finding on immaterial issue.

Approved in Bradley v. Parker (Cal.), 34 Pac. 235, and Lewis v. First Nat. Bank, 46 Or. 188, 78 Pac. 992, both following rule; Bone v. Hayes, 154 Cal. 763, 99 Pac. 174, where complaint was good against one defendant although not against others, issues were tendered as to that one to support findings thereon.

Distinguished in Cargnani v. Cargnani, 16 Cal. App. 100, 116 Pac. 308, holding court in divorce erred in failing to find upon material averments of cruelty set forth in cross-complaint.

57 Cal. 620–623, PEOPLE v. TAYLOR.

Under Section 996, Political Code, office becomes vacant when person elected thereto fails to file official bond within time prescribed, but such person is still the incumbent within meaning of that section from date of commencement of term.

Approved in Campbell v. Board of Supervisors, 7 Cal. 157, 93 Pac. 1063, where incumbent of district attorney's office was, at succeeding election defeated by one who was by judgment declared ineligible and

failed to qualify, incumbent cannot enjoin supervisors from filling office; State v. Wheatley, 160 Ind. 190, 66 N. E. 687, information to oust incumbent, in nature of quo warranto, held fatally defective in failing to allege relator had taken required oath and given required bond.

Distinguished in People v. Nye, 9 Cal. App. 162, 98 Pac. 245, holding officer elected for second term who died before time of its beginning cannot be regarded as incumbent of office at any time during such term, unler section 996, Political Code.

57 Cal. 623–624, **LA SOCIETE FRANCAIS v. SELHEIMER.**

Court has Discretion to Grant or Refuse jury in equity trial.

Reaffirmed in Avery Mfg. Co. v. Crumb, 14 N. D. 63, 103 N. W. 411.

57 Cal. 625–626, **COMSTOCK QUICKSILVER MIN. CO. v. SUPERIOR COURT.**

It is not the Signing but Filing of findings that determines the action.

Approved in County of San Luis Obispo v. Simas, 1 Cal. App. 181, 81 Pac. 975, holding order became effective only when filed with clerk.

When Action is Tried in One County, judge may sign findings and decision when in another county.

Reaffirmed in Estudillo v. Security Loan Co., 158 Cal. 69, 109 Pac. 885.

Criticised in concurring opinion in Estudillo v. Security Loan etc. Co., 158 Cal. 72, 109 Pac. 886, majority following rule.

57 Cal. 629–636, **CLARK v. CRANE.**

Order Denying Motion to Settle Statement on motion for new trial is appealable.

Approved in Freeman v. Brown, 4 Cal. App. 109, 87 Pac. 205, order denying motion for leave to amend statement on motion for new trial is appealable.

Order Extending Time to Give Nature of Motion for new trial made after expiration of statutory time is void.

Distinguished in Sherman v. Southern Pac. Co., 31 Nev. 287, 102 Pac. 257, setting aside default on ground of mistake and excusable neglect.

57 Cal. 640–641, **DEAN v. BASSETT.**

To Constitute Ratification, principal must be acquainted with that which has actually been done.

Approved in Ballard v. Nye (Cal.), 69 Pac. 483, holding receipt without inquiry of part of insurance money from one who had pretended to act as plaintiff's agent, and without notice or knowledge that he had so acted, was not ratification of his acts.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 618.

Effect of Reference to Extrinsic Document to control or modify character of estate that would otherwise pass. See note, 8 L. R. A. (n. s.) 1039.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 58 CALIFORNIA.

58 Cal. 2–4, STEWART v. WHITLOCK.

Where Husband and Wife Executed Mortgage on homestead, mistake of wife in not excluding certain parts thereof due to misrepresentations to her by husband cannot affect right of mortgagee, who did not know of her intention.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, 429, holding where plaintiff's agent conveyed land which he held in trust for them and deceived his principals as to terms of transfer, the fraud, if any, cannot affect the vendee, who purchased in good faith without knowledge of intention of plaintiffs.

58 Cal. 4–5, LATAILLADE v. SANTA BARBARA GAS CO.

Informal Complaint in Justice's Court Upheld.

Approved in Moran v. Ebey, 39 Mont. 519, 104 Pac. 523, upholding informal complaint in justice's court.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 113.

58 Cal. 6–8, BRODRIBB v. TIBBETS.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 740.

58 Cal. 8–11, MORA v. LE ROY.

Superfluous Matter in Complaint may be stricken out on motion.

Approved in Milan v. Hood (Cal.), 30 Pac. 1107, nolding superfluous matter in cross-complaint should have been stricken out.

When Demurrer to Complaint is Sustained without leave to amend, defendant is entitled to have final judgment entered in his favor.

Approved in Le Breton v. Stanley Contracting Co., 15 Cal. App. 434, 114 Pac. 1030, order sustaining demurrer without leave to amend does not preclude court from granting motion for judgment on pleadings.

58 Cal. 11–16, MABURY v. RUIZ.

Execution of Deed Absolute in Form is not abandonment of homestead when intended as security for loan, except as against innocent purchaser.

Approved in Bull v. Coe (Cal.), 15 Pac. 125, following rule; MacLeod v. Moran, 153 Cal. 99, 94 Pac. 605, holding deed of trust to secure debt not abandonment of homestead.

Wife may Intervene in Foreclosure Suit against husband to set up homestead right.

Approved in Potlatch Lumber Co. v. Runkel, 16 Idaho, 197, 101 Pac. 397, 23 L. R. A. (n. s.) 536, claimant of property attached in action for debt may intervene to assert his rights.

58 Cal. 16–19, CITY OF LOS ANGELES v. MELLUS.

Final Judgment Entered upon General Demurrer to complaint is bar to another action on same cause.

Approved in City of Los Angeles v. Mellus, 58 Cal. 20; following rule; Parrotte v. Dryden, 73 Neb. 294, 102 N. W. 612, final judgment on demurrer to petition in equity to obtain new trial in former suit bars later action on same grounds for same purpose.

Distinguished in Frye v. Miley, 54 W. Va. 333, 46 S. E. 138, bill in equity dismissed on demurrer for lack of jurisdiction is not bar to another action on same matter when court has acquired jurisdiction.

58 Cal. 21–39, AGUIRRE v. ALEXANDER.

Where Jury by Their Verdict Disregarded Instruction of court, verdict will be set aside.

Criticised in Compressed Air Co. v. West San Pablo Co., 9 Cal. App. 363, 99 Pac. 532, holding judgment will not be reversed for mere error, in failing to follow instructions, when it clearly appears appellant has suffered no damage therefrom.

Right to Reversal or New Trial where jury disregarded erroneous instructions. See note, 21 L. R. A. (n. s.) 853.

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 610, 626.

58 Cal. 42–50, COMMERCIAL BANK v. MITCHELL.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 490, 494.

58 Cal. 59–61, KNOX v. LOS ANGELES COUNTY.

Superintendent of Irrigation Under Act of March 10, 1874, was not county officer, but only officer of such portions as should be formed into irrigation districts.

Approved in State v. Higginbotham, 84 Ark. 539, 106 S. W. 485, director of levee district embracing portions of several counties is not county officer.

58 Cal. 62–63, DOWNEY v. HELLMON.

New Trial for Insufficiency of Evidence to support verdict wil not be granted when evidence is conflicting.

Reaffirmed in Farrell v. Solary, 43 Fla. 131, 31 So. 285.

58 Cal. 63–73, WEISENBERG v. TRUMAN.

Taking of Deed Containing Recital of dedication of land to city gave grantees notice of that fact.

Approved in Sisk v. Caswell, 14 Cal. App. 391, 112 Pac. 191, holding grantee of deed bound by recitals therein when for two years

after recordation he failed to discover it did not correspond with contract of sale.

Liability for Disinterment of Dead Bodies, and actions relating thereto. See note, 42 L. R. A. 724.

58 Cal. 73–80, FELIZ v. CITY OF LOS ANGELES.

City of Los Angeles has No Right to Dispose of water of Los Angeles river to parties outside the city to injury of owners of land bordering river.

Distinguished in Fellows v. City of Los Angeles, 151 Cal. 62, 90 Pac. 140, holding water, right to use which was in question, had been reduced to private ownership and was not owned by city of Los Angeles.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 722.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 676.

58 Cal. 80, ELMS v. LOS ANGELES.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 676.

58 Cal. 81–83, ELMS v. LOS ANGELES.

Guardian ad Litem of Infant in Partition Suit may consent to judgment after court has passed upon partition made by referees and approved it.

Approved in Becker v. Chester, 115 Wis. 149, 91 N. W. 651, executor cannot consent that costs of action to have certain clause in will declared void be paid from funds of estate.

58 Cal. 91–95, McGARY v. PEDRORENA.

Statutes are to be Considered Prospective and not retrospective in their operation, unless contrary intention clearly appears.

Approved in In re Cole, 12 Cal. App. 292, 107 Pac. 582, holding section 25½, article IV, Constitution, giving legislature power to create fish and game districts, is neither self-operative nor retrospective.

Ruling will not be Reviewed on Appeal unless exception be taken in lower court.

Distinguished in Dahl v. Stakke, 12 N. D. 329, 96 N. W. 354, reviewing, on appeal from order denying new trial, on ground of insufficiency of evidence to sustain verdict, direction for verdict not excepted to.

58 Cal. 95–98, BARRON v. DELEVAL.

Right to Written Notice of Overruling Demurrer may be waived.

Approved in Estate of Keating, 158 Cal. 114, 110 Pac. 111, dismissing appeal for failure to file certain notice within ten days after entry of order when no written notice of entry of order was served but appellant had actual notice thereof; Bell v. Thompson, 8 Cal. App. 485, 97 Pac. 159, notice of filing cost bill waived when party had actual knowledge of filing and claimed right to retax costs after four years for want of such written notice.

58 Cal. 99–100, THOMAS v. ANDERSON.

Contract Reading "We, the Undersigned, promise and agree to pay the sum set opposite our names," constitutes separate and distinct obligations.

Approved in Los Angeles National Bank v. Vance, 9 Cal. App. 60, 98 Pac. 60, holding subscription by several persons of sums set opposite

their respective names to secure location of federal building does not create joint or joint and several obligation.

58 Cal. 101–102, DE LA OSSA v. OXARART.

Judgment Against Administrator concludes heirs.

Approved in Sturgis v. State, 2 Okl. Cr. 375, 102 Pac. 62, following rule; McClung v. Cullison, 15 Okl. 408, 82 Pac. 500, holding heir of intestate not necessary party to foreclosure of mortgage and concluded by decree against administrator.

58 Cal. 102–104, PEOPLE v. GARCIA.

Indictment, Charging Same Offense in different forms under different counts, must clearly show that matters set forth in different counts are descriptive of one and same offense.

Distinguished in People v. Oppenheimer, 156 Cal. 741, 106 Pac. 78, holding allegation in information that assault was committed with deadly weapon not at variance with proof of use of two deadly weapons.

58 Cal. 104–108, PEOPLE v. NELSON.

Indictment for Burglary Which Charges Defendant entered with intent to commit felony, without stating what particular felony, states no offense.

Approved in Newby v. State, 75 Neb. 36, 105 N. W. 1100, information charging crime of having possession of forged instrument with intent to publish same as genuine with intent to defraud, but not charging possessor knew it to be false, states no offense.

58 Cal. 111–115, FREEMAN v. RAHM.

Decree of Distribution to Devisee Estops One who, prior to decree, made agreement with devisee to purchase his interest in estate, paid purchase price and received power of attorney to receive devisee's share, but got no deed, as against creditor who has attached devisee's interest.

Criticised in Cooley v. Miller & Lux, 156 Cal. 513, 514, 515, 517, 105 Pac. 982, 983, 984, when devisee makes valid grant, prior to distribution of his interest in estate, decree distributing such interest to devisee does not devest grantee of his rights acquired under grant.

58 Cal. 115–124, GREINER v. GREINER.

Prior to Codes, Interest of Wife in common property was mere expectancy, like interest which heir may possess in property of his ancestor.

Approved in Estate of Moffitt, 153 Cal. 364, 95 Pac. 1026, 20 L. R. A. (n. s.) 207, upon death of husband, wife takes one-half community property as heir; Directors of Fallbrook Irr. District v. Abila, 106 Cal. 362, 39 Pac. 796, wife does not have such interest in community realty as to entitle her to sign petition for irrigation district as owner of property; Reade v. de Lea, 14 N. M. 463, 95 Pac. 137, upholding deed by husband alone to property acquired by community prior to act of March 20, 1901.

Wife cannot Maintain Action During Coverture to set aside transfer of common property made by husband for purpose of defrauding her.

Approved in Cummings v. Cummings (Cal.), 14 Pac. 564, following rule; Duncan v. Duncan, 6 Cal. App. 408, 92 Pac. 311, holding claim

and delivery does not lie to recover community goods transferred by husband at suit of wife when fraud is not alleged.

Wife may Maintain Action for Injunction to restrain husband from carrying out threatened fraudulent transfer of community property.

Approved in Hall v. Johns, 17 Idaho, 228, 105 Pac. 72, interest of wife in community property is so vested that husband cannot deprive her of it by voluntary alienation for mere purpose of devesting her claim.

Liability of Community Property for debts. See note, 19 L. R. A. 235.

58 Cal. 126–133, 41 Am. Rep. 251, FRATT v. WHITTIER.

Fixtures Placed in Building by Tenant remain property of tenant as against landlord.

Approved in Churchill v. More, 4 Cal. App. 223, 88 Pac. 292, holding contract giving right of renewal of fixtures to lessee binds vendee who took with notice of such right.

Distinguished in Miller v. Waddingham (Cal.), 25 Pac. 690, holding houses built upon mudsills by contractor for vendee in possession, who has paid in part for land, cannot be turned over to contractor and removed by him in lieu of payment for his work.

Storm Doors, Windows, and Screens as fixtures. See note, 30 L. R. A. (n. s.) 1190.

58 Cal. 133–142, MILLER v. HEILBRON.

Stock in National Banks must be Assessed at its actual cash value.

Overruled in San Francisco Nat. Bank v. Dodge, 197 U. S. 80, 92, 25 Sup. Ct. Rep. 384, 49 L. Ed. 669, holding sections 3608, 3609, Political Code, unconstitutional in so far as assessment of stock of national banks differs from that of state banking institutions.

State Taxation of National Banks. See note, 45 L. R. A. 751, 754.

58 Cal. 142–144, FARLEY v. SPRING VALLEY ETC. IRR. CO.

Vested Rights of Which Pre-emptor cannot be Deprived as acquired only upon proving up and paying for claim.

Approved in Graham v. Great Falls W. P. & T. Co., 30 Mont. 401, 76 Pac. 811, preferential right given to successful contestant of contest to determine right to purchase land is not vested, nor can it be enforced against government.

Right of Prior Appropriation of water. See note, 30 L. R. A. 672.

58 Cal. 144–146, PEOPLE v. DONNELLY.

Possessory Right Acquired by Purchaser from state, prior to payment of purchase money or patent, is taxable.

Approved in Delinquent Tax List v. Territory, 4 Ariz. 188, 37 Pac. 370, holding unconfirmed Mexican grant taxable to possessor.

Distinguished in Slade v. Butte County, 14 Cal. App. 459, 112 Pac. 487, certificates of purchase of lands which state anticipates will be granted to it in lieu of school lands, which have not been received by state, are not taxable.

Exemption from Taxation or Assessment of lands owned by governmental bodies or in which they have an interest. See note, 132 Am. St. Rep. 347.

58 Cal. 147–152, JEFFERS v. COOK.

Statute of Limitations may be Pleaded in bar by new parties brought in by supplemental pleading after statute has run.

Approved in Matteson v. Wagoner, 147 Cal. 746, 82 Pac. 439, following rule.

Distinguished in Lemon v. Hubbard, 10 Cal. App. 476, 102 Pac. 556, holding statute had not run against defendant on amendment which did not state new cause of action when he had been served with original complaint before statute had run.

Relation of New Pleadings to statutes of limitations. See note, 3 L. R. A. (n. s.) 306.

Commencement of Action Against Mortgagor who had disposed of his interest in mortgaged premises does not keep alive lien of mortgage, and action thereon against mortgagor's grantee is barred in four years.

Approved in Sanford v. Bergin, 156 Cal. 51, 103 Pac. 336, acknowledgment of deal after statute had run as to mortgage does not revive or extend mortgage lien.

58 Cal. 152–159, DAVIS v. DREW.

Finding of Facts by Mere Reference to paragraphs of answer, while not to be commended, is sufficient.

Approved in Chatfield v. Continental Bldg. etc. Assn., 6 Cal. App. 668, 92 Pac. 1042, holding finding that all allegations of complaint are true is sufficient when answer consists of denials only; Heintz v. Cooper (Cal.), 47 Pac. 360, holding sufficient a finding by reference to pleadings.

58 Cal. 159–163, CAREY v. RAE.

Right of Way of Necessity Over Another's Land ceases when new right of way is acquired by judgment in partition.

Approved in Fowler v. Wood, 73 Kan. 535, 117 Am. St. Rep. 534, 85 Pac. 772, 6 L. R. A. (n. s.) 162, reaffirming rule; Cassin v. Cole, 155 Cal. 679, 96 Pac. 278, holding right of way of necessity ceased by dedication of public road.

Way of Necessity Where Other Means of access exist. See note, 17 L. R. A. (n. s.) 1019, 1020.

Impassibility of Road Gives Only Temporary Right to pass over adjoining private property.

Reaffirmed in Shriver v. County Court, 66 W. Va. 689, 66 S. E. 1063.

Creation and Conveyance of Easements Appurtenant. See note, 136 Am. St. Rep. 698.

Easements Created by Severance of Tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 349, 350, 351.

58 Cal. 163–168, MORAN v. ABBEY.

Payment by Surety of Debt Evidenced by Note extinguishes obligation, and surety's remedy against principal debtor is one of reimbursement only.

Reaffirmed in Crystal v. Hutton, 1 Cal. App. 254, 81 Pac. 1116.

58 Cal. 168–177, HUNGARIAN HILL ETC. MIN. CO. v. MOSES.

In Action to Quiet Title, Where Answer consists of denials, and contains none of elements of cross-complaint, it is error to award decree quieting defendant's title.

Approved in Erbes v. Smith, 35 Mont. 47, 88 Pac. 570, in action for waste, where answer alleged equitable title to land by virtue of parol contract to purchase and prayed defendant's title be quieted, judgment quieting title was not proper.

58 Cal. 177–180, COKER v. SUPERIOR COURT.

To Perfect Appeal from Justice Court, it is necessary to file notice, serve same upon adverse party, and file undertaking within thirty days after judgment; none can be dispensed with nor supplied if not done, nor remedied if fatally defective after time limited by statute.

Approved in Swem v. Monroe, 148 Cal. 743, 83 Pac. 1075, holding that neither undertaking nor deposit to stay proceedings can be taken in lieu of deposit or undertaking for costs on appeal; Stimpson etc. Scale Co. v. Superior Ct., 12 Cal. App. 540, 107 Pac. 1015, 1016, holding insufficient appeal bond not filed within statutory time of five days after notice of appeal; Crowley Launch etc. Co. v. Superior Court, 10 Cal. App. 344, 101 Pac. 936, holding failure of sureties on bond for appeal from justice court to qualify, upon exception, within statutory time, deprives superior court of jurisdiction of appeal; Lane v. Superior Court, 5 Cal. App. 764, 91 Pac. 406, holding appeal not perfected when bond was not filed within thirty days after judgment; Snyder v. Wooden, 11 Idaho, 155, 81 Pac. 378, Deardoff v. Thortensen, 16 N. D. 359, 113 N. W. 618, Lough v. White, 14 N. D. 355, 104 N. W. 518, and Regan v. Superior Court, 14 Cal. App. 574, 575, 114 Pac. 73, all holding undertaking on appeal must be filed within thirty days after rendition of judgment to perfect appeal from justice's court; Jenkins v. Carroll, 42 Mont. 313, 112 Pac. 1069, jurisdiction of subject matter of appeal from justice's court can only be conferred by proceeding in accordance with statutory requirements.

Order of Service of Notice of Appeal and filing thereof is unimportant on appeal from justice court.

Approved in State v. Brown, 30 Nev. 498, 499, 98 Pac. 872, 873, following rule; Billings v. Palmer, 2 Cal. App. 433, 83 Pac. 1077, holding service of amended complaint, although service is admitted, does not become effectual until time of filing.

Disapproved in State v. District Court, 34 Mont. 117, 118, 115 Am. St. Rep. 522, 85 Pac. 873, and State v. District Court, 32 Utah, 422, 91 Pac. 135, both holding filing of notice of appeal must precede or be contemporaneous with service of same on adverse party.

What Courts may Issue and to What Courts Writ of prohibition may issue. See note, 111 Am. St. Rep. 931, 935.

58 Cal. 180–186, CAREY v. BROWN.

Finding That All Allegations of Complaint are true and all allegations of answer are untrue is sufficient.

Approved in Healey v. Norton (Cal.), 41 Pac. 1081, following rule.

Stipulation That Appeal has Been Duly Perfected is conclusive on appellate court.

Approved in Burnett v. Piercy, 149 Cal. 184, 86 Pac. 605, holding want of service of notice of appeal on lienholder waived by stipulation, signed by his attorney, to effect that appeal was perfected.

58 Cal. 186–190, LYBECKER v. MURRAY.

Discretion of Court is Governed by Legal Rules to do justice according to law as near as may be.

Approved in dissenting opinion in Bates v. Gregory (Cal.), 22 Pac. 687, majority refusing mandamus to compel city of Sacramento to issue bonds under Statutes of 1864, page 217, to liquidate bonds issued under act of 1853, which had become barred by limitation since 1861.

General Denials as Sham Pleadings. See note, 113 Am. St. Rep. 648, 649.

58 Cal. 190–193, 41 Am. Rep. 257, HENDRICKS v. SPRING VALLEY ETC. IRR. CO.

Liability for Removal of Lateral or Subjacent Support of land in its natural condition. See note, 68 L. R. A. 674.

58 Cal. 196–212, PRESTON v. CULBERTSON.

Where Polls for Precinct Were Opened at place near and in plain view of place appointed by supervisors because of objection of owner of appointed place, and it did not appear that any voter was thereby deprived of his vote, vote of precinct should not be rejected.

Approved in Lane v. Otis, 68 N. J. L. 660, 54 Atl. 444, upholding election held outside territorial limits of precinct but otherwise lawfully held, no fraud or other harm being charged.

Distinguished in Johnstone v. Robertson, 8 Ariz. 364, 365, 366, 76 Pac. 466, 467, where place of election was changed and no near place designated by written notice, votes cannot be considered under provision that written notice must be posted two days.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 76.

Constitutionality of "Australian Ballot" Statutes. See note, 16 L. R. A. 755.

View by Jury. See note, 42 L. R. A. 393.

58 Cal. 214–218, PEOPLE v. BRILLIANT.

Where Indictment for Perjury Contains express averment of materiality of oath, it is sufficient unless it affirmatively appears from other averments that it was immaterial.

Approved in People v. Nash, 15 Cal. App. 328, 114 Pac. 787, upholding sufficiency of general averment that false statement was material; People v. Collins, 6 Cal. App. 500, 92 Pac. 516, upholding indictment for perjury; Kizer v. People, 211 Ill. 416, 71 N. E. 1038, upholding indictment for perjury setting forth facts from which materiality may be inferred without direct averment they were material in language of statute; Shevalier v. State, 85 Neb. 370, 123 N. W. 425, reversing conviction for perjury where materiality of testimony was not alleged or proven.

Indictments for Perjury. See note, 124 Am. St. Rep. 667.

58 Cal. 218–225, 41 Am. Rep. 258, PEOPLE v. FEILEN.

In Trial for Bigamy, It is Error to instruct jury that former wife is presumed to be alive, on legal presumption that fact once shown to exist is presumed to continue in existence.

Approved in People v. Elster (Cal.), 3 Pac. 888, holding instruction in regard to inference of guilty possession of goods recently stolen is improper influence of jury by court.

Burden of Proving and Sufficiency of Evidence of termination of former marriage. See note, 89 Am. St. Rep. 200.

58 Cal. 226–228, PEOPLE v. DALTON.

Liability for Disinterment of Dead Bodies, and actions relating thereto. See note, 42 L. R. A. 734.

58 Cal. 229–231, 41 Am. Rep. 265, VEERKAMP v. HULBURD CANNING ETC. CO.

Contract to Deliver Fruit Crop Considered and held that price for each lot delivered became due and payable upon its delivery.

Approved in Los Angeles Gas etc. Co. v. Amalgamated Oil Co., 156 Cal. 781, 106 Pac. 58, holding that entire contract for sale of oil during period of years with monthly delivery was apportionable with respect to payments for oil actually delivered; Dees v. Self, 165 Ala. 229, 51 So. 737, applying rule to contract for timber which was cut and removed part at a time; Matthews Glass Co. v. Burk, 162 Ind. 614, 70 N. E. 373, holding under contract for delivery of glass in installments at certain discount from prices made by A and plaintiff to have right to cancel contract if price fall ninety per cent below certain list, payments to be made on delivery, price determined by prices of A at receipt and not by subsequent reduction.

58 Cal. 234–237, BANK OF WOODLAND v. HIATT.

Purchaser has Right to Rely upon representations of seller as to facts not within purchaser's knowledge.

Approved in Pott v. Hanson, 109 Minn. 421, 124 N. W. 18, following rule; Brandt v. Krogh, 14 Cal. App. 51, 111 Pac. 280, representations as to oil lands of which buyer was ignorant and relied on by him held to be fraudulent; Togni v. Taminelli, 11 Cal. App. 13, 103 Pac. 902, holding void deed inserted in instrument which was represented to signer to be release only; Eichelberger v. Mills Land etc. Co., 9 Cal. App. 638, 100 Pac. 121, holding purchaser of land had right to rely upon owner's representations as to area; Evans v. Duke (Cal.), 69 Pac. 689, holding false representations of vendor as to area under cultivation and profits he had made therefrom are ground for rescission; Howe v. Martin, 23 Okl. 569, 138 Am. St. Rep. 840, 102 Pac. 131, definite assertion of truth of fact of which party had no knowledge, made to induce sale, held fraudulent; Cleavenger v. Sturm, 59 W. Va. 665, 53 S. E. 595, misrepresentation of material fact, though in slight degree, will defeat specific performance.

Distinguished in Craig v. Wade, 159 Cal. 173, 112 Pac. 891, circular to stockholders of corporation concerning its business held to be of matters of opinion, and one who purchased stock in reliance thereon could not recover on ground of fraud; Price v. Spencer (Cal.), 53 Pac. 1075, holding evidence of intrinsic value of bank stock not admissible in action for false representation as to value thereof, where it had well-known and fixed market value.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 602.

58 Cal. 237–239, WILLIAMS v. SACRAMENTO COUNTY.

Where Notice is Required to be Published at least once a week for four consecutive weeks publication at intervals of eight days is insufficient.

Approved in Reclamation District v. McPhee, 13 Cal. App. 385, 109 Pac. 1107, holding notice published from March 11th to April 3d,

when hearing was April 4th, insufficient under requirement of four weeks' publication next preceding hearing.

58 Cal. 239–240, COULTHURST v. COULTHURST.

Cross-complaint must State Facts Sufficient to entitle pleader to affirmative relief.

Approved in Bacon v. Rice, 14 Idaho, 112, 93 Pac. 512, cross-complaint held insufficient in quiet title suit.

Necessity of Alleging Jurisdictional Residence in divorce proceeding. See note, 12 L. R. A. (n. s.) 1197.

58 Cal. 241–243, FAIRBANKS v. WILLIAMS.

In Action to Recover Damages for Taking and detention of property, plaintiff can only recover fair compensation for time and money properly expended in pursuit of property.

Approved in Lynch v. McGhan, 7 Cal. App. 134, 93 Pac. 1044, holding damages cannot be given under section 3336, and at the same time interest under section 3333, Civil Code.

58 Cal. 245–247, PEOPLE v. TUQUA.

It is Error to Refuse Instruction upon meaning of words "deadly weapon" as used in indictment.

Distinguished in Territory v. West, 4 Ariz. 216, 36 Pac. 208, court need not, in absence of request, define "deadly weapon."

What Weapons may be Considered Deadly under law of homicide and assault. See note, 21 L. R. A. (n. s.) 497, 499.

58 Cal. 249–254, PEOPLE v. FLAHAVE.

It is Error to Instruct Jury That Defendant in murder case is justified in killing assailant only when facts and circumstances make it absolutely necessary.

Approved in People v. Webster, 13 Cal. App. 353, 109 Pac. 639, following rule; People v. Bruggy (Cal.), 26 Pac. 758, reversing judgment for error in instruction in regard to necessity of killing in self-defense; Wilson v. Territory, 7 Ariz. 51, 60 Pac. 698, in passing on question of killing in self-defense, jury must consider circumstances as they "appeared to defendant" at time; Prince v. United States, 3 Okl. Cr. 705, 109 Pac. 243, upholding instructions that, killing being proven, burden is on defense to prove circumstances in mitigation, unless proof by prosecution showed accused was justified.

Papers Purporting to be Instructions Inserted by clerk in record in criminal case cannot be considered unless authenticated by court's instruction.

Cited in State v. Scholfield, 13 N. D. 666, 102 N. W. 879, arguendo.

58 Cal. 256–259, CHRISTY v. FISHER.

One Under Moral or Legal Obligation to pay taxes cannot strengthen his title by purchase at tax sale.

Approved in Brooks v. Garner, 20 Okl. 257, 94 Pac. 702, following rule; Stiles v. Granger, 17 N. D. 508, 117 N. W. 779, holding purchase of land at tax sale by agent authorized to pay taxes operates merely as payment of taxes; Collins v. Hoffman, 62 Wash. 281, 113 Pac. 626, manager of corporation cannot purchase at delinquent tax sale and obtain title without color of fraud as against corporation and its grantee.

Right of Wife to Secure Husband's Property at tax sale. See note, 9 L. R. A. (n. s.) 674.

58 Cal. 260–262, RAMSEY v. FLOURNOY.

Each Party in Contest of Right to purchase state lands must show in his pleading that he has some right to land superior to other parties.

Approved in Moran v. Bonynge, 157 Cal. 297, 107 Pac. 314, holding complaint by intervener in contest of right to purchase land insufficient in failing to show his assignor was qualified to foreclose.

When Defendant is Ruled Out of Land Contest by demurrer to his answer being sustained, his objections to subsequent proceedings cannot be considered.

Reaffirmed in Moran v. Bonynge, 157 Cal. 300, 107 Pac. 315.

Distinguished in Jacobs v. Walker (Cal.), 33 Pac. 91, holding as proper party to contest of right to purchase state land, one in possession of part of it whose application has been adjudged invalid and his right to purchase denied.

Right to Appeal as a Party Interested or injured. See note, 119 Am. St. Rep. 743.

58 Cal. 262–270, PEOPLE v. MORTIER.

Judgment will not be Reversed in criminal case for disqualification of juror discovered after verdict.

Approved in People v. Duncan, 8 Cal. App. 198, 96 Pac. 419, holding objection could not be taken after verdict to substitution of juror; State v. Suttles, 13 Idaho, 99, 88 Pac. 239, record need not show defendant was informed of his right to challenge individual juror before jury is sworn.

Reading of Section of Penal Code as Instruction, held to be instruction given in writing.

Affirmed in State v. Roy, 118 La. 487, 43 So. 60, holding reading portion of charge from published decisions of supreme court is charge given in writing.

58 Cal. 274–279, COSNER v. COLUSA COUNTY.

"Approval" as Used in Statute Defined.

Cited in State v. Rhein, 149 Iowa, 81, 127 N. W. 1081, construing meaning of word "approve."

58 Cal. 281–283, REESE v. HOECKEL.

When Vendor Agreed to Convey Perfect Title to land subject to mortgage, vendee was entitled to specific conveyance of land released from mortgage.

Approved in Clinton v. Shugart, 126 Iowa, 189, 101 N. W. 789, reaffirming rule; Glassman v. Condon, 27 Utah, 467, 76 Pac. 344, vendor warranting perfect title required to tender such title free from encumbrance before suing for purchase money.

58 Cal. 287–289, NEAL v. NEAL.

Witness may be Asked on Cross-examination any question which tends to test his accuracy, veracity or credibility, and court should be especially liberal where witness is party to suit.

Approved in Taggart v. Bosch (Cal.), 48 Pac. 1094, holding it error to exclude on cross-examination of plaintiff question whether he had private accounts with defendant.

Examination of Witnesses to Handwriting by comparison. See note, 63 L. R. A. 170.

58 Cal. 289–303, ELLIS v. TONE.

Every Riparian Proprietor has Equal Right to unimpeded flow in its natural course and to reasonable use of waters flowing in natural channel over his land.

Approved in Lux v. Haggin (Cal.), 4 Pac. 926, following rule; Nielson v. Sponer, 46 Wash. 16, 123 Am. St. Rep. 910, 89 Pac. 156, upper owner cannot deprive lower owner of water by using water by means of ditch so porous that none of the water was returned to stream.

In Action for Damages for Destruction of growing crops, it is proper to admit evidence in regard to what the land would have produced in that year.

Approved in Teller v. Bay etc., Dredging Co., 151 Cal. 214, 90 Pac. 944, 12 L. R. A. (n. s.) 267, holding value of crop destroyed should be determined by deducting from value of probable yield probable cost of producing after time of destruction, and of marketing; Sacchi v. Bayside Lumber Co., 13 Cal. App. 85, 108 Pac. 890, upholding admission of evidence of diminished value of leasehold due to flooding land, in action for damages against one negligently causing flood; Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 66, 91 Pac. 429, on issue of value of crop destroyed, evidence was admissible to show what crops could be produced, average yield of each on similar land, kind of crops destroyed, their stage of growth, and cost of producing and marketing, and market price.

Whole Instructions Should be Taken Together to arrive at its meaning.

Approved in Hayden v. Consolidated Min. etc. Co., 3 Cal. App. 138, 84 Pac. 423, and Nash v. Kreling (Cal.), 56 Pac. 262, both reaffirming rule.

58 Cal. 304–306, LOUIS v. TRISCONY.

In Action Against Survivor of Two Joint Makers of note, plea that note was presented to administrator of decedent's estate and allowed by him is no defense.

Approved in Thompson v. Bank of California, 4 Cal. App. 670, 88 Pac. 990, following rule.

58 Cal. 314–315, FAIRBANK v. HUGHSON.

Competency of Expert Witnesses for comparison of handwriting. See note, 63 L. R. A. 938, 985.

58 Cal. 315–328, NORTH BLOOMFIELD GRAVEL MIN. CO. v. KEYSER.

Prohibition Lies to Restrain Judge from proceeding in action in which he is disqualified by reason of interest, although court has jurisdiction of cause.

Approved in Heilbron v. Campbell (Cal.), 23 Pac. 123, and Forrest Coal Co. v. Doolittle, 54 W. Va. 213, 214, 46 S. E. 239, both following rule; Huntington v. Superior Court, 5 Cal. App. 296, 90 Pac. 145, upholding prohibition to prevent second trial upon charge of murder caused by abortion, although charge is modified to man-

slaughter; People v. Ebey, 6 Cal. App. 772, 93 Pac. 381, holding judge disqualified to hear criminal case by reason of his relation to attorney for defendant; Remy v. Olds (Cal.), 42 Pac. 240, calling qualified judge to sit in court of disqualified judge does not satisfy section 398, Code of Civil Procedure.

Distinguished in Lassen Irr. Co. v. Superior Court, 151 Cal. 362, 90 Pac. 711, refusing prohibition to prevent judge from hearing cause when only sentimental interest was shown; City of Oak Cliff v. State, 97 Tex. 393, 79 S. W. 1068, judge of supreme court who was taxpayer in city not disqualified to pass on question of validity of act requiring city to levy tax.

Writ of Prohibition. See note, 111 Am. St. Rep. 945.

Jurisdiction is the Power to Hear and determine a cause.

Approved in Ex parte Wade, 2 Okl. Cr. 106, 100 Pac. 38, upholding act of 1907, relating to transfer of indictments for misdemeanors to inferior courts having jurisdiction of offense charged therein.

58 Cal. 328, CONNOLLY ETC. CO. v. KEYSER.

Prohibition Lies to Restrain Judge from proceeding in action in which he is disqualified by reason of interest.

Approved in Forrest Coal Co. v. Doolittle, 54 W. Va. 213, 46 S. E. 239, following rule.

58 Cal. 328, MILTON MINING CO. v. KEYSER.

Prohibition Lies to Restrain Judge from proceeding in action in which he is disqualified by reason of interest.

Approved in Forrest Coal Co. v. Doolittle, 54 W. Va. 213, 46 S. E. 239, following rule.

58 Cal. 330–334, BRANNAN v. PATY.

When Facts Which Might be Used as counterclaim are pleaded as defense merely, they will be so treated.

Approved in Regan v. Jones, 14 N. D. 593, 105 N. W. 613, following rule; State v. Coughran, 19 S. D. 277, 103 N. W. 33, averments in answer not treated as counterclaim when not so designated.

58 Cal. 334, DOANE v. WEIL.

Boards or Bodies to Which Power of taxation delegable. See note, 15 L. R. A. (n. s.) 65.

Procedure for Establishment of drains and sewers. See note, 60 L. R. A. 194.

58 Cal. 335–338, ESTATE OF McCARTY.

Objection to Proof of Will not Taken in court below cannot be raised on appeal.

Approved in Evans v. Glencross, 4 Ariz. 226, 36 Pac. 213, defense not pleaded in court below on motion for arrest of judgment cannot be raised on appeal.

58 Cal. 339–341, KENNEDY v. DUNN.

Trustee may Employ Auctioneer to cry sale under the trust.

Reaffirmed in Stockwell v. Barnum, 7 Cal. App. 418, 94 Pac. 402.

Sales Under Powers in Mortgages and trust deeds. See note, 92 Am. St. Rep. 580, 595.

Necessity of Reasonable Price on mortgage sales under powers. See note, 103 Am. St. Rep. 57, 58.

58 Cal. 341–344, METROVICH v. JOVOVICH.

Terms of Undertaking to Release Attached Property under section 565, Code of Civil Procedure, are not complied with by offer to return or by return of portion of attached property.

Approved in Mullaly v. Townsend (Cal.), 61 Pac. 951, holding when attachment was released on undertaking and defendant subsequently mortgaged property, and sheriff released execution because it was claimed by mortgagor, such levy was sufficient demand on defendant to sustain action on undertaking given to release attachment; Jones v. Short, 53 Or. 528, 529, 101 Pac. 211, holding bond not satisfied by delivering part and tendering value of remainder.

58 Cal. 348–355, CHASE v. EVOY.

Motion for New Trial may be Dismissed for Failure to prosecute because statement was not filed in statutory time, but denial of motion is equally proper.

Approved in Descalso v. Duane (Cal.), 33 Pac. 328, holding order both denying and dismissing motion for new trial for failure to prosecute, though somewhat inconsistent, must be considered dismissal.

In Action Against Administratrix, allegation that "claim was duly verified by oath of plaintiff in form prescribed by law" is sufficient against general demurrer.

Approved in Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 311, 90 Pac. 207, upholding sufficiency of allegation that assignment of mortgage by executrix was made "pursuant to order duly made in such estate," in absence of objection in lower court.

Distinguished in Burke v. Maguire, 154 Cal. 463, 98 Pac. 24, holding appellate court may review demurrer upon any ground presented, whether considered in lower court or not.

Counterclaim must be One Existing in favor of defendant and against plaintiff at commencement of action.

Approved in Le Breton v. Stanley Contracting Co., 15 Cal. App. 432, 114 Pac. 1029, in action by bank unaccepted check cannot be set up as counterclaim.

58 Cal. 356, MATTER OF REAL ESTATE ASSOCIATES.

Functions of Receiver Appointed in Involuntary insolvency proceedings are not suspended during appeal from order adjudicating insolvency.

Approved in Morbeck v. Bradford-Kennedy Co., 18 Idaho, 462, 110 Pac. 262, following rule.

58 Cal. 358–360, VON ROUN v. SUPERIOR COURT.

Certiorari Does not Lie to Review Order which court had power to make.

Approved in Matter of Hughes, 159 Cal. 364, 113 Pac. 686, determination by superior court that petition for habeas corpus is sufficient is not reviewable on certiorari.

58 Cal. 361, MUIR v. SUPERIOR COURT.

Defense of Former Adjudication in Contempt Proceedings does not go to jurisdiction so as to be reviewable on certiorari.

Approved in Times-Mirror Co. v. Superior Court, 15 Cal. App. 517, 115 Pac. 248, decision of trial court as to whether another action between same parties was pending not reviewable on certiorari.

58 Cal. 364–373, HENDERSON v. HICKS.

Real Estate Broker's Commissions as affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 604.

58 Cal. 373–378, FISH v. FOWLIE.

Holder of Legal Title of Real Estate may mortgage it.

Approved in North Dakota etc. Cattle Co. v. Serumgard, 17 N. D. 480, 138 Am. St. Rep. 717, 117 N. W. 458, real estate held subject to mortgage made by holder of legal title between act of sale on foreclosure under prior mortgage and expiration of period of redemption.

What Expectant and Contingent Interests in property are subject to attachment or execution. See note, 23 L. R. A. 642.

58 Cal. 382–385, EMMERSON v. WEEKS.

Nonsuit Should not be Granted on opening statement unless it is clearly evident therefrom no cause of action exists.

Reaffirmed in Jordan v. Reed, 77 N. J. L. 589, 71 Atl. 282.

Right to Direct Verdict or Enter Nonsuit on opening statement of counsel. See note, 29 L. R. A. (n. s.) 218.

58 Cal. 387–421, ROSENBERG v. FRANK.

Equity Jurisdiction of District Courts is that administered by high court of chancery in England.

Approved in Bacon v. Bacon, 150 Cal. 485, 89 Pac. 320, and Pasadena v. Superior Court, 157 Cal. 788, 109 Pac. 623, both holding superior courts invested with same equity jurisdiction as district court.

Probate Court has Exclusive Jurisdiction of probate of will.

Approved in McDaniel v. Pattison (Cal.), 27 Pac. 654, holding chancery court has no jurisdiction to probate will, although sought incidentally to main relief.

Legislature cannot Fix Jurisdiction of any but inferior courts.

Reaffirmed in Guardianship of Deisen, 2 Cof. Prob. 466.

Adjudicated Cases are Only Useful in Construction of wills for the establishment of general principles.

Approved in In re Lotzgesell's Estate, 62 Wash. 359, 113 Pac. 1108, following rule; Estate of Granniss, 3 Cof. Prob. 434, construing residuary clause in will.

Trust cannot Fail for want of trustee.

Approved in Estate of Tessier, 2 Cof. Prob. 368.

58 Cal. 426–428, BROWN v. SAN FRANCISCO GAS LIGHT CO.

In Absence of Proof It is Presumed law in another state is same as in this state.

Approved in O'Sullivan v. Griffith, 153 Cal. 507, 95 Pac. 876, Easton v. George Wostenholm & Son, 137 Fed. 530, 70 C. C. A. 108, and Wilhite v. Skelton, 5 Ind. Ter. 630, 82 S. W. 935, all following rule.

Presumption as to Law of Other States. See note, 21 L. R. A. 468.

How Case Determined When Proper Foreign Law not proved. See note, 67 L. R. A. 43, 44.

Oral Proof of Foreign Laws. See note, 25 L. R. A. 449.

58 Cal. 431–435, BEAUCHAMP v. ARCHER.

Contract for Sale of Cattle Considered and held that payment and delivery were concurrent conditions.

Approved in Catlin v. Jones, 48 Or. 162, 85 Pac. 516, where contract required one party to sell the other certain property at specified price, payment and delivery were concurrent acts.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 62,

58 Cal. 443–449, HERROLD v. REEN.

Homestead Right is Creature of statute and subject to change at any time.

Approved in Hannon v. Southern Pac. R. R. Co., 12 Cal. App. 359, 107 Pac. 339, purpose of inserting in section 1265, Civil Code, relating to homestead, "it descends to and vests in survivor," was to make it sure that power to change still remained in the legislature, and that so-called joint estate was not to be considered a vested estate.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 35, 44, 45, 48.

Right of Widow to Convey, Lease, or Encumber Homestead during minority of children. See note, 10 L. R. A. (n. s.) 789.

58 Cal. 457–519, ESTATE OF HINCKLEY.

Only One-third of Testator's Distributable Assets may be devised to charitable uses.

Approved in Estate of Jones, 2 Cof. Prob. 186, following rule; Estate of Dwyer, 159 Cal. 694, 115 Pac. 247, in determining whether devise to charity exceeds one-third of testator's estate, court is not limited to property within its jurisdiction which is so bequeathed, but will consider all property so devised wherever situated; Estate of McLaughlin, 1 Cof. Prob. 83, arguendo.

Conclusiveness on Valuation in inventory. See note, 1 Cof. Prob. 212.

Trusts for Charitable Purposes when relating to real property are not prohibited by title II, part IV, Civil Code.

Approved in Estate of Sutro, 155 Cal. 733, 734, 102 Pac. 922, holding common-law rule as to charitable trusts in force in this state; Spence v. Widney (Cal.), 46 Pac. 466, 467, sustaining trust to found astronomical observatory in connection with university.

Code Prohibits Limitations or Conditions which may suspend power of alienation beyond lives of persons.

Approved in Estate of Spreckels, 5 Cof. Prob. 367, limitation of Civil Code, section 715, against suspension of power of alienation, applies to trusts of personalty or realty.

In Order That There may be Good Trust for charitable use, there must be some public benefit open to an indefinite and vague number; persons to be benefited must be uncertain and indefinite, until selected to be beneficiaries of trust.

Approved in Crow v. Clay County, 196 Mo. 260, 95 S. W. 375, holding bequest for tuition of poor children under sixteen within certain district is charitable bequest.

Distinguished in Estate of Hull, 3 Cof. Prob. 382, bequest to street railroad in trust to be by it invested and income used in purchasing

books and magazines for reading-room of its employees is not public charity.

Direction to Executors to Apply Residue of estate to any charitable or benevolent purpose they might agree upon is inoperative.

Approved in Estate of Sutro, 2 Cof. Prob. 136, reaffirming rule.

Learning is a Charitable Use.

Approved in Estate of Hull, 3 Cof. Prob. 383, bequest to street railroad in trust to be by it invested and income used in purchasing books for employees' reading-room is not public charity.

It is Duty of Executors to Close Administration as soon as debts and expenses are paid and there are persons entitled to possession of estate.

Approved in Estate of Tessier, 2 Cof. Prob. 368, following rule.

Charitable Trusts in Perpetuity are Valid.

Disapproved in Danforth v. Oshkosh, 119 Wis. 306, 97 N. W. 274, rule that power of alienation cannot be suspended for period longer than during two lives in being applies to trusts for charity.

Trust to "Human Beneficence and Charity" held valid in view of context.

Approved in Banner v. Rolf, 43 Tex. Civ. App. 92, 94 S. W. 1127, devise of land to church for site and support of school held sufficiently certain as to object.

Trust for "Beneficence and Charity" is valid on ground that use of word "and" showed beneficence and charity were used synonymously.

Distinguished in Estate of Sutro, 155 Cal. 737, 102 Pac. 923, holding void for uncertainty trust for different objects named in will which were not synonymous and execution of which was placed at discretion of trustees.

Enforcement of General Bequest for charity or religion. See note, 14 L. R. A. (n. s.) 55, 58.

Doctrine of Cy Pres Applies in This State whenever particular object of charitable trusts become impracticable.

Approved in Estate of Peabody, 154 Cal. 179, 97 Pac. 186, following rule; Estate of Hull, 3 Cof. Prob. 385, as to administration of trusts under cy pres doctrine.

Miscellaneous.—Cited in Blair v. Hazzard, 158 Cal. 726, 112 Pac. 300, to point that administration, once suspended, may be completed where it has been resumed merely to enter decree of distribution giving security to title; Hinckley v. Stebbins (Cal.), 29 Pac. 53, referring historically to principal case.

58 Cal. 519, WARD v. SUPERIOR COURT.

Bond on Appeal from Justice Court is not void because in excess of amount required.

Approved in Edwards v. Superior Court, 159 Cal. 714, 115 Pac. 650, bond on appeal from justice's court from money judgment, in sum of over one hundred dollars and conditioned for payment of costs on appeal, confers jurisdiction on superior court, though it also purports to stay execution; Pacific Window Glass Co. v. Smith, 8 Cal. App. 767, 97 Pac. 900, and Thomas, Jr., v. Hawkins, 12 Cal. App. 333, 107 Pac. 580, both holding appeal perfected by cash deposit in lieu of undertaking, although in excess of amount required; Edmonston v. Steele, 12 Idaho, 617, 87 Pac. 678, bond given on ap-

peal from justice's court held good as appeal bond though not sufficient to stay execution.

58 Cal. 520, MURPHY v. SUPERIOR COURT.

Prohibition Does not Lie to Stop Trial on information for assault with intent to commit murder, on ground that examining magistrate did not examine on oath the prosecutor or other witnesses, remedy being by appeal.

Approved in State v. Morse, 27 Utah, 338, 75 Pac. 740, following rule; Western Meat Co. v. Superior Court, 9 Cal. App. 544, 99 Pac. 978, refusing prohibition to stop trial of corporation on criminal indictment on ground it was not legally committed, where remedy was by appeal.

Writ of Prohibition. See note, 111 Am. St. Rep. 956.

58 Cal. 521–527, COFFEY v. EDMONDS.

Scope and Effect of Election Law provisions for preserving ballots. See note, 30 L. R. A. (n. s.) 605.

58 Cal. 527–529, WILLIAMS v. McDONALD.

Printed Signature may be Adopted as one's own.

Approved in Hewel v. Hogin, 3 Cal. App. 254, 84 Pac. 1006, and Hewel v. Hogin (Cal. App.), 84 Pac. 1004, both following rule; Ardery v. Smith, 35 Ind. App. 97, 73 N. E. 841, typewritten signature to remonstrance against issuance of liquor license is sufficient.

Signing by Proxy. See note, 22 L. R. A. 301.

Point not Made in Court Below cannot be considered in appellate court for first time.

Reaffirmed in Yaeger v. Southern Cal. Ry. Co. (Cal.), 51 Pac. 193.

58 Cal. 530–533, ESTATE OF MARTIN.

Date is Essential to Validity of Holographic Will.

Approved in Estate of Price, 14 Cal. App. 464, 112 Pac. 483, where blanks for day and month were left unfilled, will was void; In re Noyes' Estate, 40 Mont. 198, 105 Pac. 1019, 26 L. R. A. (n. s.) 1145, printed date "190–" in holographic will renders it void.

Holographic Wills. See notes, 104 Am. St. Rep. 28; 1 Cof. Prob. 432, 437.

Recital in Holographic Will That Testator is of age of sixty years does not constitute a date.

Approved in Estate of Fay, 1 Cof. Prob. 429, denying probate to holographic will which by mistake bears date twenty-eight years prior to time of its execution.

58 Cal. 533–536, PRATT v. CRANE.

Government Patent for Land Listed and patented by state to another is void.

Distinguished in Blakeley v. Kingsbury, 6 Cal. App. 713, 93 Pac. 132, applicant to purchase public land cannot, by making complete payment, prevent contest so as to become real owner and render state trustee of legal title.

58 Cal. 537–538, SANTA ROSA v. COULTER.

Farm Lands Included in City Limits are subject to municipal taxation.

Approved in Atherton v. Village of Essex Junction, 83 Vt. 226, 74 Atl. 1121, following rule.

Municipal Taxation of Rural Lands. See note, 34 L. R. A. 196.

Power of Legislature to Annex Territory to municipalities. See note, 27 L. R. A. 741.

58 Cal. 553–555, CHAPMAN v. POLACK.

Miscellaneous.—Cited in Chapman v. Polack (Cal.), 5 Pac. 232, affirming judgment on authority of principal case.

58 Cal. 556–558, WATSON v. HIS CREDITORS.

When Title to Homestead Declared During Joint Life of spouses is decreed by law to pass absolutely to survivor, no order of probate court can make it joint property of husband and children.

Approved in Hoppe v. Hoppe (Cal.), 36 Pac. 393, holding order setting apart homestead to wife cannot devest minor children of interest belonging to minors under section 1468, Code of Civil Procedure.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 44.

58 Cal. 558–561, PEOPLE ex rel. PENNIE v. RANSOM.

Act of 1880, Amending Sections 84, 103, and 110, Code of Civil Procedure, relating to justices' courts, is valid.

Approved in Ex parte Fedderwitz (Cal.), 62 Pac. 936, holding city of Berkeley entitled to one justice of peace as being city of over ten thousand inhabitants.

Who are Public Officers. See note, 17 L. R. A. 249.

58 Cal. 561–572, WOOD v. BOARD OF ELECTION COMMISSIONERS.

City and County of San Francisco is continuation of municipal corporation known as city of San Francisco.

Approved in Kahn v. Sutro, 114 Cal. 321, 46 Pac. 89, holding territory of city and county of San Francisco is in political and judicial relations to other parts of state a county, and its officers are county officers in so far as they exercise powers given by general laws relating to counties.

When General Act Makes No Reference to Special Acts relating to same matter, such special acts are not affected by provisions of general statute repugnant thereto.

Approved in dissenting opinion in Houston & Tex. Cent. Ry. Co. v. Texas, 95 Tex. 533, 68 S. W. 788, majority construing together two acts passed at same session of legislature.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 285.

Statutes of General Nature do not impliedly repeal special municipal charters.

Approved in Boise City Nat. Bank v. Boise City, 15 Idaho, 802, 100 Pac. 96, act of 1905, relating to street and sewer bonds does not apply to cities incorporated under special charters.

58 Cal. 572–576, BISHOP v. OAKLAND.

Section 103, Code of Civil Procedure, relating to election of justices of peace in cities, is a general law, and city is bound to provide suitable office for justice.

Approved in Ex parte Fedderwitz (Cal.), 62 Pac. 936, holding city of Berkeley entitled to elect one justice, as being city of more than ten thousand inhabitants; dissenting opinion in Graham v. Fresno, 151 Cal. 474, 91 Pac. 150, majority holding Code of Civil Procedure does not apply to Fresno in view of charter provision for inferior courts.

Distinguished in Fleming v. Hance, 153 Cal. 165, 94 Pac. 621, holding void statute creating police court in Los Angeles in so far as it provides for payment of prosecuting attorney therein from city treasury; Graham v. Fresno, 151 Cal. 469, 91 Pac. 148, holding legislature has no power to direct appropriation of city funds for payment of justice of peace in city having inferior court under charter.

Who are Public Officers. See note, 17 L. R. A. 249.

58 Cal. 576–578, **JENKS v. OAKLAND.**

Section 103, Code of Civil Procedure, relating to election of justices of peace in cities is general law, and city must pay salary of justice elected thereunder.

Approved in Nicholl v. Koster, 157 Cal. 420, 108 Pac. 304, holding city and county of San Francisco liable for payment of salary of probation officer of juvenile court acting under law of March 8, 1909; dissenting opinion in Graham v. Fresno, 151 Cal. 474, 91 Pac. 150, majority holding section 103, Code of Civil Procedure, does not apply to city of Fresno in view of charter provisions for inferior courts.

Distinguished in Fleming v. Hance, 153 Cal. 165, 94 Pac. 621, holding void statute creating police court in Los Angeles in so far as it provides for payment of salary of prosecuting attorney from city treasury; Graham v. Fresno, 151 Cal. 469, 91 Pac. 148, under constitutional amendment of 1896 to article XI, legislature cannot provide for payment of salary of justice of peace by city which has charter inferior courts.

58 Cal. 578–581, **HANDLEY v. FIGG.**

Exception to Decision on Ground that it is not supported by evidence cannot be reviewed on appeal from judgment unless taken within sixty days from its rendition.

Approved in People v. Jones (Cal.), 70 Pac. 1063, following rule; In re Rose's Estate (Cal.), 20 Pac. 712, holding appeal from decree settling administrator's account taken within statutory time after entry of decree but not within sixty days from decision and filing of findings is not in time to present question of sufficiency of evidence.

58 Cal. 581–585, **CASHIN v. DUNN.**

Fixed Salaries must be Paid Out of general fund of city and county of San Francisco in preference to all other demands, and "One-twelfth Act" of 1878 does not apply to auditing and payment of demands of salaried officers whose appointment is provided for and salary fixed by law.

Approved in Harrison v. Horton, 5 Cal. App. 418, 90 Pac. 717, holding provision of San Francisco charter forbidding auditor to draw warrants except upon unexhausted specific appropriation has

no application to salary of officer fixed by ordinance under authority of charter.

What Constitutes "Indebtedness" of Municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 405.

58 Cal. 585–589, DYER v. MILLER.

Petition of Property Owners is Essential to authority of supervisors to order grading of street.

Approved in Wilcox v. Engebretsen, 160 Cal. 292, 116 Pac. 751, Statutes of 1891, page 116, as amended in 1893, relating to change of street grades, does not make order of council changing street grade conclusive of sufficiency of petition therefor; Hawkins v. Horton, 91 Minn. 289, 97 N. W. 1054, holding void proceedings for local improvements not based on petition signed by majority of property holders.

58 Cal. 590–596, MARTIN v. WALKER.

Cotenant Out of Possession may Maintain Action in partition against tenant in possession whose possession is adverse and hostile.

Approved in Buhrmeister v. Buhrmeister, 10 Cal. App. 395, 102 Pac. 222, holding tenant in common, owning share of inheritance and in possession under lease may maintain partition against owner of residue of estate; Varni v. Devoto, 10 Cal. App. 307, 101 Pac. 935, partition may be maintained by equitable owner of undivided interest in property; Adams v. Hopkins (Cal.), 69 Pac. 230, rights of adverse occupants may be determined in partition; Noce v. Daveggio (Cal.), 4 Pac. 496, holding conveyance to plaintiff vesting in him an undivided interest in land and making him tenant in common with defendant entitled him to partition; Denton v. Fyfe, 65 Kan. 4, 93 Am. St. Rep. 272, 68 Pac. 1075, tenant in common out of possession cannot maintain suit for partition against cotenants who hold adversely, without joining cause of action for possession of land.

Right of One Out of Possession to partition. See note, 20 L. R. A. 629.

Proceeding in Partition is One in which rights of all parties may be fully inquired into and finally determined.

Approved in Baca v. Anaya, 14 N. M. 393, 395, 94 Pac. 1021, parties in possession of land under earlier grant entitled to intervene to quiet title in action to partition same land pending between cotenants under later grant.

58 Cal. 596–599, SHINN v. MacPHERSON.

Lien for Purchase Money of Homestead. See note, 86 Am. St. Rep 176, 182.

58 Cal. 600–605, FARMERS' NAT. GOLD BANK v. WILSON.

Holder of Corporate Stock for Value by previous unregistered transfer in good faith prevails against attaching creditor of his vendor or execution purchaser who takes with notice of the transfer.

Approved in National Bank of the Pacific v. Western Pac. Ry. Co., 157 Cal. 577, 580, 108 Pac. 678, 679, upholding rights of vendee of corporate stock over attachment for debt of vendor levied prior to transfer on books of corporation; Mapleton Bank v. Standrod, 8

Idaho, 749, 71 Pac. 121, 67 L. R. A. 656, unregistered transfer of stock as pledge has preference over subsequent attachment thereof in favor of creditor of assignor of stock.

Validity of Pledge of Other Transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers. See note, 67 L. R. A. 662.

58 Cal. 605–608, NICHOLS v. DUNPHY.

Judgment may be Reversed as to one defendant and left in force as to others.

Approved in Zibbell v. Southern Pacific Co., 160 Cal. 248, 116 Cal. 518, reaffirming rule; Redwood City Salt Co. v. Whitney, 153 Cal. 424, 95 Pac. 886, reversing judgment against a partnership and against a member thereof individually as to individual member only; Fowden v. Pacific Coast Steamship Co., 149 Cal. 155, 157, 86 Pac. 180, holding new trial may be granted as to one of two joint tort-feasors against whom judgment was rendered, without disturbing verdict and judgment as to other; St. John v. Andrews Institute, 192 N. Y. 386, 85 N. E. 144, reversal of several judgment as to party appealing does not inure to benefit of party not appealing; Shreeder v. Davis, 43 Wash. 134, 86 Pac. 199, joint judgment against two persons for tort, though reversed as to one appealing therefrom held good as to other who did not appeal.

As to Whether Judgment Against Tort-feasors may be set aside as to some and allowed to stand as to others. See note, 27 L. R. A. (n. s.) 212.

There can be but One Verdict for a Single Sum against two or more joint tort-feasors.

Approved in Marriott v. Williams, 152 Cal. 711, 125 Am. St. Rep. 87, 93 Pac. 878, following rule.

58 Cal. 608–616, COLLINS v. TOWNSEND.

Pleading must be Taken Most Strongly against pleader.

Reaffirmed in Witham v. Blood, 124 Iowa, 698, 100 N. W. 559.

Person Desiring to Rescind Contract because of fraud must, as far as possible, restore parties to former condition within reasonable time.

Approved in McGue v. Rommel, 148 Cal. 548, 83 Pac. 1003, upholding instruction that rescission for mistake must be made promptly upon knowledge of mistake.

58 Cal. 617–618, BAKER v. SNYDER.

Affidavits Used on Motion cannot be Considered on appeal from order given unless certified by clerk as so used.

Approved in Wilkes v. Tibbets (Cal.), 31 Pac. 609, refusing to consider on appeal affidavits not certified by clerk.

58 Cal. 624–659, PEOPLE v. PARKS.

Clear and Substantial Conflict between statute and constitution must be found to justify condemnation of statute.

Approved in Pioneer Irr. Dist. v. Bradley, 8 Idaho, 319, 101 Am. St. Rep. 201, 68 Pac. 297, upholding act, Session Laws of 1901, page 191, amending act providing for irrigation districts, as not embracing more than one general subject.

Act of April 23, 1880, to Promote Drainage, is void as embracing more than one subject under its title.

Approved in Doane v. Weil, 58 Cal. 334, following rule; Miller v. Dunn (Cal.), 11 Pac. 604, holding unconstitutional act of legislature providing for payment of indebtedness incurred under act to promote drainage.

Numerous Provisions Having One General Object fairly indicated by the title of a legislative act may be united therein.

Approved in Murphy v. Bondshu, 2 Cal. App. 252, 83 Pac. 280, holding act of March 23, 1901, amending Political Code in relation to taxes and revenue, is not unconstitutional as embracing more than one subject in its title; Robinson v. Kerrigan, 151 Cal. 51, 121 Am. St. Rep. 90, 90 Pac. 133, holding Torrens Act of March 17, 1897, is not unconstitutional as embracing therein subjects not expressed in title.

Legislature has No Power to Create Board composed of executive officers and delegate to it legislative duties.

Approved in United States v. Grimaud, 170 Fed. 212, holding void act of June 4, 1897, making it criminal offense to violate any rule or regulation thereafter made by Secretary of Interior under power therein conferred, since it attempted to give to such secretary power to determine what act should constitute a crime.

Boards or Bodies to Which Power of taxation delegable. See note, 15 L. R. A. (n. s.) 65.

Procedure for Establishment of drains and sewers. See note, 60 L. R. A. 194.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 59 CALIFORNIA.

59 Cal. 6–20, 43 Am. Rep. 231, EX PARTE BURKE.

Unless a Different Intention Clearly Appears, statutes are prospective and not retroactive in their operation.

Approved in In re Cole, 12 Cal. App. 292, 107 Pac. 582, amendment to Constitution by adding section 25½ of article IV did not repeal or affect prior county ordinance.

Constitutionality of Sunday Law. See note, 22 L. R. A. 721, 723.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

59 Cal. 20–21, REYNOLDS v. LEWIS.

Tenant is Estopped from denying title of landlord under whose permission he occupies land.

Approved in Ashton v. Golden Gate Lumber Co. (Cal.), 58 Pac. 3, where lessor was authorized under deed of trust to lease for life of beneficiary, in action for rents accrued after death of beneficiary, lessee could not deny lessor's title.

59 Cal. 22–26, SEELEY v. SAN JOSE INDEPENDENT MILL ETC. CO.

Officer Authorized to Transact Business for a corporation may do all acts incidental thereto.

Approved in Preston v. Central Cal. etc. Inv. Co., 11 Cal. App. 201, 104 Pac. 466, managing agent of a corporation may perform for such corporation any act within the ordinary affairs of the corporation.

Powers of President and Vice-president of corporation. See note, 14 L. R. A. 358.

One Assenting to Payment of his debt by another cannot repudiate indebtedness on ground of invalidity of original debt.

Approved in Laidlaw v. Pacific Bank (Cal.), 67 Pac. 899, applying rule in action brought by creditor of a bank for money expended for its benefit at its request.

Directors may Sue Corporation for services performed or money advanced for benefit of corporation.

Approved in Shively v. Eureka Tellurium Min. Co., 5 Cal. App. 244, 89 Pac. 1076, upholding rule where finding of lower court that directors were regularly elected was supported by evidence.

Validity of Contract between director and his corporation. See note, 139 Am. St. Rep. 612.

59 Cal. 26–28, FERRY v. HAMMOND.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 339.

59 Cal. 28–33, 43 Am. Rep. 239, STURGIS v. GALINDO.

Equity will not Decree That One Party specifically perform contract which other party may at his option abandon.

Approved in Kolachny v. Galbreath, 26 Okl. 778, 110 Pac. 905, applying rule to lease of land for purpose of operating for oil and gas, which reserved right in lessee to terminate same upon notice, where lessor afterward sold the land and his grantee made new lease with other parties.

Mutuality as Condition of Right to specific performance of continuing contract. See note, 6 L. R. A. (n. s.) 393.

Court is Without Power to Order specific performance of a contract uncertain in its terms.

Approved in Marsh v. Lott, 8 Cal. App. 393, 97 Pac. 166, option to purchase was too uncertain as to how balance of seventy thousand dollars was to be paid, and as to protection from default in payment of taxes, to be specifically enforced.

59 Cal. 37–51, JANIN v. BROWNE.

Where Executory Contract is of a Personal Nature, death of party who is to act under it determines the contract.

Approved in Barrett v. Towne, 196 Mass. 491, 82 N. E. 700, 13 L. R. A. (n. s.) 643, where a testator employed counsel to defend his brother from beginning to end, he intended to bind his personal representatives, and contract survived him; Mills v. Smith, 193 Mass. 17, 78 N. E. 768, 6 L. R. A. (n. s.) 865, contract by which one was to take entire charge of land of another with right to make sales binding on his executors was not violative of law against perpetuities; Macdonald v. O'Shea, 58 Wash. 174, 108 Pac. 438, obligation of a building contract survived the contractor and was binding on his estate; Mendenhall v. Davis, 52 Wash. 173, 100 Pac. 338, 21 L. R. A. (n. s.) 914, applying rule to contract of a deceased dentist, who had agreed to render personal services as part consideration for a debt.

Effect on Contract of Death of Party. See note, 23 L. R. A. 709.

Agency Unless Coupled With an Interest is revocable at any time.

Approved in Blumenthal v. Goodall (Cal.), 25 Pac. 132, upholding right of owner of land to revoke authority of agent to sell at any time before complete performance on part of agent.

59 Cal. 52–57, BRADY v. PAGE.

Courts Take Judicial Notice of Streets, of their boundaries, and relation to each other.

Approved in Pacific Paving Co. v. Verso, 12 Cal. App. 365, 107 Pac. 591, reaffirming rule; Stanley v. Kansas City, 179 Mo. 407, 78

S. W. 600, court will not take judicial notice that road outside of city limits is within five miles thereof.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 444.

59 Cal. 64–76, McBROWN v. MORRIS.

Public Lands in Possession of One Party are not subject to preemption or homestead settlement by another.

Approved in Bishop v. Glassen (Cal.), 12 Pac. 258, reaffirming rule; Gragg v. Cooper, 150 Cal. 586, 89 Pac. 346, land actually possessed by one without any other right is not subject to entry by another; Nash v. McNamara, 30 Nev. 134, 133 Am. St. Rep. 694, 93 Pac. 408, 16 L. R. A. (n. s.) 168, applying rule in contest between a mining claim located upon ground covered by prior location, and a subsequent location made upon same ground after expiration of time for doing required work on first claim.

59 Cal. 79–89, HOWARD v. THROCKMORTON.

Under a Contract of Agistment, agister takes charge and control of animals.

Approved in Williams v. Miller (Cal.), 6 Pac. 14, contract to grant use of land for pasturing all cattle it is capable of grazing, but not less than three thousand head, calls for payment for three thousand head or more.

Liability of Cotenants to Account for use and occupation and rents and profits. See note, 28 L. R. A. 837.

59 Cal. 89–91, PEOPLE v. PFEIFFER.

A Party Aggrieved Means One Prejudiced by the judgment.

Approved in Washington County Abstract Co. v. Stewart, 9 Idaho, 381, 385, 74 Pac. 957, party aggrieved, though not named in body of suit or title of action, is entitled to appeal.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 751.

Intervener's Time to Appeal runs from time complaint in intervention is stricken out.

Approved in More v. Miller (Cal.), 53 Pac. 1078, following rule; Dollenmayer v. Pryor, 150 Cal. 3, 87 Pac. 617, in land contest referred by surveyor general to superior court, order denying one who claimed to be settler right to intervene was final; Thorpe v. North Moneta etc. Water Co., 12 Cal. App. 187, 106 Pac. 1107, order denying leave to file complaint in intervention is a final judgment.

Intervention. See note, 123 Am. St. Rep. 314.

59 Cal. 91–94, SWANGER v. MAYBERRY.

Illegality Vitiates Contracts of every description.

Approved in Holland v. Sheehan, 108 Minn. 364, 122 N. W. 2, 23 L. R. A. (n. s.) 510, contract by which layman agreed to find and bring to lawyer, persons having cause of action against railroad companies, in consideration of a division of fees, is void; Glass v. Basin & Bay State Min. Co., 31 Mont. 31, 32, 77 Pac. 304, contract providing that certain persons should be officers of corporation until its business should be in successful operation was void; Combs v. Miller, 24 Okl. 578, 103 Pac. 590, applying rule in action on a promis-

sory note given for right of possession only of a tract of land on which plaintiff was a trespasser; McLaughlin v. Ardmore L. & T. Co., 21 Okl. 176, 95 Pac. 780, where consideration for promissory note was deed of land from payee to payor in the unlawful possession of payee, contract was void.

Validity of Contracts in Business which it is misdemeanor to transact. See note, 12 L. R. A. (n. s.) 578, 580, 581, 586.

59 Cal. 94–96, BIDDLE v. OAKS.

Validity of Statute Subjecting to Doom of assessor a taxpayer failing to furnish list of property. See note, 24 L. R. A. (n. s.) 390.

59 Cal. 97–99, SILVEY v. NEARY.

A Finding Contrary to Facts admitted by the pleadings renders the judgment erroneous.

Approved in California Ins. Co. v. Schindler (Cal.), 1 Pac. 476, where undertaking was admittedly given as a condition to continuance of injunction, finding that it was given in place of former undertaking was erroneous; State v. Stockwell, 28 Ind. App. 535, 63 N. E. 322, ward not bound by order of court that guardian be given credit for balance in his hands and discharged from his trust, made upon his petition that estate of ward be turned over for purpose of caring for ward.

59 Cal. 99–100, BAUDER v. TYRREL.

Reversal of Judgments. See note, 96 Am. St. Rep. 130.

59 Cal. 107–113, SONOMA VALLEY BANK v. HILL.

Possession of Pledged Property does not suspend right to proceed against pledgor personally for debt.

Approved in Jones v. Evans, 6 Cal. App. 91, 91 Pac. 534, indorsee of notes has right of personal action against maker, notwithstanding he holds security pledged by payee; People's Home Sav. Bank v. Sadler, 1 Cal. App. 198, 81 Pac. 1033, provision in by-laws of bank giving it lien on shares of stockholders for unpaid calls does not prevent suit for collection of indebtedness without foreclosure of lien.

59 Cal. 113–117, BIGGINS v. CHAMPLIN.

Acquiescence in Agreed Boundary Line, for period longer than that prescribed by statute of limitations, establishes its correctness.

Distinguished in Smith v. Robarts (Cal.), 9 Pac. 105, where coterminous owners both recognized that the division line was a mutual mistake.

59 Cal. 117–119, ELLIOTT v. FIGG.

Upon Death of Pre-emptor Before Final Payment, pre-emption claim survives only for the benefit of his heirs.

Approved in Polk v. Sleeper, 158 Cal. 635, 112 Pac. 181, where application to purchase state land has never been approved and applicant commenced contest for purchase of land and he dies pending contest, action abates.

Distinguished in Cooper v. Wilder (Cal.), 41 Pac. 27, one who entered on land under timber culture act had an equitable interest in the land he could pass by devise.

59 Cal. 119–129, 43 Am. Rep. 242, GOWER v. ANDREW.

Agent cannot Use Information he obtains in course of his agency, for purpose of buying for himself.

Approved in American Circular Loom Co. v. Wilson, 198 Mass. 207, 126 Am. St. Rep. 409, 84 N. E. 137, applying rule to employee of manufacturer who, while acting as director, learned his employer wished to acquire a patent, and secretly purchased the patent.

Rights of Employer and Employee with respect to things produced by labor of employee. See note, 5 L. R. A. (n. s.) 1173.

59 Cal. 131, ESTATE OF BULMER.

An Association Charged With the Performance of state functions is a public corporation.

Approved in People v. San Joaquin Valley Agricultural Assn., 151 Cal. 805, 91 Pac. 744, district agricultural association organized under act of April 15, 1880, is a public corporation; Los Angeles School Dist. v. Longden, 148 Cal. 382, 83 Pac. 247, city school district comprising territory of city and additional land is a separate corporate entity not merged in that of city.

59 Cal. 132–135, CERF v. OAKS.

Right to Attach Property in Hands of assignee for creditors. See note, 26 L. R. A. 596.

59 Cal. 142–148, ZUCK v. CULP.

In Cases of Trust, the Statute of Limitations does not commence to run until demand.

Approved in Spencer v. Duncan (Cal.), 40 Pac. 549, in action to compel accounting of money placed in defendant's hands for investment, there was no sufficient denial of trust to put statute in operation.

Limitation of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 486.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 473.

59 Cal. 148–149, EDWARDS v. SONOMA VALLEY BANK.

Sale of Personal Property not accompanied by immediate delivery is void as to attaching creditors, though delivered before levy.

Disapproved in Western Mining Supply Co. v. Quinn, 40 Mont. 162, 135 Am. St. Rep. 612, 105 Pac. 733, sale of goods, though not accompanied by immediate delivery, is not void as to attaching creditor, if buyer takes possession before suit is commenced.

As to Whether Presumption of Fraud flowing from retention of chattel by vendor may be overcome. See note, 24 L. R. A. (n. s.) 1143.

Taking Possession Before Attachment of Right or lien of person attacking sale of chattels, as curing failure to take immediate possession. See note, 28 L. R. A. (n. s.) 215.

Finding of Ultimate Fact controls probative facts not inconsistent therewith.

Approved in Bryan v. Tormney (Cal.), 21 Pac. 726, applying rule in action to quiet title where finding as to defendant's chain of title was not necessarily inconsistent with plaintiff's ownership.

59 Cal. 154–168, 43 Am. Rep. 245, PALMTAG v. DOUTRICK.

Tenant Disturbed in His Occupation by one claiming paramount title to his lessor may surrender possession.

Approved in Ashton v. Golden Gate Lumber Co. (Cal.), 58 Pac. 4, where plaintiff was authorized under deed of trust to execute lease for life of beneficiary, undisturbed tenant cannot deny plaintiff's right to rents accruing after death of beneficiary.

Pledgee Undertakes to Return Property pledged when obligation is paid.

Approved in Bell v. California, 153 Cal. 240, 94 Pac. 892, complaint for redemption of property pledged was insufficient in failing to allege tender of amount secured by pledge.

Wrongful Recovery by Pledgor of thing pledged does not devest pledgee of lien.

Approved in Voss v. Chamberlain, 139 Iowa, 572, 130 Am. St. Rep. 331, 117 N. W. 270, 19 L. R. A. (n. s.) 106, reaffirming rule; Castle v. Hickman (Cal.), 41 Pac. 1037, where life insurance policy held as security for payment of note was delivered to maker on condition paid-up policy to be issued would be delivered in lieu thereof, lien was not affected.

59 Cal. 168–179, AMADOR ETC. MIN. CO. v. MITCHELL.

Judgments are Impeachable Only for Such Frauds as were not before the court.

Approved in Justis v. Georgia Industrial Co., 109 Va. 370, 63 S. E. 1085, condemnation decree obtained by city under secret arrangement with a private corporation to convey the land condemned to it was void for fraud.

Bailee Sued by Bailor can Only Set Up title in third person by authority of such person.

Approved in Bondy v. Amer. Transfer Co., 15 Cal. App. 739, 115 Pac. 966, this estoppel applies to title of owner who had intrusted the goods to bailor.

59 Cal. 181–183, HEINLEN v. MARTIN.

Decision on Former Appeal Becomes Law of the case for all subsequent proceedings in it.

Approved in Gaffey v. Mann, 5 Cal. App. 714, 91 Pac. 173, judgment on former appeal allowing counsel fees to prevailing party in action for slander has become law of the case; Hall v. Blackman, 9 Idaho, 559, 75 Pac. 609, all questions presented were decided on former appeal.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 328.

59 Cal. 183–188, SAN JOSE SAVINGS BANK v. STONE.

Evidence of Contemporaneous Parol Agreement that note was payable at time other than according to its terms is inadmissible.

Approved in Carver v. San Joaquin Cigar Co., 16 Cal. App. 768, 118 Pac. 95, where consideration of note is admitted, maker could not defend on ground that it was agreed between parties that note should not be paid and that it was given merely to close payee's account against maker; dissenting opinion in Wright v. Beeson, 159 Cal. 141, 112 Pac. 1094, to point that parol evidence is inadmissible of oral

agreement contemporaneous with execution of note, that note was not payable at time mentioned therein.

Contemporaneous Agreements and their breach as defense to note. See note, 43 L. R. A. 450.

59 Cal. 194–197, WIARD v. BROWN.

Court of Equity may Order invalid contract to be delivered up and canceled.

Approved in Merk v. Bowery Min. Co., 31 Mont. 309, 78 Pac. 523, upholding complaint seeking to remove cloud from plaintiff's title by canceling contract giving option to purchase.

59 Cal. 197–206, CHIDESTER v. CONSOLIDATED DITCH CO.

No One is Responsible for an act of God or inevitable accident.

Approved in The Salton Sea Cases, California Development Co. v. New Liverpool Salt Co., 172 Fed. 819, 97 C. C. A. 214, where flood resulted from the negligent construction by irrigation company of intakes from Colorado river into its canal, it was not relieved from liability by fact that flood was extraordinary.

Negligence is a Question for the Jury if different conclusions can rationally be drawn from the evidence.

Approved in Payne v. Oakland Traction Co., 15 Cal. App. 148, 113 Pac. 1082, applying rule in action by motorman for injuries sustained by descending into pit of car-barn to assist car repairer in fixing brakes; Paolini v. Fresno Canal etc. Co., 9 Cal. App. 8, 97 Pac. 1133, in action for damages to land from unnecessary seepage, there were enough facts and circumstances to take from court right to direct a verdict; Mugford v. Atlantic etc. Co., 7 Cal. App. 675, 95 Pac. 675, action for damages by experienced employee injured through operation of pile-driver, whose danger was obvious, was properly nonsuited on ground of contributory negligence; dissenting opinion in Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, majority holding railroad company was not liable for injury to one, unseen by officers of train, asleep on track.

Owner of Ditch is Liable for damages to others resulting from his negligent maintenance of same.

Approved in Fleming v. Lockwood, 36 Mont. 393, 122 Am. St. Rep. 375, 92 Pac. 965, 14 L. R. A. (n. s.) 628, where there was no proof of negligence, ditch owner was not insurer against damage to neighbor; Howell v. Big Horn Basin Colonization Co., 14 Wyo. 36, 81 Pac. 790, applying rule to one who constructed an irrigation canal and in connection therewith a basin for storing water, and erected spills which drained water from basin onto land of another.

Liability of Water Companies. See note, 81 Am. St. Rep. 492.

Negligence in Storing or Confining Water which escapes and causes damage. See note, 1 L. R. A. (n. s.) 602.

Stenographers' Notes as Evidence and right to read them to jury. See note, 81 Am. St. Rep. 361.

59 Cal. 206–243, MULLIGAN v. SMITH.

Finding of a Municipal Board as to its jurisdiction to act is not conclusive of that fact.

Approved in Wilcox v. Engebretsen, 160 Cal. 292, 294, 296, 116 Pac. 751, 752, 753, under General Laws of 1909, Act 3930, section 38,

order of council directing change of grade is not conclusive adjudication that sufficient petition by majority of owners had been filed; Denver v. Londoner, 33 Colo. 121, 80 Pac. 122, upholding finding as to matter not inherently jurisdictional, and authorized by charter to be made in the manner it was; Farr v. Detroit, 136 Mich. 204, 206, 99 N. W. 21, 22, denying relief in action to restrain collection of assessment, where one benefited by street work had knowledge of the work and made no objection until completed, though city council had no jurisdiction to proceed.

Distinguished in Union Trust Co. v. State of California, 154 Cal. 723, 724, 9 Pac. 186, 24 L. R. A. (n. s.) 1111, Montgomery avenue bonds issued under act of April 1, 1872, created no contractual liability on part of state to holders of such bonds; State v. Superior Court, 47 Wash. 14, 91 Pac. 242, where, under statute, county commissioners had authority to pass on petition for establishment of road, their determination cannot be collaterally attacked.

Municipal Board cannot Take Valid Action until at least majority of foot frontage is represented in petition for street work.

Approved in Morse v. City of Omaha, 67 Neb. 431, 435, 437, 93 N. W. 736, 737, 738, holding in action to enjoin collection of special taxes and assessments for repaving, petition was not signed by owners of majority of foot frontage.

When Act of Officer of Corporation does not fall within ordinary scope of his powers, no presumption of authority prevails.

Approved in Trephagen v. City of Omaha, 69 Neb. 583, 111 Am. St. Rep. 570, 96 N. W. 250, general manager of corporation organized to yard, feed and take care of cattle, etc., was without authority to sign name of corporation to petition for opening of highway.

Executors of Deceased Owners are not owners authorized to petition for street improvements.

Approved in City of Sedalia v. Montgomery, 227 Mo. 28, 109 Mo. App. 220, 88 S. W. 1020, administrator acted without authority in signing protest against street improvement.

59 Cal. 243-259, 43 Am. Rep. 257, PEOPLE v. CAMPBELL.

Law Changing Form of Procedure for trial of offenses committed before passage of law is not ex post facto.

Approved in Harris v. United States, 4 Okl. Cr. 318, 111 Pac. 983, law curtailing defendant's peremptory challenges, enacted after commission of offense, is not ex post facto; Hallock v. United States, 185 Fed. 421, and dissenting opinion in Hallock v. United States, 185 Fed. 429, majority applying rule where accused was indicted after admission of Oklahoma as a state, by grand jury drawn under federal statute composed of more members than required by state statute.

Order Setting Aside Indictment is no bar to further prosecution for same offense.

Approved in People v. Disperati, 11 Cal. App. 475, 105 Pac. 619, dismissal of information in the interests of justice, where jury failed to agree, is no bar to another prosecution for same offense.

Evidence of Threats in Prosecution for homicide. See notes, 89 Am. St. Rep. 701; 3 L. R. A. (n. s.) 524.

Right of State to Appeal in a criminal case. See note, 19 L. R. A. 343.

59 Cal. 260–262, ROGERS v. SHAW.

Unauthorized Alteration of Written Instruments. See note. 86 Am. St. Rep. 119.

59 Cal. 262–264, LORENZ v. JACOBS.

Cotenancy in Mines. See note, 91 Am. St. Rep. 888.

59 Cal. 267–268, SMITH v. HIS CREDITORS.

Equity will not Relieve where injury is trifling.

Approved in Ciapusci v. Clark, 12 Cal. App. 53, 106 Pac. 440, applying rule to contract providing for payment of small rental pending removal of standing timber which was fully paid for, from which contract forfeiture clause had been omitted.

Relation of Bankrupt Law to Assignments and insolvent proceedings under state laws. See note, 45 L. R. A. 187.

59 Cal. 269–272, TENNENBROCK v. SOUTH PACIFIC COAST R. R. CO.

The Question of Contributory Negligence is one of law for the court where the evidence is clear as to the facts.

Approved in Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, railroad not liable for injuries to one, unseen by officers of train, asleep on track; Williams v. Southern Pac. R. Co. (Cal.), 9 Pac. 157, in action for injuries received by trespasser asleep on track, nonsuit was properly granted.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 526, 552.

59 Cal. 273–274, PFISTER v. WADE.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 341.

Miscellaneous.—Cited in Pfister v. Wade, 69 Cal. 136, 10 Pac. 370, on subsequent appeal.

59 Cal. 274–275, DESMOND v. SUPERIOR COURT.

By Pleading to the Merits, objection to process is waived.

Disapproved in Fisher v. Crowley, 57 W. Va. 319, 50 S. E. 424, defect in summons is not waived by proceeding to trial after an adverse ruling on motion to quash and exception taken thereto.

Contest on Merits After Special Appearance, as waiver of objections to jurisdiction over person. See note, 16 L. R. A. (n. s.) 180.

59 Cal. 282–283, COOPER v. VIERRA.

Acquiescence in Boundary Line for period longer than that prescribed by statute of limitations establishes its correctness.

Approved in Lonstalot v. McKeel, 157 Cal. 642, 108 Pac. 710, and Adams v. Child, 28 Nev. 185, 88 Pac. 1088, upholding rule though line established is not true line according to call of deeds.

Distinguished in Mann v. Mann, 152 Cal. 27, 91 Pac. 996, where coterminous land owners, knowing part of land of each was separated from main body of tract by county road, attempted to exchange parcels so separated; Lewis v. Ogram, 149 Cal. 508, 117 Am. St. Rep. 151, 87 Pac. 61, 10 L. R. A. (n. s.) 610, where parties agree on division line for purpose of transferring from one to the other body of land his true line does not embrace, no title passes; Smith v. Rob-

arts (Cal.), 9 Pac. 105, where acquiescence in fence line as true divisional line was recognized by both parties as a mutual mistake.

Adverse Possession Due to Ignorance or mistake as to boundary. See note, 21 L. R. A. 833.

59 Cal. 286–288, TEMPLETON v. POOL.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 776.

59 Cal. 290–292, FORD v. SANTA CRUZ R. R. CO.

Only Damages Actually Sustained prior to commencement of suit are recoverable in cases of public nuisance.

Disapproved in Williams v. Southern Pacific R. R. Co., 150 Cal. 627, 89 Pac. 600, where injury or trespass to land is permanent in character, all damages, past and prospective, are recoverable in one action.

Consent of City Authorities to Use Street for railroad purposes does not authorize interference with the use of private property.

Approved in Coats v. Atchison etc. Ry. Co., 1 Cal. App. 443, 82 Pac. 641, railroad company liable to abutting land owner for injury resulting from being deprived of access over street to his premises.

Presumption That Commission of Nuisance was not by statutory authority. See note, 70 L. R. A. 586.

Right of Abutter to Damages for Special Injuries where street railway not considered additional burden. See note, 25 L. R. A. (n. s.) 1267.

59 Cal. 292–293, ESTATE OF HARDWICK.

After Probate Court has Set Apart Homestead for use of widow and minor children, it loses control over property set apart.

Approved in Estate of Hayes, 1 Cof. Prob. 552, reaffirming rule; Estate of Adamson, 5 Cof. Prob. 398, where statutory homestead from community property has been set apart to widow, her petition to assign to her personalty valued at five hundred dollars should be granted though homestead is valued at three thousand dollars.

59 Cal. 294–301, McKEEVER v. MARKET STREET R. R. CO.

Representatives may Sue for Death of One caused by wrongful act of another.

Approved in Alder Co. v. Fleming, 159 Fed. 597, 86 C. C. A. 419, Montana statute permitting heirs of deceased adult to bring suit for damages is sufficiently broad to create a liability, though none existed at common law.

Question of Negligence is One for the Jury if different conclusions can rationally be drawn from the evidence.

Approved in Payne v. Oakland Traction Co., 15 Cal. App. 148, 113 Pac. 1082, evidence presented question for jury in action by motorman who chose manner of ascending from pit, to which he had descended to assist car repairer; Mugford v. Atlantic etc. Co., 7 Cal. App. 675, 95 Pac. 675, in action for damages brought by experienced employee for injuries sustained from operating pile-driver, where danger was obvious, nonsuit properly granted; dissenting opinion in Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, majority hold-

ing railroad company not liable for injuries to one unseen by officers of train, asleep on the track.

Injuries by Street-car Collisions with vehicles or horses. See note, 25 L. R. A. 510.

59 Cal. 303, CRANE v. GLADDING.

Statement on Motion for New Trial must clearly specify errors on which moving party relies.

Reaffirmed in Chase v. Alaska F. & L. Co., 2 Alaska, 84.

59 Cal. 312–313, GREGG v. SAN FRANCISCO & N. P. R. R. CO.

Where Excessive Damages are Awarded, court may order new trial unless specified portion is remitted.

Distinguished in F. M. Davis Iron Works Co. v. White, 31 Colo. 85, 71 Pac. 385, in action for personal injuries, where verdict was excessive, court had no power to order remittitur of excessive part and give judgment for balance.

59 Cal. 316–318, KOCHER v. HAYFORD.

Court of Equity may Reform Deed containing erroneous description of land.

Approved in Home and Farm Co. v. Freitas, 153 Cal. 685, 96 Pac. 310, where mistake in deed conveying about sixteen acres more than contemplated by the parties is clear, finding as to its mutuality, on conflicting evidence, will not be disturbed.

59 Cal. 319, SPECT v. SUPERIOR COURT.

Prohibition is not the Proper Remedy where question to be decided is within jurisdiction of trial court.

Approved in Western Meat Co. v. Superior Court, 9 Cal. App. 544, 99 Pac. 978, where corporation charged with violation of anti-trust law was not "legally committed," the remedy was to move to set aside the information on that ground; State v. Morse, 27 Utah, 339, 75 Pac. 740, on application for writ of prohibition to restrain criminal proceedings, where preliminary steps had not been taken, the remedy of accused was by appeal.

Writ of Prohibition. See note, 111 Am. St. Rep. 956.

59 Cal. 321–326, PEOPLE v. SACRAMENTO CO.

Supervisors have No Jurisdiction to change assessments placed on railroad property by board of equalization.

Approved in San Francisco etc. R. R. Co. v. Stockton, 149 Cal. 86, 84 Pac. 772, railroad property within city limits, used for station purposes, depot, freight-houses, etc., are to be assessed by local authorities.

59 Cal. 328–340, PEOPLE v. DUNN.

Solvent Credits may Properly be Assessed at more than face of obligation.

Approved in City of Los Angeles v. Glassell, 4 Cal. App. 48, 87 Pac. 243, sole remedy for over-assessment of personal property is an appeal to the board of equalization.

59 Cal. 341–342, PEOPLE v. SCOTT.

Where Plea of Guilty is Made Under Circumstances working injustice, it is an abuse of discretion to refuse to permit its withdrawal.

Approved in State v. Stevenson, 67 W. Va. 558, 68 S. E. 238, upholding refusal of court to withdrawal of plea of guilty made under surmise that under special judge sitting at time of its entry, punishment would be lighter than under regular judge, who later returned to bench.

Insanity After Commission of Criminal Act. See note, 38 L. R. A. 579.

59 Cal. 343–344, PEOPLE v. OURISH.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 360, 362.

59 Cal. 345–357, PEOPLE v. BROWN.

Opinion Formed from Reading Newspapers does not necessarily disqualify juror.

Approved in People v. Sowell, 145 Cal. 298, 78 Pac. 719, challenges for actual bias properly denied where opinions based on rumors were not unqualified.

Acts and Declarations of Co-conspirators are admissible.

Approved in People v. Zimmerman, 3 Cal. App. 87, 84 Pac. 447, formation of conspiracy to rob may be proved by one of the co-conspirators; People v. Bunkers, 2 Cal. App. 207, 84 Pac. 369, in prosecution of legislator for receiving a bribe, conversations with accomplice connected with bribery were admissible.

All the Conspirators Who Confederate Together for the purpose of taking life are criminally liable for what any of them do.

Approved in dissenting opinion in Powers v. Commonwealth, 110 Ky. 456, 61 S. W. 754, majority holding where a conspiracy to intimidate the legislature resulted in the murder of a state senator by one of the conspirators, a co-conspirator was not responsible as accessory before the fact.

Homicide in Carrying Out unlawful conspiracy. See note, 68 L. R. A. 194.

Homicide in Resisting Arrest, or of officers of justice. See note, 66 L. R. A. 382.

Denial of Continuance upon Admissions by prosecution as affected by right of accused to meet witnesses. See note, 16 L. R. A. 240.

59 Cal. 357–358, PEOPLE v. HIGGINS.

Prisoner, Who by Absenting Himself from trial renders valid verdict impossible, cannot afterward plead once in jeopardy.

Approved in State v. Dry, 152 N. C. 816, 67 S. E. 1002, applying rule where, in joint prosecution for murder, court ordered mistrial with assent of accused, because one of them temporarily left courtroom.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 74.

Former Jeopardy by Reason of Discharge of Jury in prisoner's absence. See note, 44 L. R. A. 694, 697, 698.

59 Cal. 362–363, PEOPLE v. LOPEZ.

Evidence That Other Goods Stolen at the same time are found in possession of the accused is admissible.

Approved in Territory v. Livingston, 13 N. M. 324, 84 Pac. 1022, where indictment charged theft of a horse, which had disappeared at same time as a mule, evidence that the mule was found in possession of accused was admissible; State v. Donavan, 125 Iowa, 242, 101 N. W. 123, where defendant and two others formed conspiracy to break and enter houses and steal, that defendant was in possession of goods stolen, not only from the house in question but others as well, was admissible.

Evidence of Other Crimes in criminal cases. See note, 62 L. R. A. 283.

59 Cal. 367-370, PEOPLE v. SOTO.

Jury may Reject Entire Testimony of witness who testifies falsely to a material fact.

Approved in State v. Connors, 37 Mont. 18, 94 Pac. 200, upholding instruction that witness false in one part of his testimony is to be distrusted in others; Whitaker v. California Door Co., 7 Cal. App. 759, 95 Pac. 911, upholding instruction leaving jury at liberty to "disregard and discard" entire evidence of witness.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 681.

59 Cal. 370-371, PEOPLE v. CRAIG.

Indictment must Allege Offense was committed within jurisdiction of court.

Distinguished in People v. Thompson, 7 Cal. App. 618, 95 Pac. 387, information charging commission of offense "at said county of ———," considered with reference to caption of pleading, was sufficient.

59 Cal. 372-381, PEOPLE v. KELLY.

Averment of Competent Authority to administer oath is sufficient to show jurisdiction.

Approved in Kizer v. People, 211 Ill. 414, 71 N. E. 1038, upholding allegation in indictment for perjury that the clerk of the court had authority to and did administer the oath to defendant, as sufficient to show court had jurisdiction.

Indictments for Perjury. See note, 124 Am. St. Rep. 668.

59 Cal. 381-385, PEOPLE v. BARNHART.

Defendant cannot Complain of an Error in his own favor.

Approved in People v. Oliver, 7 Cal. App. 603, 95 Pac. 174, defendant, who was sentenced for three years less than minimum term provided by law for his offense, cannot urge error as ground for reversal; Egan v. State, 136 Wis. 118, 116 N. W. 756, where statute imposes heavier penalty for burglary committed in night-time than in daytime, it was not necessary to conviction of burglary in daytime to prove it was committed in daytime.

Pleader is not Required to Allege More than is necessary to meet requirements of statute.

Approved in State v. Copenhaver, 35 Mont. 344, 89 Pac. 62, but where pleader charged burglary in the first degree, a conviction of burglary in the second degree was error.

59 Cal. 392–396, PEOPLE v. WREDEN.

Questions Calling for the Opinion of a witness based upon what he has heard should be excluded.

Approved in Estate of Dolbeer, 149 Cal. 247, 86 Pac. 704, applying rule to question asked in contest of will which called for a statement of facts "learned by the witness" in regard to testatrix.

Utterances of an Insane Man ought not to be treated as evidence against him.

Distinguished in People v. Fallon, 149 Cal. 291, 86 Pac. 690, upholding refusal of court to instruct jury that if they found defendant insane at time of homicide, they should disregard his declarations then made.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 742.

One not an Expert on Insanity may state his opinion as to state of mind of another.

Approved in Weber v. Della Mountain Min. Co., 14 Idaho, 414, 94 Pac. 444, applying rule where gist of action was competency of a person to transact business at a given time.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 722, 723.

59 Cal. 397–398, PEOPLE v. WILLIAMS.

The Infamous Crime Against Nature does not need to be defined.

Approved in People v. Erwin, 4 Cal. App. 396, 88 Pac. 371, information charging attempt to commit crime substantially in the language of section 286 of the Penal Code is sufficient.

59 Cal. 400–401, PEOPLE v. AH SING.

Courts, in Instructing the Jury, should not determine the weight to be given any particular fact or circumstance.

Approved in People v. Elster (Cal.), 3 Pac. 887, 888, where defendant did not fail or refuse to account for his possession of property, instruction of court assuming guilty possession was erroneous; State v. Crofford, 121 Iowa, 408, 96 N. W. 894, applying rule to charge suggesting that in opinion of the court, the circumstantial evidence given was of greater weight and force than the direct evidence; State v. Willing, 129 Iowa, 76, 105 N. W. 357, applying rule to instruction that alleged confessions of defendant, if understandingly made, "were entitled to great weight."

Circumstantial Evidence. See note, 97 Am. St. Rep. 800.

Possession of Recently Stolen Property as evidence of burglary. See note, 12 L. R. A. (n. s.) 200.

59 Cal. 402–403, PEOPLE v. BARNHART.

Erroneous Statement of Evidence by Counsel to the jury is not error for which new trial will be awarded.

Approved in Williams v. State, 4 Okl. Cr. 540, 114 Pac. 1121, remarks of counsel in which he characterized defense as flimsy, and stated defendant was not corroborated, were insufficient to work reversal.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 656.

59 Cal. 405–416, EX PARTE HOLLIS.

Issue as to Title Should be Tried in an appropriate action.

Approved in Hibernia Savings etc. Society v. Robinson, 150 Cal. 142, 88 Pac. 721, rights of one not party to foreclosure suit cannot be settled upon application for writ of assistance in favor of purchaser at foreclosure sale; Estate of Curtis, 1 Cof. Prob. 537, probate court has no authority to adjudicate question of title to personalty in dispute between third person and estate of decedent; Ex parte Pahia, 13 Haw. 581, probate judge, on hearing of guardian's accounts, had no jurisdiction over question of alleged invalidity of deed; State v. District Court, 30 Mont. 110, 75 Pac. 962, applying rule in contempt proceedings for violation of injunction restraining trespass on mining property, title to which was not determined in injunction suit.

If Title to Debtor's Property cannot be directly reached by execution, receiver should be appointed.

Approved in Ryland v. Arkansas City Milling Co., 19 Okl. 442, 92 Pac. 163, under proceedings in aid of execution, judgment debtor cannot be ordered to apply property title to which is in third person.

Court has No Jurisdiction to Punish for contempt one not a party to the proceedings.

Approved in Bauter v. Superior Court, 6 Cal. App. 196, 91 Pac. 750, in proceeding in mandamus to compel former secretary of corporation to produce books, court cannot punish successor in office not party to proceedings, for contempt in not complying with writ.

Disobedience of Void Order as Contempt. See note, 16 L. R. A. (n. s.) 1066.

The Only Question on Habeas Corpus is as to jurisdiction.

Approved in In re McCoy, 10 Cal. App. 124, 101 Pac. 423, upholding power of court to examine into validity of ordinance of writ of habeas corpus; Ex parte Haase, 5 Cal. App. 543, 90 Pac. 947, on petition for habeas corpus, attack upon judgment of conviction upon plea of guilty of burglary in the first degree is collateral.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 173.

59 Cal. 416–417, EX PARTE STRANGE.

Instance Where One Informed Against for murder was admitted to bail.

Cited in Ex parte Firmin, 60 Tex. Cr. 371, 131 S. W. 1114, discussing burden of proof on habeas corpus for bail after indictment.

59 Cal. 417–420, EX PARTE COTTRELL.

During Pendency of Action for Divorce, court can modify its order as to allowance from time to time.

Reaffirmed in Kapp v. Dist. Court, 31 Nev. 454, 103 Pac. 239.

Contempt Proceedings to Compel Payment of Alimony. See note, 24 L. R. A. 436, 438, 439.

59 Cal. 420–423, EX PARTE COTTRELL.

One cannot be Punished for Disobeying Order he is unable to comply with.

Approved in Egilbert v. Superior Court, 6 Cal. App. 194, 91 Pac. 749, applying rule to one cited for contempt as secretary of corpora-

tion, for failure to produce books, who had resigned and had no control over the books; Lutz v. District Court, 29 Nev. 153, 86 Pac. 445, where affidavit on which contempt proceedings for failure to pay alimony were based failed to show ability to make the payments required, it was fatally defective.

On Habeas Corpus Court cannot Take Evidence upon disputed questions of fact.

Approved in In re McCoy, 10 Cal. App. 125, 101 Pac. 424, upon writ applied for to test validity of ordinance, court may inquire into facts not judicially known bearing upon validity of the ordinance; In re Myrtle, 2 Cal. App. 386, 84 Pac. 337, writ of habeas corpus cannot be invoked to review a judgment.

In Proceeding for Contempt, Petition or Affidavit on which they are based must show court has jurisdiction.

Approved in Cline v. Langan, 31 Nev. 244, 101 Pac. 554, prohibition will issue where court attempts to punish for violation of a void order by referees.

59 Cal. 430–438, **PEOPLE v. HUNT.**

There Need be No Appreciable Length of Time between intent to kill and act of killing to constitute murder in first degree.

Reaffirmed in People v. Machuca, 158 Cal. 65, 109 Pac. 887.

Right of Self-defense by original aggressor. See notes, 109 Am. St. Rep. 805; 45 L. R. A. 691.

59 Cal. 438–442, **PEOPLE v. CLOUGH.**

Possession of Stolen Property shortly after alleged larceny is a circumstance tending to show guilt.

Reaffirmed in People v. King, 8 Cal. App. 332, 96 Pac. 918.

Distinguished in People v. Abbott (Cal.), 34 Pac. 502, where there was uncertainty as to identification of property and person, instruction as to effect of possession of property recently stolen was unjustified.

Knowledge of and Consent to the crime by the proposed victim of a conspiracy prevents conviction.

Approved in Johnson v. United States, 158 Fed. 73, 85 C. C. A. 399, an indictment charging conspiracy to effect concealment by a bankrupt of property from his trustee will not lie where the trustee is charged as one of the conspirators.

Instigation or Consent to Crime for purpose of detecting criminal as defense to prosecution. See note, 25 L. R. A. 342, 343.

59 Cal. 444–455, **CITY OF LOS ANGELES v. MELLUS.**

The Allegation, "An Order was Made," is not equivalent to "an order was only made."

Distinguished in Gurnsey v. Northern California Power Co., 7 Cal. App. 544, 94 Pac. 862, in action in ejectment to recover possession of highway on which poles and wires were erected, it was sufficient to aver in substance granting of franchise in answer.

Judgment on Demurrer Based on technical defect in pleading is not available as res adjudicata.

Approved in Yates v. Jones Nat. Bank, 74 Neb. 743, 105 N. W. 290, former judgment which did not dispose of action for deceit on its

merits but held theory of action was of a different character did not support plea of res adjudicata.

It Rests upon One Who has Signed an instrument to show it was not to be operative unless signed by another named therein.

Approved in Stanton v. Singleton (Cal.), 54 Pac. 589, applying rule in action to enforce a contract granting option to purchase a mine, which was signed by two of three co-owners.

Conditional Execution of Contract under parol agreement that it shall not take effect until others sign. See note, 45 L. R. A. 326.

Effect of Delivery of Bond Unsigned by principal obligor. See note, 12 L. R. A. (n. s.) 1119.

59 Cal. 457–464, PEOPLE v. VELARDE.

Possession of Stolen Property, After Alleged Taking is a circumstance tending to show guilt.

Approved in People v. King, 8 Cal. App. 332, 96 Pac. 918, upholding instruction as to recent possession of stolen property; People v. Horton, 7 Cal. App. 36, 93 Pac. 383, upholding instruction including therein the words "or claiming to be the owner thereof after alleged taking," where defendant had made claim of ownership; People v. Nicolosi (Cal.), 34 Pac. 825, circumstances under which stolen trunk was found were sufficient to justify verdict of jury.

Distinguished in People v. Abbott (Cal.), 34 Pac. 502, where uncertainty as to identification of person and property was prominent, instruction on effect of possession of stolen property was unjustified.

Information is not Based upon Sufficiency of proceedings under which original warrant of arrest was issued.

Approved in People v. Gregory, 8 Cal. App. 741, 97 Pac. 913, refusing to set aside information, where wife of accused had sworn to complaint filed with magistrate on which warrant of arrest was issued; State v. King, 71 Kan. 292, 80 Pac. 608, upholding warrant for arrest of A under complaint charging B and others under fictitious names, where court ascertained that A was one of parties charged under fictitious name; State v. Wisnewski, 13 N. D. 653, 102 N. W. 884, complaint in justice's court charging maintenance of nuisance "in a certain one-story building," is sufficient as basis for preliminary examination for offense charged in information; State v. Anderson, 35 Utah, 501, 101 Pac. 387, complaint for perjury was sufficient as a basis for preliminary examination.

Evidence and Instructions as to character of accused. See note, 20 L. R. A. 613.

Admissibility Against Third Persons of declarations of deceased person. See note, 94 Am. St. Rep. 677.

59 Cal. 471–476, SOUTHERN PACIFIC R. R. CO. v. SUPERIOR COURT.

Copy of Summons must be Served with complaint, in order to give court jurisdiction.

Approved in State v. Harrington, 31 Mont. 298, 78 Pac. 485, where justice's summons was served without copy of complaint, court was without jurisdiction.

In Action Commenced in Justice's Court superior court can only retry issues tried in court below.

Approved in Golden Gate Tile Co. v. Superior Court, 159 Cal. 477, 114 Pac. 979, mandamus lies to compel superior court to proceed with trial of justice's court appeal which has been properly taken and which superior court has erroneously dismissed; Null v. Superior Court, 4 Cal. App. 210, 87 Pac. 394, where appeal from justice's court was on question of law, superior court could only reverse or affirm decision, and remand case for trial on issues of fact; Smith v. Superior Court, 2 Cal. App. 530, 84 Pac. 55, on appeal from judgment of justice granting nonsuit, superior court properly refused to grant trial de novo; Maxson v. Superior Court (Cal.), 54 Pac. 520, 521, on appeal from default judgment of justice's court, superior court had no jurisdiction, on reversing, to remand case to the justice; Smith v. Clyne, 15 Idaho, 262, 97 Pac. 42, appeal sustained on question of law alone must be remanded for further proceedings; Zimmerman v. Bradford-Kennedy Co., 14 Idaho, 686, 95 Pac. 827, defendant, who failed to answer in lower court, and appeals on questions of both law and fact, will not be allowed to file answer and raise issue of fact for first time in appellate court; Estate of McVay, 14 Idaho, 68, 93 Pac. 32, amendments of the pleadings should not be allowed in the appellate court.

Distinguished in Armantage v. Superior Court, 1 Cal. App. 136, 81 Pac. 1035, where appeal is taken on question of fact, or on questions both of law and fact, cause is in superior court for all purposes.

Prohibition will not Lie Unless Attention of court below has been called to its excess of jurisdiction.

Approved in Burge v. Justice's Court, 11 Cal. App. 215, 104 Pac. 582, superior court improperly issued writ of prohibition to justice's court of another county for want of jurisdiction to serve summons out of county.

Writ of Prohibition. See note, 111 Am. St. Rep. 957.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 107.

59 Cal. 476–479, ALEXANDER v. DENAVEAUX.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 172.

59 Cal. 483–484, SHERMAN v. SANTA BARBARA CO.

Sheriff is Entitled to Charge Mileage for removal of prisoner from magistrate's court to county jail.

Distinguished in Yavapai County v. O'Neill, 3 Ariz. 381, 29 Pac. 434, in action by sheriff against county for mileage for serving criminal warrant, officer is not entitled to charge for going to make arrest and again for bringing back prisoner.

59 Cal. 486–490, DE ARNAZ v. ESCANDON.

Notary's Certificate is Conclusive of the facts stated in it.

Approved in First Nat. Bank v. Glenn, 10 Idaho, 232, 109 Am. St. Rep. 204, 77 Pac. 625, facts and statements of married woman at time of acknowledgment justified notary in attaching his certificate in due form.

Deed Obtained by Fraud is Only Voidable, and bona fide purchaser will hold the property.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, upholding rule in action to establish a trust where grantors sought to avoid their

deed on ground that a third person practiced a fraud on them, of which grantee was ignorant.

59 Cal. 494–496, HAVEN v. SEELEY.

Where Complaint Sets Forth Specific Facts upon which title rests, every necessary fact must be alleged.

Cited in Emerson v. Yosemite Gold Min. etc. Co., 149 Cal. 59, 85 Pac. 125, reaffirming rule.

59 Cal. 496–502, RUMP v. GERKENS.

Purchaser Who Undertakes to Pay Off Mortgage as part of purchase price is entitled to subrogation.

Approved in Capitol Nat. Bank v. Holmes, 43 Colo. 161, 127 Am. St. Rep. 108, 95 Pac. 316, 16 L. R. A. (n. s.) 470, where purchaser paid off mortgage in ignorance of judgment lien against his grantor, mortgage was revived for his benefit as a prior lien to the judgment lien.

59 Cal. 507–516, WEDEL v. HERMAN.

Prior to Codes, Execution, Acknowledgment and certification were essentials to conveyance by married woman.

Reaffirmed in Cordano v. Wright, 159 Cal. 615, 115 Pac. 229.

What is Community Property. See notes, 126 Am. St. Rep. 103; 4 Cof. Prob. 46.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 873, 875.

Delivery of Deed to Third Person or record, or delivery for record, by grantor. See note, 54 L. R. A. 884.

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 373.

59 Cal. 517–522, SAN DIEGO WATER CO. v. CITY OF SAN DIEGO.

Contract Between Water Company and City in violation of statute is void.

Distinguished in Bothwell v. Consumers' Co., 13 Idaho, 573, 92 Pac. 534, 24 L. R. A. (n. s.) 485, where water company fixed its own rate and consumer tendered that rate and demanded water, company could not claim rate had not been fixed as prescribed by law.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 68.

59 Cal. 535–538, BROWN v. BURBANK.

A New Trial will be Granted for failure of court to find on all issues.

Approved in Millard v. Supreme Council American Legion of Honor (Cal.), 21 Pac. 825, moving party is not required to specify in his statement failure of findings to determine issues as a ground for his motion; Dillon Improvement Co. v. Cleaveland, 32 Utah, 7, 88 Pac. 672, appellate court has no power to remand case with directions to find on omitted issues, but must reverse and order new trial granted.

59 Cal. 540–541, MERRILL v. CHANDLER.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 199, 204.

59 Cal. 545–548, GREEN v. BECKMAN.

Liability of Stockholder for debt of corporation is a "liability created by law."

Approved in O'Neill v. Quarnstrom, 6 Cal. App. 472, 92 Pac. 392, giving of note at later date by corporation did not extend time within which to bring action on stockholder's liability.

Statute of Limitations in Actions against corporate officers and stockholders. See note, 96 Am. St. Rep. 973.

59 Cal. 560–563, GOODWIN v. GOODWIN.

Facts Constituting Alleged Intimidation and duress should be pleaded.

Distinguished in Yordi v. Yordi, 6 Cal. App. 31, 91 Pac. 353, in action to compel reconveyance of real property, where effect of alleged acts must be judged from circumstances difficult of precise affirmation.

Undue Influence to Vitiate an Act must amount to force and coercion destroying free agency.

Approved in Turner v. Gumbert, 19 Idaho, 353, 114 Pac. 37, following rule.

Undue Influence Which Invalidates a Will. See notes, 2 Cof. Prob. 95; 1 Cof. Prob. 251.

59 Cal. 563–566, VAN EVERY v. OGG.

It is the Duty of the Landlord to repair upon notice.

Approved in Augevine v. Knox-Goodrich (Cal.), 31 Pac. 530, lessor, who had no notice of defect, was not liable to tenant for injury to his health resulting from defective sewer.

Liability of Landlord for Injury to tenant from defect in premises. See note, 34 L. R. A. 829.

Implied Covenant in Lease as to Fitness of property for purpose intended. See note, 33 L. R. A. 450.

Nature and Elements of Unlawful Detainer. See note, 120 Am. St. Rep. 63.

Right of Servant to Recover Damages from third persons for injuries in performance of duties. See note, 46 L. R. A. 92.

59 Cal. 567, PEOPLE v. HELBING.

Where Defendant Pleads not Guilty and a former acquittal, he is entitled to a verdict on both issues before judgment of conviction.

Approved in People v. O'Leary (Cal.), 16 Pac. 885, reaffirming rule; Ex parte King, 10 Cal. App. 283, 101 Pac. 811, remedy by habeas corpus inapplicable to judgment voidable on appeal for failure to pass on both pleas; Storm v. Territory (Ariz.), 94 Pac. 1102, where court charged that pleas of former acquittal and once in jeopardy were not sustained, and only verdict rendered found defendant guilty as charged, the error was not prejudicial to defendant; State v. Snyder, 182 Mo. 505, 82 S. W. 25, pleading specially the statute of limitations did not entitle defendant to separate preliminary trial of that plea; State v. Kieffer, 17 S. D. 69, 95 N. W. 230, in prosecution for theft of one of several animals, court was not authorized to enter judgment on plea of not guilty until former jeopardy had been disposed of; State v. Creechley, 27 Utah, 145, 75 Pac. 385, it will not be presumed on appeal that no evidence was offered in support of plea of autrefois acquit.

Distinguished in Storm v. Territory, 12 Ariz. 34, 94 Pac. 1102, where facts in support of former acquittal and once in jeopardy are not in dispute, failure of jury to return verdict on such pleas was not prejudicial.

59 Cal. 568–579, DAVIS v. BAUGH.

Variance Which Could not Mislead Defendant to his prejudice is immaterial.

Approved in Bollinger v. Bollinger, 154 Cal. 702, 99 Pac. 199, applying rule where terms and beneficiaries of trust found were not in accordance with allegations of cross-complaint.

Court may Refuse to Permit the Repetition of testimony which could be of no advantage.

Approved in People v. Eaton (Cal.), 68 Pac. 584, reaffirming rule.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 58.

59 Cal. 580–583, BANK OF WOODLAND v. HIATT.

Only Such Costs as are Necessary should be allowed on appeal.

Approved in Estate of Bell, 157 Cal. 532, 108 Pac. 498, where one of the parties refused to have two appeals considered on single record, cost of printing and filing additional transcript properly fell on her.

59 Cal. 583–585, ESTATE OF MONTGOMERY.

Judgment of Supreme Court on Ground of nonappearance will not be vacated, even on sufficient showing, if a like judgment must follow.

Approved in Bishop v. Glassen (Cal.), 12 Pac. 258, reaffirming rule.

59 Cal. 585–591, CENTRAL PACIFIC R. R. CO. v. MUDD.

Vendee Who Performs Conditions of Contract cannot be removed by ejectment.

Approved in Gervaise v. Brookins, 156 Cal. 108, 103 Pac. 331, failure of title of vendor did not give vendee right to retain possession while neglecting to pay price when due, though he was willing to pay balance on receipt of good title.

As to When Vendor may Recover Possession from vendee. See note, 107 Am. St. Rep. 730.

Equity has a Right to Relieve against a forfeiture.

Approved in Gumaer v. Draper, 33 Colo. 128, 79 Pac. 1042, applying rule to contract for sale of land providing one rate of interest if payments be made at maturity and another if made later, where vendor allowed amounts to go unpaid without demand for settlement.

What Title of Interest will support ejectment. See note, 18 L. R. A. 782.

59 Cal. 596–597, DAVIS v. SACRAMENTO.

Duty and Liability of Municipality with respect to drainage. See note, 61 L. R. A. 676.

59 Cal. 598, PEOPLE v. TITHERINGTON.

Whether Possession of Stolen Property is strong evidence or only slight evidence tending to show guilt is question for jury.

Approved in State v. Brady, 121 Iowa, 568, 97 N. W. 64, in prosecution for burglary, instruction that recent possession of stolen goods

raises presumption of guilt unless shown they were obtained honestly and fairly is erroneous.

Possession of Stolen Property as evidence of guilt. See notes, 101 Am. St. Rep. 501; 12 L. R. A. (n. s.) 200, 207.

59 Cal. 599–600, COGGINS v. SACRAMENTO.

Legislature has Power to Establish Police or other inferior courts in cities.

Approved in Nicholl v. Koster, 157 Cal. 421, 108 Pac. 304, in absence of charter provisions governing compensation of juvenile court officers, city is bound by provisions of "juvenile court law"; Fleming v. Hance, 153 Cal. 165, 94 Pac. 621, legislature may provide that city governed by charter making no provision for police courts must pay salary of police judge; Ex parte Fedderwitz (Cal.), 62 Pac. 936, upholding legal existence of office of justice of the peace for the town of Berkeley.

Distinguished in Graham v. Fresno, 151 Cal. 469, 91 Pac. 148, where freeholders' charter has created police court, legislature has no power to create another police court maintainable at expense of city.

59 Cal. 601–608, PEOPLE v. SMITH.

In Order to Justify Homicide, Defendant is only required to produce such proof as will raise a reasonable doubt as to his guilt.

Approved in Anderson v. Territory, 9 Ariz. 53, 54, 76 Pac. 637, instruction requiring defendant to establish his claim of self-defense by a preponderance of evidence was erroneous.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 489.

Evidence and Instructions as to character of accused. See note, 20 L. R. A. 619.

59 Cal. 609–611, STOCKTON v. DUNHAM.

Failure of Court to Rule upon Objection to evidence is reversible error.

Approved in Doe v. Allen, 1 Cal. App. 563, 82 Pac. 569, where motion was later renewed and ruling obtained, no error was made.

59 Cal. 612–613, NIAGARA ETC. MINING CO. v. BUNKER HILL ETC. MIN. CO.

In Ejectment, Trespasser cannot Justify Act by showing title outstanding in third person.

Approved in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987, when defendants, who were using water ditch under permission of plaintiff's grantor, asserted right to ditch, they were trespassers.

59 Cal. 613–615, FUNK v. STERRETT.

One Claiming by Right of Possession only can bring suit to quiet title.

Approved in Foss v. Dam, 1 Alaska, 347, upholding suit to quiet title by one in possession of lot on public lands in Alaska and using same for trade and residence.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 857, 886.

59 Cal. 615–619, BARRETT v. SIMS.

Property Covered by Declaration of Homestead is exempt from execution until value in excess of exemption is ascertained.

Approved in Boggs v. Dunn, 160 Cal. 286, 116 Pac. 745, following rule; White v. Horton, 154 Cal. 106, 97 Pac. 72, 18 L. R. A. (n. s.) 490, apportioning funds on foreclosure of mortgage on homestead between mortgagee, homestead claimant, and judgment creditor.

59 Cal. 620–623, HARRIS v. HARRIS.

Signature to Contract, However Made, may be approved, adopted and acknowledged.

Approved in First Nat. Bank v. Glenn, 10 Idaho, 234, 109 Am. St. Rep. 204, 77 Pac. 626, where married woman acknowledged her signature by mark, which was not witnessed, officer's certificate of acknowledgment was a sufficient witnessing of her signature; Currier v. Clark, 145 Iowa, 620, 124 N. W. 624, where son had authority to sign his parents' names to a mortgage and they adopted the signatures, he could also sign their names to contracts extending time of payment.

Signing by Proxy. See note, 22 L. R. A. 301.

Contracts Made by Persons not Entirely without understanding are only voidable.

Approved in Ratliff v. Baltzers, 13 Idaho, 159, 89 Pac. 73, though "off" or insane on some subjects, party was competent to make contracts sued on.

To Constitute Delivery, Act must be accompanied with intent that deed become operative.

Approved in Koester v. Port Huron Co., 24 S. D. 559, 124 N. W. 745, fact that seller or his agent, acquired manual possession of order for threshing machine and purchase notes did not constitute binding delivery under circumstances of case.

59 Cal. 625–626, LAUGENOUR v. HENNAGIN.

Certificate of Purchase of State Lands entitles holder to maintain ejectment.

Approved in Hockett v. Alston, 3 Ind. Ter. 444, 58 S. W. 679, deed from sheriff in pursuance of sale under a Cherokee statute is sufficient evidence of title on which to base ejectment.

59 Cal. 630, PEOPLE v. DEVINE.

Crime of Assault With Intent to Kill consists of act and intent.

Approved in State v. Rodriguez, 31 Nev. 343, 102 Pac. 863, intent must be alleged and proved beyond a reasonable doubt.

59 Cal. 630–639, ISENHOOT v. CHAMBERLAIN.

Parol Evidence is Admissible in Equity, in case of fraud or mistake, to make writing speak real intention of parties.

Approved in Naden v. Christopher, 62 Wash. 418, 113 Pac. 1118, parol is admissible to show that clause in deed specifically transferring right to collect rents due and to become due under certain lease of land conveyed was by agreement not a warranty, but only a transfer of right to back rent.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 827, 877.

59 Cal. 640–651, PEOPLE v. TAYLOR.

Dying Declarations are Inadmissible unless made under sense of impending death.

Approved in People v. Abbott (Cal.), 4 Pac. 770, physical and mental condition of wounded man justified inference he was conscious of impending death; State v. Roberts, 28 Nev. 371, 82 Pac. 101, considering mortal nature of injuries, it sufficiently appeared deceased was without hope of recovery; Wagoner v. Territory, 5 Ariz. 178, 51 Pac. 145, permitting length of time which elapsed between declarations and death, in absence of better evidence, to prove belief in impending death.

Dying Declarations as Evidence. See note, 56 L. R. A. 369, 375, 382, 411.

Voluntary Statements Made by Accused at coroner's inquest are admissible against him on subsequent trial.

Approved in State v. Finch, 71 Kan. 798, 81 Pac. 495, evidence of witness, subsequently prosecuted for manslaughter, taken at coroner's inquest when not under arrest or accused of crime, was admissible against him.

Admissibility, on Trial for Murder, of testimony of accused at coroner's inquest. See note, 70 L. R. A. 35.

59 Cal. 652, SHAEFFER v. MATZEN.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 570.

59 Cal. 655–661, CARROLL v. SPRAGUE.

To be Privileged, the Matter must be Learned only as counsel or attorney for the party to the suit.

Approved in In re Niday, 15 Idaho, 564, 98 Pac. 847, attorney who had received letters written by his client, but not in the course of professional employment, did not make sufficient showing to entitle him to refuse to produce them; Moyers v. Fogarty, 140 Iowa, 715, 119 N. W. 165, communications made by one to an attorney who was his general counsel, which had no relation to any suit in which the attorney was then acting, was not privileged; Mackel v. Bartlett, 33 Mont. 131, 82 Pac. 797, statements made by one to an attorney, to whom he had taken his brother for the purpose of employing him in the matter of his brother's assignment for creditors, were not privileged.

59 Cal. 661–662, RICKEY v. SUPERIOR COURT.

Form of Notice of Appeal is not conclusive as to nature or character of appeal.

Approved in Smith v. Superior Court, 2 Cal. App. 530, 84 Pac. 55, nature of appeal on question of law alone could not be changed by recital in notice that it involved questions of law and fact.

Where No Issues of Fact have Been Tried in justice's court, superior court cannot try case de novo.

Approved in Maxson v. Superior Court (Cal.), 54 Pac. 520, reaffirming rule; Null v. Superior Court, 4 Cal. App. 210, 87 Pac. 394, applying rule where only issue decided by justice's court was as to its jurisdiction; Smith v. Clyne, 16 Idaho, 468, 101 Pac. 819, where no issue of fact was tendered in probate court on appeal on questions

of law alone, district court could pass not only on question of law presented, but also whether lower court erred in entering judgment; Smith v. Clyne, 15 Idaho, 262, 97 Pac. 42, appeal sustained on questions of law alone must be remanded for further proceedings.

Distinguished in Armantage v. Superior Court, 1 Cal. App. 135, 136, 81 Pac. 1035, where appeal is taken on question of fact or on questions both of law and fact, cause is in superior court for all purposes.

Prohibition Lies to Superior Court which on appeal from justice court allows defendant to file answer and tries case.

Approved in Golden Gate File Co. v. Superior Court, 159 Cal. 477, 114 Pac. 979, mandamus lies to compel superior court to proceed with trial of justice's court appeal, which has been properly taken and which superior court has erroneously dismissed.

Nature and Elements of Writ of Prohibition. See note, 111 Am. St. Rep. 944.

59 Cal. 665–668, BEALS v. CROWLEY.

A Gift Causa Mortis may be Effected by delivery to a third person in trust for the donee.

Approved in Hogan v. Sullivan, 114 Iowa, 461, 87 N. W. 449, where there was no designation of beneficiaries when money was first deposited payable to third person, subsequent designation with assent of third person was effectual.

Gifts Causa Mortis. See note, 99 Am. St. Rep. 902.

59 Cal. 672–673, SMITH v. BROWN.

Where Time of Holding Office is not prescribed by law, appointing power may remove at pleasure.

Approved in Sponogle v. Curnow, 136 Cal. 582, 69 Pac. 256, upholding power of board of managers of state hospital to appoint and remove medical superintendent, no term of office being fixed by insanity act of 1897; People ex rel. Sedgwick v. Shear (Cal.), 15 Pac. 93, act providing for appointment of superintendent for house of correction did not limit power of removal to manner indicated in act; Farrell v. Police Commissioners, 1 Cal. App. 7, 81 Pac. 675, applying rule to policeman appointed by board of police commissioners; Childs v. State, 4 Okl. Cr. 480, 113 Pac. 548, applying rule to attorney appointed as counsel to the governor under special act.

Right to Remove Officers Summarily. See note, 15 L. R. A. 97.

Mandamus to Compel Surrender of Office. See note, 31 L. R. A. 350.

59 Cal. 674–678, PEOPLE v. WILLIAMS.

Under Penal Code, Section 1129, court may order accused, who has been out on bail, into custody at any time during progress of trial.

Approved in State v. Hyde, 234 Mo. 260, 136 S. W. 334, holding where accused homicide was out on fifty thousand dollar bond, it was reversible error for court, after state's evidence was in, to revoke bail order.

Power to Reverse Conviction for insufficiency of evidence. See note, 17 L. R. A. 484.

59 Cal. 678–682, GRANGER v. ORIGINAL EMPIRE ETC. MIN. CO.

Severable Instrument, Partly Void and partly valid, may be enforced as to that which is valid.

Approved in Porter v. Fisher (Cal.), 34 Pac. 701, a broker employed under parol contract to sell or exchange land and the personalty thereon, for a commission of five per cent; may recover five per cent on a separate valuation placed on the personalty.

Object of Special Meeting of a Corporation need not be stated in the notice thereof.

Approved in Bank of National City v. Johnston (Cal.), 60 Pac. 778, upholding action of board of directors at an adjourned meeting, in electing to proceed by action for collection of an assessment upon stock.

Recitals in Minutes of Proceedings at Meeting raises presumption that due notice was given.

Approved in Robinson v. Blood, 151 Cal. 506, 91 Pac. 259, applying rule where resolution authorizing employment of attorney was entered on minutes which recited meeting was called by the president; Turner v. Fidelity Loan Concern, 2 Cal. App. 130, 83 Pac. 65, upholding due enactment of resolution where record of meeting recited directors were notified, and contrary did not appear.

59 Cal. 683–698, MURDOCK v. CLARKE.

Mortgagee in Possession is Liable for use of land without right.

Approved in Murdock v. Clarke (Cal.), 24 Pac. 273, and Murdock v. Clarke, 90 Cal. 440, 27 Pac. 279, both reaffirming rule on subsequent appeals.

Mortgagee in Possession is Bound to Exercise the same care and diligence as a provident owner.

Distinguished in Murdock v. Clarke (Cal.), 24 Pac. 275, and Murdock v. Clarke, 90 Cal. 439, 27 Pac. 278, both holding on subsequent appeals, mortgagee in possession is bound to exercise reasonable care, and is responsible for the want thereof.

59 Cal. 698–703, BIXLER v. SACRAMENTO COUNTY.

Creation of Reclamation Districts and setting off of lands of such districts are legislative acts.

Approved in Inglin v. Hoppin, 156 Cal. 485, 105 Pac. 583, mandamus lies to enforce right of land owners to have their lands in a particular reclamation district set off into an independent district.

59 Cal. 703–709, JARNOTT v. COOPER.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 918, 921.

NOTES

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60 Cal. 1-2, PEOPLE v. WILLIAMS.

Property Which may be Embezzled. See note, 87 Am. St. Rep. 23.

60 Cal. 2-5, PEOPLE v. FLANAGAN.

In Criminal Cases, Burden of Proof is on prosecutor, and if upon the whole evidence jury entertains reasonable doubt of guilt, accused is entitled to benefit thereof.

Approved in Anderson v. Territory, 9 Ariz. 53, 54, 76 Pac. 637, holding requirement that when commission of homicide by defendant is proved, burden of proving mitigation, justification, or excuse is on defendant, unless shown by prosecution, only requires defendant to produce such proof as will raise reasonable doubt.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 489.

Where Defendant Commits Homicide upon Aggressor to prevent commission of felony upon his person or property, if circumstances were such as to excite fears of reasonable man, and defendant acted under such fears, he is not criminally responsible for homicide.

Approved in People v. Bruggy (Cal.), 26 Pac. 758, disapproving instruction in regard to killing in self-defense to effect that killing must be absolutely necessary to save one's own life.

Expulsion of Trespasser. See note, 93 Am. St. Rep. 258, 259.

Right to Use Deadly Weapon in resisting trespass. See note, 22 L. R. A. (n. s.) 724, 726.

60 Cal. 7-10, PEOPLE v. BIRD.

Where There is No Evidence Tending to Establish Circumstances recited in instructions as possible facts, such instructions are erroneous.

Approved in People v. Maughs, 149 Cal. 261, 86 Pac. 191, where there was no evidence of pursuit by defendant to kill deceased, it was misleading to give abstractly correct instructions thereon.

60 Cal. 10, NAGLEE v. SPENCER.

Appeal from Judgment Does not Devest Trial Court of jurisdiction over motion for new trial.

Approved in Chambliss v. Hass, 125 Iowa, 488, 101 N. W. 154, 68 L. R. A. 126, fact that defendant appealed and judgment was affirmed and thereafter paid on execution is no ground for denying defendant's subsequent motion for new trial made within statutory time, on ground of newly discovered evidence.

60 Cal. 12–35, SAN FRANCISCO ETC. R. R. CO. v. STATE BOARD OF EQUALIZATION.

Numerous Provisions of Act of Legislature may be united when they have one general object fairly indicated by title.

Approved in Potter v. Santa Barbara, 160 Cal. 356, 116 Pac. 1104, Political Code, section 2745–2773, relating to creation of road divisions, does not embrace subject not within its title; Murphy v. Bondshu, 2 Cal. App. 252, 83 Pac. 279, upholding act of March 23, 1901, relating to revenue and taxes.

As to When Title of Statute Embraces only one subject and what may be included thereunder. See note, 79 Am. St. Rep. 483.

Power of Legislature to Enact or amend a code or compilation of laws, by a single statute. See note, 55 L. R. A. 852.

Under Section 10, Article VIII, Constitution, only franchise, roadway, roadbed, and rolling stock of railroad corporation can be assessed by state board of equalization.

Approved in San Francisco etc. R. R. Co. v. Stockton, 149 Cal. 86, 84 Pac. 772, following rule.

Boards or Bodies to Which Power of taxation delegable. See note, 15 L. R. A. (n. s.) 67.

Taxation of Corporate Franchises. See note, 57 L. R. A. 97.

Under Article 10, Section XIII, Constitution, "roadbed" means only foundation on which superstructure of road rests, and "rails" refers only to rails in place on such superstructure.

Approved in San Francisco etc. R. R. Co. v. Stockton, 149 Cal. 90, 84 Pac. 774, following rule; Attorney General v. Detroit, 148 Mich. 95, 111 N. W. 869, construction and ownership of street railway tracks by city in streets to be leased to street railway company furnishing equipment and power constitute work of internal improvement which is prohibited by Constitution, article XIV, section 9; Shreveport v. Shreveport Belt Ry. Co., 107 La. 787, 32 So. 190, determining proportion of cost of street paving payable by railroad.

Under Political Code, Section 3692, state board of equalization must assess railroad property annually on or before first Monday in March.

Cited in Bunkie Brick Wks. v. Police Jury of Avoyelles, 113 La. 1064, 37 So. 971, improvements constructed after first day of January of current tax year are not assessable under act of 1898.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 341, 374.

60 Cal. 35–63, CENTRAL PACIFIC R. R. CO. v. STATE BOARD OF EQUALIZATION.

Fourteenth Amendment of Federal Constitution applies only to natural persons, not to corporations.

Overruled in Grocers' Fruit etc. Co. v. Kern County Land Co., 150 Cal. 476, 89 Pac. 124, holding corporation entitled to have its right to change of venue considered in light of fourteenth amendment, and granted in same cases as for natural persons.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 331.

State Constitutional Provision That Property of quasi-public corporations is subject to taxation without deduction of mortgages does not conflict with fourteenth amendment.

Distinguished in Chicago etc. Ry. Co. v. State, 128 Wis. 641, 108 N. W. 580, upholding Laws of 1903, page 601, chapter 378, exempting mortgage liens from taxation.

Taxation of Corporate Franchises. See note, 57 L. R. A. 56.

Corporate Taxation and the Commerce Clause. See note, 60 L. R. A. 685.

60 Cal. 71–72, PEOPLE v. MILNE.

One may by Single Act Endeavor to accomplish two or more criminal results.

Approved in State v. Clark, 46 Or. 141, 80 Pac. 101, stealing of articles belonging to two or more persons at same time and place constitute but one offense.

60 Cal. 72–74, PEOPLE v. SIMONS.

Instruction That to Render Killing Justifiable defendant must be wholly without fault in bringing about or commencing the difficulty in which the wound was given, held incorrect.

Approved in People v. Button (Cal.), 38 Pac. 202, holding killing justifiable, when defendant, although he had begun combat, sought to withdraw before homicide.

Right of Self-defense by original aggressor. See note, 109 Am. St. Rep. 808.

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 688, 707.

60 Cal. 74–78, PEOPLE v. HURLEY.

Presumption of Guilt Arising from Possession of stolen property is completely removed by proof of good character of prisoner.

Distinguished in People v. Peltin, 1 Cal. App. 615, 82 Pac. 981, holding such instruction properly refused when evidence of good character was not general, and was partially neutralized by circumstances in proof.

Evidence of Good Character to create doubt of guilt. See notes, 103 Am. St. Rep. 907; 20 L. R. A. 614.

Finding Stolen Property in Prisoner's Apartment is competent as evidence against him as finding upon his person, but such apartment must be shown to be in his exclusive occupation.

Approved in State v. Drew, 179 Mo. 323, 101 Am. St. Rep. 474, 78 S. W. 596, finding of recently stolen goods on premises of man of family, without showing his actual conscious possession thereof, does not raise presumption of guilt; Sorenson v. United States, 168 Fed. 799, 94 C. C. A. 181, holding finding of stolen watch in dresser drawer of house occupied by defendant's wife three weeks after burglary inadmissible against him, in absence of showing that watch was ever in his possession.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 505, 515.

60 Cal. 78–84, EX PARTE CHIN YAN.

Where Legislature Confers on Municipality Power to pass ordinances of certain character, ordinance passed pursuant thereto cannot be held unreasonable.

Approved in St. Louis etc. Ry. Co. of Texas v. Bolton, 36 Tex. Civ. 91, 81 S. W. 125, upholding city ordinance restricting speed of trains in city to six miles per hour.

Statute Prohibiting Keeping of House of Prostitution and gaming does not mean house where both are carried on.

Approved in Pittsburgh etc. Ry. Co. v. State, 172 Ind. 159, 87 N. E. 1038, construing word "and," as used in section 3 of "full crew" law of 1907, to mean "or."

Limit of Amount of License Fees. See note, 30 L. R. A. 440.

60 Cal. 85–92, PEOPLE v. AH LEE.

Where Declarations Offered in Evidence are merely narrative of past occurrence, they cannot be received as proof of existence of such occurrence.

Approved in People v. Wong Loung, 159 Cal. 531, 114 Pac. 834, declarations of accused made to arresting officers at distance from place of shooting that he had done nothing are inadmissible; Murphy v. Board of Police Pension Fund Commrs., 2 Cal. App. 469, 85 Pac. 577, holding inadmissible statements of injured party, as to what was matter with him, made after injury and after persons alleged to have committed injury had passed out of sight.

Declarations of Party Injured as to cause and manner of injury are admissible though made after all action on part of accused has ceased.

Approved in Croomes v. State, 40 Tex. Cr. 675, 51 S. W. 925, in prosecution for assault with intent to rape child, her declarations made immediately after coming out of house where she was assaulted are admissible though she was incompetent to testify.

Statement of Accused After Completion of Act and with view to apprehension of offender is inadmissible.

Distinguished in State v. Foley, 113 La. 58, 104 Am. St. Rep. 493, 36 So. 887, where officer, hearing shot, ran four hundred feet and found wounded person in gutter who, in answer to question, said Foley shot him without cause, answer is admissible.

60 Cal. 95–97, PEOPLE v. LEE AH YUTE.

Reversal of Conviction Because of Unfair or irrelevant argument or statements of prosecuting attorney. See note, 46 L. R. A. 656, 660.

60 Cal. 98–102, NESSLER v. BIGELOW.

Statute of Limitations Does not Begin to Run against claimant of mining claim until his patent issues.

Approved in Tyee Consolidated Min. Co. v. Langstedt, 136 Fed. 128, 69 C. C. A. 548, following rule.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 715.

60 Cal. 103–106, EX PARTE WALLINGFORD.

Superior Court has No Jurisdiction of misdemeanors such as have been committed to justice court by legislature.

Approved in People v. Palermo Land & Water Co., 4 Cal. App. 720, 89 Pac. 725, misdemeanor of water company in refusing to

deliver water under county ordinance providing penalty of two hundred dollars is cognizable only by justice court; Moore v. Orr, 30 Nev. 462, 467, 98 Pac. 399, 401, holding district court could not try such a misdemeanor by indictment after trial in justice court.

Jurisdiction of Offense is Determined by nature of offense, not by form of procedure adopted.

Approved in People v. Palermo Land & Water Co., 4 Cal. App. 721, 89 Pac. 725, holding sections 1392 and 1397, Penal Code, providing for procedure against corporations do not affect jurisdiction of justice court over misdemeanor of corporation.

60 Cal. 107-108, PEOPLE v. LEONG QUONG.

Where Person upon Whom Crime is Committed is referred to in indictment by name in common use, although not true name, use of such name is proper.

Approved in State v. Myrberg, 56 Wash. 387, 105 Pac. 624, following rule; Shain v. Du Jardin (Cal.), 38 Pac. 530, holding one person, or association, may do business under firm name entirely distinct from name or names of person or persons composing firm; State v. Moxley, 41 Mont. 409, 110 Pac. 86, holding mistake in name of owner of property in indictment for crime to be material where injury was not otherwise so described as to identify it.

Distinguished in State v. Ham, 21 S. D. 603, 114 N. W. 715, where indictment for larceny alleged stolen cattle were property of A and evidence showed B was part owner, variance was fatal.

Name of Owner of Stolen Property is not material part of offense of larceny.

Approved in State v. Vincent, 16 S. D. 72, 91 N. W. 350, following rule; People v. Spencer, 16 Cal. App. 758, 117 Pac. 1040, where information for drawing fraudulent check charged accused with drawing check on National Bank of Commerce, doing business in Seattle, and evidence showed check drawn on National Bank of Commerce, variance is immaterial; Hendee v. State, 80 Neb. 83, 113 N. W. 1051, in charging violation of Criminal Code, section 121, it is sufficient, as matter of ownership, to allege property embezzled belonged to estate of deceased person; State v. Holburn, 23 S. D. 211, 121 N. W. 101, where indictment alleged "Watson" was owner of stolen property and evidence showed "Wasson" was owner, variance is immaterial.

60 Cal. 113-115, PEOPLE v. KALLOCH.

Miscellaneous.—Cited in People v. Kalloch, 60 Cal. 115, companion case; People v. Markham, 64 Cal. 162, 49 Am. St. Rep. 600, 30 Pac. 623, miscited for 60 Cal. 116.

60 Cal. 118, PEOPLE v. CASTRO.

Miscellaneous.—Cited in People v. More, 155 Cal. 241, 100 Pac. 690, refusing to set aside conviction for rape when evidence both of defendant and of prosecuting witness was to some extent corroborated.

60 Cal. 118-126, CUNNINGHAM v. SHANKLIN.

State is Estopped Whenever Its Status is similar to that of any ordinary individual.

Limited in Chicago etc. Ry. Co. v. Douglas Co., 134 Wis. 206, 114 N. W. 514, 14 L. R. A. (n. s.) 1074, state not estopped from assessing lands merely because it makes wrongful claim to ownership thereof.

60 Cal. 126–142, OAKLAND BANK OF SAVINGS v. WILCOX.

Banking Customs. See note, 21 L. R. A. 446.

60 Cal. 142–149, PEOPLE v. MORROW.

Instruction in Regard to Circumstantial Evidence considered and approved.

Approved in People v. Daniels (Cal.), 34 Pac. 234, following rule.

Circumstantial Evidence. See note, 97 Am. St. Rep. 774, 783.

Instruction Considered and Approved in regard to weight and credibility of testimony of defendant in criminal case testifying in his own behalf.

Approved in People v. Ryan, 152 Cal. 368, 92 Pac. 855, upholding instruction as to credibility of defendant testifying in his own behalf in criminal case.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 818.

Circumstantial Evidence is as Reliable as any other class of evidence.

Reaffirmed in State v. Foster, 14 N. D. 569, 105 N. W. 940.

60 Cal. 149–153, GAFFORD v. BUSH.

Justice Court has Jurisdiction of All Misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months or both.

Approved in People v. Palermo Land & Water Co., 4 Cal. App. 720, 89 Pac. 725, superior court has no jurisdiction over misdemeanor of water company in refusing to deliver water where punishable by two hundred dollar fine and ninety days' imprisonment; Moore v. Orr, 30 Nev. 464, 98 Pac. 399, prohibiting district court from proceeding on indictment for offense jurisdiction of which lay only in justice's court.

Prohibition Lies to Prevent Superior Court from trying indictment for offense of which justice court only has jurisdiction.

Approved in Moore v. Orr, 30 Nev. 460, 98 Pac. 398, following rule.

60 Cal. 153–156, PEOPLE v. MARTIN.

Section 12, Article XI, Constitution, includes among taxes license fees imposed by section 3360, Political Code.

Distinguished in Los Angeles v. Los Angeles etc. Gas Co., 152 Cal. 768, 93 Pac. 1007, article XIII, section 1, Constitution, does not prohibit license tax upon privilege of carrying on particular business within a city; State v. Union Cent. Life Ins. Co., 8 Idaho, 246, 67 Pac. 649, upholding license tax on corporation under section 1, article XII, Constitution.

60 Cal. 166–177, SAN FRANCISCO PIONEER WOOLEN FACTORY v. BRICKWEDEL.

Contract Between Water Company and City in violation of Constitution or statutes is void and cannot be made basis of action for recovery of water rates.

Distinguished in Bothwell v. Consumers' Co., 13 Idaho, 573, 92 Pac. 534, 24 L. R. A. (n. s.) 485, holding where water company has fixed rates to consumers but not in manner prescribed by law, and consumer tenders monthly rate and demands water, company cannot defend on ground that rate was not legally fixed.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 101.

60 Cal. 177–215, EX PARTE KOSER.

Sections 300 and 301, Penal Code (Sunday law) are valid.

Approved in Ex parte Murphy, 8 Cal. App. 447, 97 Pac. 202, upholding ordinance prohibiting public poolrooms except in hotels for use of guests only, as being general, in that it applies to all of an appropriate class; State v. Dolan, 13 Idaho, 710, 92 Pac. 1000, 14 L. R. A. (n. s.) 1259, upholding Sunday law of 1907.

Constitutionality of Sunday Law. See note, 22 L. R. A. 721, 723.

Doctrine of Stare Decisis cannot be Invoked to prevent inquiry into constitutionality of sections of Penal Code.

Approved in dissenting opinion in Walling v. Brown, 9 Idaho, 751, 76 Pac. 322, majority sustaining sections 1210 and 1211, Revised Statutes, on ground of stare decisis.

Legislature cannot Deprive Owner of Use of Property so long as its use is not injurious to public or to others having equal rights.

Approved in Modern Loan Co. v. Police Court, 12 Cal. App. 587, 108 Pac. 59, provisions of Penal Code, sections 1408, 1409, in so far as applicable to search-warrant proceedings, are void as authorizing magistrate to determine title to property without trial or hearing; State v. Fraternal Knights & Ladies, 35 Wash. 345, 77 Pac. 503, upholding Laws of 1901, page 362, chapter 174, section 12, requiring subsequently formed fraternal insurance associations to adopt mortuary assessment rates not lower than those indicated in Fraternal Congress Mortuary Table.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

60 Cal. 215–222, ALDEN v. PRYAL.

Vendee cannot Recover on Failure of Warranty of title while remaining in possession of land.

Reaffirmed in Barnum v. Cochrane, 143 Cal. 645, 77 Pac. 657.

Where Mortgage Provided for Attorney's Fees on foreclosure, but left blank amount, fees are properly allowed on foreclosure.

Approved in Hildreth v. Williams (Cal.), 33 Pac. 1114, following rule; McCornick v. Swem, 36 Utah, 12, 102 Pac. 628, holding stipulation in note for attorney's fee with amount left blank amounts to promise to pay reasonable fee.

60 Cal. 223–228, REAL ESTATE ASSOCIATES v. SUPERIOR COURT.

Receiver may be Appointed Ex parte in insolvency proceedings.

Approved in California etc. Assn. v. Superior Court, 8 Cal. App. 713, 97 Pac. 770, holding receiver could be appointed ex parte to preserve assets of corporation where directors had abandoned their trust; Horn v. Pere Marquette R. Co., 151 Fed. 636, federal judge has power to appoint receiver at chambers.

Miscellaneous.—Cited in Unna v. Brown, 6 Haw. 683.

60 Cal. 229–232, HINDS v. MARMOLEJO.

Words "Fixed" and "Allowed," Relating to Interest, as used in section 30 of National Banking Act, construed.

Cited in Gist v. Rackliffe-Gibson Const. Co., 224 Mo. 387, 123 S. W. 926, under act of 1903, providing that public improvement ordinances shall fix time for completion of work, ordinance declaring work shall be completed within specified time after award of contract, with allowances for bad weather, strikes, etc., is valid.

Under Section 30, National Banking Act, construed with section 1918, Civil Code, national banks may charge and receive such rates of interest as may be agreed upon.

Approved in Daggs v. Phoenix Nat. Bank, 5 Ariz. 419, 53 Pac. 204, holding national bank in Arizona may charge any rate of interest agreed upon.

60 Cal. 232–233, ESTATE OF CALAHAN.

Appealable Judgments and Orders in probate proceedings are only those enumerated in subdivision 3, section 963, Code of Civil Procedure.

Approved in In re Seymour, 15 Cal. App. 290, 114 Pac. 1024, order refusing to vacate order fixing place for interment of body of decedent and providing for monument over grave is not appealable; In re Kelly's Estate, 31 Mont. 357, 78 Pac. 579, order denying application to vacate decree in distribution and to vacate order settling administrator's account, is not appealable; dissenting opinion in Estate of Silva, 14 Haw. 17, majority holding appealable an order directing attorney to pay into court to await further proceedings the sum paid to him by client as fee out of amount distributed to such client.

60 Cal. 235–238, CEREGHINO v. HAMMER.

Guaranty Providing for Payments to be made from proceeds from certain crop is conditional, and plaintiff in suing thereon must show profit had from crop.

Approved in Bagley v. Cohen (Cal.), 50 Pac. 4, holding guaranty for payment of note on conditions of note entailed no liability where principal never became liable on note by reason of failure of condition.

60 Cal. 264–277, HOWARD v. DONAHUE.

Liability of Cotenants to Account for use and occupation and rents and profits. See note, 28 L. R. A. 847.

60 Cal. 279–280, PEOPLE v. CRANE.

Mandamus Lies to Compel Trial Court to settle document containing all essentials of bill of exceptions but entitled "plaintiff's proposed statement on appeal."

Approved in Matter of Ford, 160 Cal. 346, 116 Pac. 762, mandamus lies to relieve indicted person from prosecution where, without good cause, trial court has arbitrarily postponed trial without accused's consent beyond statutory time.

There is No Substantial Difference between statement on appeal and bill of exceptions except that former follows notice of motion for new trial.

Approved in Sauer v. Eagle Brewing Co., 3 Cal. App. 130, 84 Pac. 427, holding where notice of intention to move for new trial stated motion would be made on "bill of exceptions," and relief applied for and granted by court was to serve "statement," appellant should not be deprived of fruits of appeal.

60 Cal. 280–284, BOYD v. BURRELL.

Record of Trial Court cannot be Altered or amended by proof in appellate court; but if incorrect, it must be made to appear by proper evidence in lower court, which can alter it to make it speak the truth.

Approved in Mendocino County v. Peters, 2 Cal. App. 27, 82 Pac. 1123, holding appellate court could not amend record on appeal; State v. Washington Irr. Co., 39 Wash. 12, 80 Pac. 803, holding record could be returned to trial court to correct date of service of notice of appeal.

60 Pac. 284–287, HUGHES v. BRAY.

Measure of Damages for Breach of Warranty of Goods sold and delivered is difference between market value of goods delivered and market value of equal quantity of goods of warranted quality at time of delivery.

Approved in Germain Fruit Co. v. Armsby Co., 153 Cal. 589, 96 Pac. 320, following rule.

Implied Warranty of Quality. See note, 102 Am. St. Rep. 613.

Warranty on Sale of Goods by Sample. See note, 70 L. R. A. 660.

Where Goods are Sold by Sample, warranty of quality is implied, and if they are inferior to sample, purchaser may accept them and sue for breach of warranty.

Approved in North Alaska etc. Co. v. Hobbs, Wall & Co., 159 Cal. 385, 113 Pac. 872, following rule.

60 Cal. 291–292, DONNELLY v. HOWARD.

Assessment for Street Work is Void if for work not authorized in resolution of intention, nor invitation for sealed proposals.

Distinguished in Bates v. Hadamson, 2 Cal. App. 578, 84 Pac. 53, upholding assessment for street work when included in resolution of intention and in contracts for which it is made; Williams v. Bisagno (Cal.), 34 Pac. 641, holding assessment for paving street not invalidated by including cost of leveling inequalities of street surface not mentioned in resolution of intention.

60 Cal. 292–295, THOMPSON v. JOHNSON.

Where Plaintiff Amends in Matter of Substance, he thereby opens default on original pleading and must serve amended pleading on defaulting party.

Approved in Cole v. Roebling Construction Co., 156 Cal. 446, 105 Pac. 257, and Milliken v. Houghton (Cal.), 4 Pac. 915, both following rule.

60 Cal. 296–299, DESCALSO v. SAN FRANCISCO.

Voluntary Appearance of Defendant Does not Confer jurisdiction in absence of transfer of cause from municipal court of appeals to county court.

Approved in State v. Nixon, 232 Mo. 506, 134 S. W. 540, parties to case arising out of territorial limits of Springfield court of appeals cannot by consent confer jurisdiction over it.

60 Cal. 305–308, CALIFORNIA FRUIT ETC. CO. v. SUPERIOR COURT.

Under Constitution and Prior to Any Act of Legislature relating to appeals from justices' courts, superior court had jurisdiction of such appeals.

Approved in People v. Richards, 1 Cal. App. 575, 82 Pac. 694, upholding Code of Civil Procedure, section 204, in so far as it empowers superior judges to draw jurors in counties of over one hundred thousand inhabitants.

60 Cal. 308–310, ESTATE OF EASTMAN.

Charitable Corporation may Take by Will.

Approved in Estate of Gibson, 1 Cof. Prob. 10, holding residuary bequest to "The Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital," to have been intended for "Sisters of Mercy," a corporation embracing "Old Ladies' Home."

60 Cal. 323–327, PEOPLE v. PACIFIC ROLLING MILLS CO.

Right to Wharfage. See note, 70 L. R. A. 193, 197.

60 Cal. 341–349, MORGAN v. MENZIES.

In Action on Undertaking, Where Condition was that sureties would pay all costs if plaintiff recovered judgment, it must be alleged that sureties have not paid such costs.

Approved in Curtiss v. Bachman (Cal.), 40 Pac. 802, holding defective complaint on injunction bond in failing to allege that sureties had not paid damages; State v. Reynolds, 137 Mo. App. 264, 117 S. W. 654, holding defective petition in action for breach of attachment bond conditioned for payment of damages which fails to allege nonpayment of damages sustained.

60 Cal. 349–351, PEOPLE v. SAN FRANCISCO GAS LIGHT CO.

Right to Wharfage. See note, 70 L. R. A. 197.

60 Cal. 358–360, JOSEPH v. DOUGHERTY.

Finding That Mortgage was "Executed" by married woman imports that it was acknowledged.

Approved in Cordano v. Wright, 159 Cal. 615, 115 Pac. 229, if acknowledgment was in fact made as required by statute, certificate of officer taking it was not necessary to validity of deed.

Miscellaneous.—Cited in Cordano v. Wright, 159 Cal. 614, 115 Pac. 229, to point that no estate in realty of married women passed in 1879, unless instrument was acknowledged by her after examination without hearing of her husband.

60 Cal. 362–367, SWEENEY v. STANFORD.

Supreme Court Does not Take Judicial Notice of rules of superior court.

Reaffirmed in Stevens v. Byrkett, 56 Or. 575, 109 Pac. 387.

60 Cal. 372–376, NEWMAN v. BIRD.

Agent of Plaintiff in Unlawful Detainer may verify complaint.

Distinguished in Levy v. David, 24 R. I. 252, 52 Atl. 1081, oath to complaint in forcible entry and detainer must be made by complainant.

60 Cal. 380–381, **PARKER v. ALTSCHUL.**

All Presumptions are in Favor of Proceedings of court of general jurisdiction.

Approved in In re Sullivan's Estate, 40 Wash. 210, 111 Am. St. Rep. 895, 82 Pac. 298, reaffirming rule; Brown v. Caldwell, 13 Cal. App. 31, 108 Pac. 875, holding recital in judgment that defendant appeared by his attorney is prima facie evidence of such fact.

60 Cal. 383–387, 44 Am. Rep. 58, **CUMMINGS v. DUDLEY.**

Where Party Agrees to Deliver Specific Property at all events, he becomes liable in damages for value of property in case he fails to deliver it.

Approved in Delafield v. San Francisco etc. Ry. Co. (Cal.), 40 Pac. 959, holding one who agreed to pay in stock and refuses to deliver is liable for amount in money.

Measure of Damages for Failure to deliver goods sold. See note, 88 Am. St. Rep. 370.

Where Party Agrees to Deliver Specific Property, amount fixed in agreement in lieu of which property was to be delivered is liquidated damages.

Distinguished in Fagan v. Hook, 134 Iowa, 391, 111 N. W. 982, when contract for exchange of personalty for land is rescinded for valid ground by owner of personalty after same has been delivered to and sold by land owner, latter is liable for market value of personalty.

60 Cal. 387–396, **FARMERS' NAT. GOLD BANK v. STOVER.**

In Action on Note, Signer, in order to set up defense of suretyship, must aver and prove that he executed note as surety and that payee knew of and consented to suretyship.

Reaffirmed in Osborn v. Hamilton, 16 Cal. App. 636, 117 Pac. 787.

In Action on Note, Parol Evidence on issue of payment is admissible to show novation.

Approved in Pearsall v. Henry, 153 Cal. 317, 95 Pac. 160, holding in action for specific performance of contract for sale of land, where it appears oral agreement was substituted by novation and was fully performed by plaintiff, he can enforce performance by other party.

Parol Evidence is Admissible by Maker of Instrument, who appears by its terms to be principal, to show he is in fact a surety, except as against persons who have acted upon faith of his apparent character as principal.

Approved in National Bank of Commerce v. Schrim, 3 Cal. App. 699, 86 Pac. 983, following rule.

Amendments to Pleadings should be allowed at any stage of trial when it is necessary for purposes of justice.

Approved in H. P. Smith Co. v. Suttich, 10 Cal. App. 541, 102 Pac. 684, upholding refusal to allow amendment to conform to evidence when there was none to support it and no good cause appeared; Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 316, 90 Pac. 209, holding permission to amend answer more than four years after issue joined so as to plead novation of indebtedness barred by limitation, properly refused; Link v. Jarvis (Cal.), 33 Pac. 207, holding amendments to complaint properly allowed; Cain v. Cody (Cal.), 29 Pac. 779,

holding complaint in replevin properly allowed to be amended to claim larger damages in conformity to evidence.

Effect of Taking or Reserving Illegal Interest by national bank. See note, 56 L. R. A. 697.

60 Cal. 400–403, PEOPLE v. COWELL.

Title to Land Between High and Low Water Mark. See note, 45 L. R. A. 240.

60 Cal. 406–408, WHITE v. NUNAN.

It is Discretionary With Court to vacate injunction pendente lite.

Approved in Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 754, 115 Pac. 952, applying rule to injunction against diversion of watercourse above plaintiff's lands to its injury.

60 Cal. 408–410, LOWER KINGS RIVER WATER DITCH CO. v. KINGS RIVER ETC. CANAL CO.

Right to have Water Flow into Ditch from natural stream is real property, and action for injury thereto may be tried in county where water is wrongfully taken from stream above head of ditch, or in county where water is used.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 727, 93 Pac. 863, 15 L. R. A. (n. s.) 359, holding rights of owners of property adjacent to irrigation ditch to have water flow therefrom through laterals is real property and servitude upon main ditch; Las Animas etc. Land Co. v. Fatjo, 9 Cal. App. 321, 99 Pac. 395, holding buildings are realty, and action for damages for burning them must be tried in county where land is situated; Rickey Land etc. Co. v. Miller & Lux, 152 Fed. 13, 81 C. C. A. 207, and People's Ditch Co. v. King's River etc. Canal Co. (Cal.), 2 Pac. 45, both holding right of appropriator of water to have water flow in stream to head of his ditch is incorporeal hereditament appurtenant to ditch and coextensive with owner's right in ditch itself; Miller & Lux v. Rickey, 127 Fed. 578, holding suit to enjoin defendant from wrongfully diverting water from stream in California which supplied plaintiff's ditch in Nevada properly brought in Nevada, and court has jurisdiction to try same, having acquired jurisdiction of person of defendant; Willey v. Decker, 11 Wyo. 541, 544, 100 Am. St. Rep. 939, 73 Pac. 224, 225, holding district court of Wyoming may enjoin diversion in Montana of waters flowing into and appropriated in Wyoming.

60 Cal. 414–425, KIDDER v. STEVENS.

Allegation of Time as to Seisin or Ouster in action of ejectment is not material, and denial raises no issue except when mesne profits are in question.

Approved in Allen v. Holt (Cal.), 7 Pac. 421, upholding complaint in ejectment alleging ownership and ouster on day named without further alleging plaintiff was owner at date of commencement of action; Reavis v. Gardner (Cal.), 60 Pac. 964, upholding findings in ejectment showing successive conveyances from source of title to plaintiff, although ultimate fact of ownership is not found; Tate v. Rose, 35 Utah, 235, 99 Pac. 1005, holding administrator seeking to quiet title to land of estate need not allege ownership at time suit was brought.

A Status Once Established is Presumed by Law to remain until contrary is established.

Approved in Lockwood v. Allen, 113 Wis. 478, 89 N. W. 493, in action to set aside deed for grantor's fraud, where making of deed and of mortgage back to secure price were admitted, finding that grantee held land unencumbered except by purchase money mortgage was warranted.

60 Cal. 425–427, SANBORN v. SUPERIOR COURT.

When Appeal is Taken from Justice's Court on questions of both law and fact, superior court has jurisdiction of appeal to try cause whether or not justice court had jurisdiction of amount in question.

Approved in Armantage v. Superior Court, 1 Cal. App. 135, 81 Pac. 1035, following rule.

Ad Damnum Clause is Test of jurisdiction of justice court.

Approved in Holmes v. Warren (Cal.), 9 Pac. 71, holding supreme court has no jurisdiction of appeal from superior court in action for less than three hundred dollars, originally tried in justice's court; Lewers v. Redhouse, 14 Haw. 293, holding ad damnum clause determined jurisdiction of court.

Voluntary Credits to Bring Debt within jurisdiction of court. See note, 28 L. R. A. 228.

60 Cal. 432–435, EX PARTE BALDWIN.

Effect of Excessive Sentence. See note, 45 L. R. A. 140.

60 Cal. 438–439, EX PARTE BULGER.

Habeas Corpus Lies to Discharge from custody prisoner who has already served maximum time imposable for offense for which he was convicted, although longer sentence was given.

Approved in In re Narvaez, 5 Cal. App. 105, 89 Pac. 858, discharging prisoner on habeas corpus at expiration of term of first sentence when he appeared to have received two cumulative sentences for same offense; Perry v. Pernet, 165 Ind. 74, 74 N. E. 611, order committing person for indefinite time for contempt in failing to comply with order for payment of money is not void so as to be attackable on habeas corpus; State v. Barr, 133 Iowa, 134, 110 N. W. 281, under Code, sections 5468, 5703, one convicted on new trial after reversal on appeal has right to benefit of actual imprisonment pending appeal and deduction earned by good behavior; State v. District Court, 35 Mont. 325, 89 Pac. 65, holding void and open to collateral attack judgment giving sentence in excess of that warranted by verdict.

Effect of Excessive Sentence. See note, 45 L. R. A. 145.

60 Cal. 439–442, HARMON v. ASHMEAD.

Defects in Statement of Cause of Action may be cured by failure to answer or by verdict, but not a defective cause of action.

Approved in Stow v. Schiefferly, 120 Cal. 612, 52 Pac. 1001, holding ambiguity in pleading cured by judgment by default; Harris v. The Munro Co., 10 Cal. App. 589, 102 Pac. 822, holding as fatally defective complaint on note not due on which judgment was taken by default.

60 Cal. 447–454, ALPERS v. BROWN.

Monopoly in Contract for removal of garbage. See note, 27 L. R. A. 542.

Municipal Power Over Nuisances affecting safety, health, and personal comfort. See note, 38 L. R. A. 330.

Ordinances as to Disposal of Dead Animals. See note, 9 L. R. A. (n. s.) 1197.

60 Cal. 454–458, CHICAGO ETC. PRESS CO. v. LOWELL.

Agent's Power to Use Principal's Property for payment of own debt. See note, 14 L. R. A. 235.

60 Cal. 458–467, REDDY v. TINKUM.

De Facto Officers. See note, 140 Am. St. Rep. 189.

60 Cal. 467–481, SCHROEDER v. SCHWEIZER LLOYD TRANSPORT.

Respondent Obtaining Judgment on Findings as they stand is not called upon to except to them in lower court or bring up evidence by bill of exceptions to show they were not sustained thereby.

Approved in Pollitz v. Wickersham, 150 Cal. 251, 88 Pac. 916, following rule.

60 Cal. 484–496, McDONALD v. McELROY.

Liability of Grantee on Covenants and conditions in deed. See note, 126 Am. St. Rep. 376.

60 Cal. 497–512, PEOPLE ex rel. HARRIS v. BLAKE; S. C., 3 Pac. 104.

Where All Tenants in Common of Land make partition deeds thereof, adopting particular map as part of deeds, public squares set out on such map and then used by city as such are thereby dedicated to public for such use.

Approved in Casserly v. County of Alameda, 153 Cal. 172, 94 Pac. 766, following rule; Eureka v. Croghan (Cal.), 19 Pac. 486, holding conveyance of land by deed, describing it as bounded by lines of certain designated streets, if projected, and as being certain part of block on official map of city, constitutes, in conjunction with five years' use of such streets, dedication thereof to public.

60 Cal. 517–526, YOUNGER v. PAGLES.

Finding of Probative Fact cannot be substituted for a finding of ultimate fact.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, finding of ownership in quiet title suit is finding of ultimate fact, and contradictory finding as to possession will be corrected.

60 Cal. 526–530, MOORE v. MOORE.

Miscellaneous.—Cited in In re Moore, 83 Cal. 587, 23 Pac. 795, on another appeal.

60 Cal. 532–551, AURRECOECHEA v. SINCLAIR.

Averments of Legal Conclusions in Pleading do not obviate necessity for statement of facts which are essential to constitute right claimed under statute.

Approved in Moran v. Bonynge, 157 Cal. 297, 107 Pac. 314, in contest of right to purchase state lands one claiming as purchaser from state must set up in his pleading all facts necessary to give him para-

mount right of purchase; Estate of Renton, 3 Cof. Prob. 531, holding insufficient allegation in will contest that contestants are adopted children of decedent without averment of particular facts on which claim of adoption rests.

60 Cal. 555-567, NEILSEN v. LEE.

Real Estate Broker's Commissions as affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 598.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 596, 605, 607, 623.

60 Cal. 567-569, SOULE v. POPE.

Right to Wharfage. See note, 70 L. R. A. 197.

60 Cal. 569-576, VOLL v. HOLLIS.

All Entries on Actual Possession of another are unlawful, and question of good or bad faith on part of defendant does not affect plaintiff's right of recovery.

Approved in Lasserot v. Gamble (Cal.), 46 Pac. 919, in forcible detainer, evidence of title in defendant is inadmissible.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 400.

Forcible Entry and Detainer against one forcibly dispossessing peaceable possessor in asserting lawful right to possession. See note, 8 L. R. A. (n. s.) 427.

60 Cal. 579-580, BROWN v. BROWN.

Appellate Court has Power to Modify Decree of court below in a divorce action with respect to distribution of community property.

Approved in Pereira v. Pereira, 156 Cal. 7, 134 Am. St. Rep. 107, 103 Pac. 491, 23 L. R. A. (n. s.) 880, following rule.

60 Cal. 581-594, PEOPLE v. WHEELER.

It is Error for Prosecuting Attorney in his argument to read from medical work on insanity without showing it was recognized standard authority.

Approved in People v. Denomme (Cal.), 56 Pac. 99, holding court could refuse to allow counsel for defendant in criminal case to use instruction agreed upon, in argument to jury.

Scientific Books and Treatises as Evidence. See note, 40 L. R. A. 571.

60 Cal. 594-601, CHAQUETTE v. ORTET.

Account of Deceased Administrator can be settled only in action in equity in district court.

Approved in King v. Chase, 159 Cal. 422, 115 Pac. 208, construing Code of Civil Procedure, section 1639, relating to accounts of representatives of deceased administrators; Elizalde v. Murphy, 4 Cal. App. 119, 87 Pac. 247, holding superior court in administration of estate may adopt form of procedure of bill in equity, as ancillary to probate proceedings, to settle account of deceased administrator.

Settlement of Account of Deceased Administrator is prerequisite to action against sureties on his bond.

Reaffirmed in Elizalde v. Murphy, 4 Cal. App. 118, 87 Pac. 247.

In Pleading Judgment It is Sufficient to allege that same remains unpaid and in full force, and it need not be alleged that it was never appealed from.

Reaffirmed in Coolot Co. v. Kahner, 140 Fed. 838, 72 C. C. A. 248.

Effect Against Surety of Judgment against officer. See note, 52 L. R. A. 188.

60 Cal. 604–610, COOK v. CLAY STREET HILL R. R. CO.

Personal Representative of Person Whose Death is caused by wrongful act of another has action for damages therefor.

Reaffirmed in Alder Co. v. Fleming, 159 Fed. 597, 86 C. C. A. 419.

In Action for Damages for Wrongful Death of Husband, ill-health of wife may be shown as bearing upon extent of loss.

Approved in Evarts v. Santa Barbara etc. Ry. Co., 3 Cal. App. 715, 86 Pac. 832, following rule; Simoneau v. Pacific Electric Ry. Co., 159 Cal. 506, 115 Pac. 326, in action by administrator for wrongful death, widow may testify that children are crippled and under doctor's care; Mize v. Rocky Mt. Bell Tel. Co., 38 Mont. 535, 129 Am. St. Rep. 659, 100 Pac. 974, holding loss of society of husband may be considered in estimating damages for his wrongful death.

Measure of Recovery for Death caused by negligence. See note, 17 L. R. A. 71, 78.

60 Cal. 617–622, MEREDITH v. SANTA CLARA MIN. ASSN.

Under Section 942, Code of Civil Procedure, notice to surety of nonpayment of judgment by appellant within thirty days after remittitur affirming such judgment is not essential to entry of judgment against him upon failure of appellant to pay.

Approved in Mowry v. Heney (Cal.), 24 Pac. 301, following rule.

60 Cal. 624–626, REILLY v. REILLY.

Superior Court has Power to Make an Order for alimony pending appeal.

Approved in Bruce v. Bruce, 160 Cal. 30, 116 Pac. 67, reaffirming rule; Roby v. Roby, 9 Idaho, 375, 74 Pac. 958, holding superior court has power to order payment of attorney's fees and costs in divorce case after record had been sent up to supreme court on appeal; dissenting opinion in Holcomb v. Holcomb, 49 Wash. 505, 95 Pac. 1094, majority holding supreme court could award alimony and counsel fees pending appeal.

Distinguished in Shors v. Shors, 133 Iowa, 27, 110 N. W. 18, under Code, section 3177, trial court cannot grant temporary alimony pending appeal.

Denied in Holcomb v. Holcomb, 49 Wash. 503, 95 Pac. 1093, holding jurisdiction of supreme court to award alimony and counsel fees passes to supreme court on appeal; Duxstad v. Duxstad, 16 Wyo. 400, 94 Pac. 463, holding supreme court may make allowance for support of appellant and for costs pending appeal in divorce.

Jurisdiction to Award Temporary Alimony, suit money, and counsel fees pending appeal. See note, 27 L. R. A. (n. s.) 713.

60 Cal. 648-650, ESTATE OF MONTGOMERY.

It is Duty of Court at Expiration of One Year from granting letters of administration to discontinue family allowance if estate be insolvent.

Approved in Estate of Overton, 13 Cal. App. 119, 108 Pac. 1022, holding family allowance properly discontinued.

60 Cal. 653-664, DASHIELL v. SLINGERLAND.

When Jurisdiction of Superior Court depends upon amount of "demand," court may render valid judgment for less than jurisdictional amount.

Approved in Becker v. Superior Court, 151 Cal. 316, 90 Pac. 690, following rule; Rubio Canyon etc. Assn. v. Everett, 154 Cal. 31, 96 Pac. 812, holding appellate court has jurisdiction over appeal from money judgment in superior court for less than jurisdictional amount; Pratt v. Welcome, 6 Cal. App. 477, 92 Pac. 501, holding in action of claim and delivery, demand, and not finding of value of property, fixes jurisdiction of court.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 61 CALIFORNIA.

61 Cal. 1–2, **HAGGIN v. CLARK.**

Satisfaction of Judgment Obtained by Mistake or Fraud may be set aside on motion.

Approved in Fox v. State, 63 Neb. 186, 88 N. W. 177, following rule.

61 Cal. 3–17, **SPRING VALLEY WATERWORKS v. BOARD OF SUPERVISORS OF SAN FRANCISCO.**

Right to have Water Rates Fixed by Commission under act for incorporation of water companies is not such vested right that mode of fixing rates cannot be changed by legislature.

Distinguished in Leavenworth v. Leavenworth City etc. Water Co., 69 Kan. 88, 76 Pac. 453, where original obligation of water company was to sell to city at value fixed by three appraisers, one of which company was to appoint, such method of selection is substantial part of contract and cannot be changed.

61 Cal. 18–53, **SPRING VALLEY WATERWORKS v. SAN FRANCISCO.**

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 91, 92.

61 Cal. 57–58, **SANTA BARBARA v. SHERMAN.**

Action to Enforce Ordinance of municipal corporation is penal, and should be brought in name of people.

Approved in Territory of Hawaii v. Whitney, 17 Haw. 186, prosecutions for violations of county ordinances are criminal rather than civil in nature, and should be brought in name of county.

Proceedings for Violations of Ordinances as prosecutions for crime. See note, 33 L. R. A. 36.

61 Cal. 58–59, **EX PARTE SHAW.**

Court cannot Require Witness Who was not Examined before committing magistrate to give bond for his appearance as witness upon trial.

Approved in In re Yasutaro, 15 Haw. 670, holding witness confined in jail pending trial of accused in lower court must be discharged after trial, and cannot be held pending defendant's appeal.

61 Cal. 59–64, LOS ANGELES v. SOUTHERN PACIFIC R. R. CO.

City of Los Angeles has Power under its charter to establish license tax for every steam railroad having depot in city.

Approved in Los Angeles v. Los Angeles etc. Gas Co., 152 Cal. 768, 93 Pac. 1007, upholding ordinance of Los Angeles imposing license tax on persons or corporations making and selling light, heat and power; Nebraska Tel. Co. v. Lincoln, 82 Neb. 71, 117 N. W. 288, upholding tax on telephone companies occupying privileges in streets.

Limit of Amount of License Fees. See note, 30 L. R. A. 426.

Corporate Taxation and the Commerce Clause. See note, 60 L. R. A. 685.

61 Cal. 65–70, LOS ANGELES v. LOS ANGELES CITY WATER-WORKS.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 41.

61 Cal. 71–72, ESTATE OF SIGOURNEY.

Action for Recovery of Real Property must be commenced in county where property is situated, but place of trial may then be changed to another county if judge is disqualified.

Approved in State v. Campbell, 3 Cal. App. 604, 86 Pac. 841, holding action by state controller to recover money coming into hands of superintendent of state asylum properly brought in Sacramento county under section 433, Political Code, but defendant entitled to change of place of trial to county of his residence.

61 Cal. 72–80, COOK v. PENDERGAST.

Motion for Change of Venue for convenience of witnesses cannot be entertained when defendant has appeared by demurrer only.

Approved in Wong Fung Hing v. S. F. etc. Funds, 15 Cal. App. 539, 115 Pac. 332, following rule; Pascoe v. Baker, 158 Cal. 234, 110 Pac. 816, when venue had been changed, motion to remand on ground of convenience of witnesses could not be made before joining issues of fact.

On Motion to Change Place of Trial on ground of convenience of witnesses, court should be informed as to what witnesses will testify.

Approved in Ennis-Brown Co. v. Long, 7 Cal. App. 316, 94 Pac. 251, following rule; Bell v. Camm, 10 Cal. App. 391, 102 Pac. 226, holding right to change place of trial to county of residence of some of defendants waived by failure to file affidavit of merits.

61 Cal. 90–92, CAL. SOUTHERN R. R. CO. v. KIMBALL.

Section 1249, Code of Civil Procedure, providing that compensation and damages under eminent domain shall be assessed as of date of summons, is valid.

Approved in Los Angeles v. Gager, 10 Cal. App. 381, 102 Pac. 19, and California Southern R. Co. v. Colton Land & Water Co. (Cal.), 4 Pac. 414, both following rule.

Right of Eminent Domain as Affected by extent to which general scheme has progressed. See note, 7 L. R. A. (n. s.) 199.

Railroad Seeking to Condemn Streets for its use need not show it has procured consent of city to use its streets.

Approved in State v. Williams, 227 Mo. 46, 127 S. W. 55, and Nashville etc. R. R. Co. v. Union Ry. Co., 116 Tenn. 527, 95 S. W. 1026, both following rule; Minnesota Canal & Power Co. v. Pratt, 101 Minn. 227, 112 N. W. 403, public service corporation authorized to furnish water, light, heat and power for public use need not have franchise from city or contract to furnish city with its products as condition to exercise of power of eminent domain.

61 Cal. 92–100, DE THOMAS v. WITHERBY.

Party Who Replevies Goods from Real Owner holds them at his risk and is liable for loss while in his possession.

Approved in Donovan v. Aetna Indemnity Co., 10 Cal. App. 728, 729, 103 Pac. 366, 367, upholding money judgment for value of goods replevied from real owner which could not be returned on judgment for defendant.

Duty to Preserve and Return Property Replevied. See note, 69 L. R. A. 283.

61 Cal. 101–103, ORENA v. SHERMAN.

Section 3633, Political Code, Providing, after refusal to make out statement, assessor may note refusal on assessment-book and make estimate of value of property, which estimate cannot be reduced by supervisors, is valid.

Approved in Georgia Railroad etc. Co. v. Wright, 124 Ga. 617, 53 S. E. 261, upholding similar statute.

Validity of Statute Subjecting to Doom of Assessor a taxpayer failing to furnish list of property. See note, 24 L. R. A. (n. s.) 390.

Distinguished in Henne v. Los Angeles County (Cal.), 59 Pac. 782, holding neglect of land owner to return mortgage on his land for taxation does not authorize arbitrary assessment thereon.

61 Cal. 104–107, RECLAMATION DISTRICT v. EVANS.

Swamp Land Assessment can be Enforced only in action to which owner of land assessed is party.

Approved in Swamp Land etc. Dist. v. Blumenberg, 156 Cal. 542, 106 Pac. 394, holding owner estopped to contest assessment for pumping work not done, when he had opportunity to contest validity thereof.

Procedure for Establishment of Drains and Sewers. See note, 60 L. R. A. 216.

61 Cal. 109–116, FIRST NAT. BANK v. DE LA GUERRA.

Homestead cannot be Declared on Land held in tenancy in common.

Reaffirmed in Schoonover v. Birnbaum, 148 Cal. 549, 83 Pac. 999.

61 Cal. 116–119, FRIEDLANDER v. SUMNER GOLD ETC. MIN. CO.

Language Employed in Supreme Court disrespectful of judge of superior court constitutes contempt of court.

Approved in First Nat. Bank v. Superior Court, 12 Cal. App. 348, 107 Pac. 328, following rule; Christensen v. Floriston Pulp etc. Co., 29 Nev. 577, 92 Pac. 219, counsel filing scurrilous brief containing unwarranted reflections on trial judge may be compelled to expunge objectionable matter and be barred from further appearance in case

until he does so; In re Chartz, 29 Nev. 117, 124 Am. St. Rep. 915, 85 Pac. 355, 5 L. R. A. (n. s.) 916, holding argument of counsel in criticising court writing former decisions to be contempt of court.

61 Cal. 119–121, **HUTCHINSON v. SUPERIOR COURT.**

Verdict must be Read in Light of pleading and case made by complaint.

Approved in Johnson v. Phenix Ins. Co., 152 Cal. 200, 92 Pac. 183, holding judgment sustained by reading verdict and pleadings together; Buzanes v. Frost, 19 Colo. App. 389, 75 Pac. 595, in action on note, general verdict for plaintiff without finding of amount of recovery is sufficient where delivery was only issue.

Judgment will not be Reversed on certiorari for mere error of court in exercise of jurisdiction.

Reaffirmed in Wetzel v. Court, 3 Cal. App. 409, 85 Pac. 859.

Wife cannot Claim Land Adversely to husband so long as he remains head of family.

Distinguished in Union Oil Co. v. Stewart, 158 Cal. 155, 110 Pac. 315, where husband deserted wife and delivered to her possession of his land, she could claim title by adverse possession.

61 Cal. 122–128, **CASE OF LOWENTHAL.**

Disbarment of Attorney in Sister State disqualifies him for admission to practice in this state.

Approved in Propper v. Owens, 136 Ga. 787, 72 S. E. 242, following rule; Law Examiners v. Williams, 116 Tenn. 56, 92 S. W. 522, admission in this state after disbarment in sister state is fraudulent and ground for disbarment.

Distinguished in In re Hovey (Cal. App.), 81 Pac. 1022, holding mere pendency of disbarment proceedings in state of former domicile does not disqualify applicant for admission to bar of this state.

Disbarment in One State or Its Concealment, as ground for disbarment in another. See note, 24 L. R. A. (n. s.) 531.

Right of Disbarred or Suspended Attorney or unlicensed person to transact legal business for another. See note, 24 L. R. A. (n. s.) 757.

61 Cal. 128–131, **PEOPLE v. SPENCER.**

Where District Attorney Drew Indictment, which was returned a true bill, and seven years later, as counsel for accused, succeeded in having indictment set aside, he was guilty of violation of duty as attorney, for which he may be removed or suspended.

Approved in In re Humphreys, 15 Haw. 189, suspending for one year attorney who served new client against former client in same matter.

61 Cal. 131–134, **PARNELL v. HAHN.**

Judgment is Conclusive upon All Questions involved in action, and upon matters which under issues might have been litigated in case.

Approved in Simmons v. Rowe, 4 Cal. App. 758, 89 Pac. 624, former judgment on foreclosure determining plaintiff's interest in partnership property subject to mortgage conclusive as to his interest in property in partition suit.

Where Equitable Defense of Contract for Sale of Land is set up in quiet title suit and specific performance asked and refused, such judgment is bar against action by party setting up such defense for damages for breach of such contract of sale.

Distinguished in Cleary v. Folger (Cal.), 33 Pac. 878, in action by vendee to recover payments made, withdrawal of defendant's cross-bill for specific performance did not estop him from claiming damages under his answer.

61 Cal. 134–136, PEOPLE v. DE COURSEY.

Information Charging Larceny and Also Embezzlement of same property charges two separate and distinct crimes, and is open to demurrer.

Approved in People v. Clement (Cal.), 35 Pac. 1022, following rule; State v. Finnegean, 127 Iowa, 290, 103 N. W. 157, in such case state can be required to elect on which count it will stand.

61 Cal. 137–140, PEOPLE v. ALECK.

Venue must be Proved as Charged.

Reaffirmed in People v. Meseros, 16 Cal. App. 278, 116 Pac. 679.

Confession of Confederate Made After Act is fully accomplished is inadmissible against accused.

Approved in People v. Ayhens, 16 Cal. App. 622, 117 Pac. 790, and Williams v. State, 40 Tex. Cr. 569, 51 S. W. 226, following rule; Del Campo v. Camarillo, 154 Cal. 653, 98 Pac. 1053, holding inadmissible against defendant declaration of alleged co-conspirator in obtaining deeds, made long after alleged conspiracy; Smith v. People, 38 Colo. 511, 88 Pac. 453, holding inadmissible, in prosecution for conspiracy, declarations of co-conspirator made long after purpose of conspiracy was consummated.

Distinguished in People v. Brady (Cal.), 36 Pac. 950, where defendant arranged with partner in crime, in presence of witness, that witness should accompany partner, who would tell him where stolen property was, and that witness should get it for partner, statements by partner to witness in defendant's absence as to location of property are admissible against defendant.

61 Cal. 142–144, PEOPLE v. JOHNSON.

Requested Instructions That in Absence of evidence of character of deceased in homicide case it must be presumed to be of ordinary fairness is properly refused.

Reaffirmed in People v. Lee, 1 Cal. App. 173, 81 Pac. 971.

Character of Accused. See note, 107 Am. St. Rep. 152.

61 Cal. 145–147, LOS ANGELES COUNTY BANK v. RAYNOR.

In Action of Ejectment Against Defendant in Execution, plaintiff makes out prima facie case by showing judgment of competent court, execution issued thereunder and sheriff's deed to himself.

Approved in Flood v. Templeton, 152 Cal. 162, 92 Pac. 84, 13 L. R. A. (n. s.) 579, in quiet title suit proof of legal title in party establishes prima facie his right to possession; Noland v. Coon, 1 Alaska, 41, defendants in equity suit to prevent interference with plaintiff's rights, who seek to defend under claims of execution sale of property, must produce marshal's deed to them.

Enforcement of Judgment Does not Depend upon its entry or docketing, and execution may be issued thereon before entry.

Approved in Hill v. Superior Court, 15 Cal. App. 312, 114 Pac. 807, construing Code of Civil Procedure, section 1118; Baum v. Roper, 1

Cal. App. 436, 82 Pac. 390, upholding writ of possession issued before entry of judgment in ejectment.

Disapproved in Hubbart v. Willis State Bank, 55 Tex. Civ. App. 508, 119 S. W. 714, holding contra.

Necessity of Entry of Judgment. See notes, 129 Am. St. Rep. 746; 28 L. R. A. 634.

Entry of Judgment Nunc Pro Tunc Validates execution previously taken.

Approved in Davidson v. Richardson, 50 Or. 327, 126 Am. St. Rep. 738, 91 Pac. 1081, 17 L. R. A. (n. s.) 319, following rule.

61 Cal. 148–149, McFADDEN v. MITCHELL.

Witness may be Cross-examined as to everything testified to upon examination in chief, but not as to other matters.

Reaffirmed in Borden v. Lynch, 34 Mont. 509, 87 Pac. 610.

61 Cal. 149–151, MEEKS v. SOUTHERN PACIFIC R. R. CO.

Where Complaint Alleged That by Reason of Injuries plaintiff had been compelled to pay certain sum for medical attendance, amendment alleging plaintiff had incurred liability therefor states new cause of action.

Approved in Johnson v. American Smelting & Refining Co., 80 Neb. 261, 116 N. W. 519, where original petition alleged damages to plaintiff for personal injury caused by negligence of third person, to whose liabilities defendant succeeded, amendment alleging injuries caused by defendants' negligence stated new cause of action.

61 Cal. 151–154, MESMER v. JENKINS.

Under Sections 1589, 1590, Code of Civil Procedure, creditors seeking recovery of property disposed of by deceased in fraud of their rights must apply to court to have such action brought by administrator.

Approved in Beswirk v. Dorris, 174 Fed. 507, holding creditor must make such application to court before he may himself bring suit to recover property.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 97.

Where Same Person is Joined in Two capacities in two causes of action in one complaint, demurrer lies for misjoinder of parties.

Approved in Merrill v. Suffa, 42 Colo. 201, 93 Pac. 1101, where mandamus was brought to compel secretary of several corporations to allow inspection of books of each of them by one who held stock in each, there were several actions joined and misjoinder of parties defendant.

61 Cal. 155–157, RALPH v. LOCKWOOD.

Section 2468, Civil Code, Forbidding Maintenance of Action by parties who have failed to file certificate required by that section, does not apply to torts.

Approved in Melcher v. Beeler, 48 Colo. 245, 139 Am. St. Rep. 273, 110 Pac. 186, holding similar statute does not apply to actions for libel.

61 Cal. 157-160, SHEILS v. HALEY.

Possession of Land Under Mutual Mistake has no effect on legal rights and gives rise to no claim.

Approved in Smith v. Roberts (Cal.), 9 Pac. 106, following rule.

61 Cal. 160-163, ESTATE OF CORWIN.

Where Petition Presented to Probate Court for specific performance of contract of sale made by decedent requires bringing in of outside parties, it should be dismissed without prejudice.

Approved in Free v. Little, 31 Utah, 464, 88 Pac. 413, where purchaser under contract with deceased failed to present petition for specific performance to administrator, he could not after closing estate maintain action for specific performance, although his option had not expired.

Specific Performance. See note, 131 Am. St. Rep. 568.

61 Cal. 164-188, PEOPLE v. GRAY.

Heavy Drinking by Jury at Their Own Expense during trial is such misconduct as to render new trial necessary.

Approved in People v. Lyle (Cal.), 4 Pac. 979, drinking small amounts of liquors during trial by a few jurors does not warrant setting aside verdict in absence of showing of injury therefrom; Bilton v. Territory, 1 Okl. Cr. 576, 99 Pac. 166, setting aside verdict in trial for capital offense because of use of intoxicants by jury during trial.

Misconduct of Jurors, Other Than Their Separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1040.

Dying Declarations, to be Admissible against accused in homicide case, must have been made when undoubting belief existed in mind of declarant that he was in immediate presence of death.

Approved in Wagoner v. Territory, 5 Ariz. 178, 51 Pac. 146, following rule; State v. Phillips, 118 Iowa, 672, 92 N. W. 880, holding statement of person killed inadmissible as dying declaration when evidence did not show he anticipated death.

Dying Declarations as Evidence. See note, 56 L. R. A. 396, 398, 412, 417.

61 Cal. 188-191, PEOPLE v. ANGELES.

Justification of Use of Deadly Weapon to prevent rape discussed.

Cited in State v. Smith, 127 Iowa, 539, 109 Am. St. Rep. 402, 103 N. W. 946, 70 L. R. A. 246, officer may use deadly weapon to prevent escape of prisoner, if that is only reasonably apparent method.

Homicide to Prevent Criminal or unlawful acts. See note, 67 L. R. A. 531, 532.

61 Cal. 191-195, PEOPLE v. CENTER.

Appeal cannot be Taken from Parts of two judgments by one notice of appeal and one undertaking on appeal.

Approved in Estate of Sutro, 152 Cal. 252, 92 Pac. 488, where appeals were taken from two judgments, and undertaking filed, which by its terms could refer to either, it is void as to both; Bergevin v. Wood, 11 Cal. App. 647, 105 Pac. 937, where there were two appellants and bond to answer for one only, it was insufficient to justify appeal from justice's to superior court; Commercial Bank v. Wells, 5 Cal.

App. 474, 90 Pac. 981, holding bond on appeal from judgment and from order denying new trial did not designate clearly to which appeal it applied and was insufficient; State v. Preston, 30 Nev. 306, 95 Pac. 920, holding fatally defective notice that two persons convicted of manslaughter intended to appeal from "judgment of district court herein" as not specifying judgment appealed from.

Miscellaneous.—Cited in Lux v. Haggin, 69 Cal. 424, 10 Pac. 773, referring historically to principal case.

61 Cal. 196-199, COUNTY OF LOS ANGELES v. LAMB.

Act of March 27, 1878, Regulating Fees in Los Angeles county, went into effect on day of its passage.

Approved in Ex parte McNaught, 23 Okl. 292, 1 Okl. Cr. 266, 100 Pac. 29, section 17, article II, of Constitution of Oklahoma, relating to prosecution of felonies, is self-executing.

61 Cal. 205-208, RECLAMATION DISTRICT v. GOLDMAN.

Local Assessments for Benefits on property exempt from general taxation. See note, 35 L. R. A. 34.

61 Cal. 209-211, WILSON v. SMITH.

Complaint for Work and Labor may state same claim in count for agreed price, and also in count for reasonable value.

Approved in Willard v. Carrigan, 8 Ariz. 72, 68 Pac. 539, and Mellon v. Fulton, 22 Okl. 638, 98 Pac. 912, 19 L. R. A. (n. s.) 960, both following rule; Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 751, 108 Pac. 718, holding in action to recover damages for taking exempt property, plaintiff, being in doubt as to ground of his exemption, could plead both that as teamster and as farmer; Foulger v. McGrath, 34 Utah, 92, 95 Pac. 1006, and Remy v. Olds (Cal.), 34 Pac. 217, both holding complaint could contain count for damages for breach of contract and count for labor and materials furnished under contract; Norbeck & Nicholson Co. v. Pease, 21 S. D. 371, 112 N. W. 1137, holding court erred in compelling plaintiff to elect on which count he would stand; Oberndorfer v. Moyer, 30 Utah, 332, 84 Pac. 1105, holding complaint could state same claim in count on open and current account and count on account stated; Rucker v. Omaha etc. Refining Co., 18 Colo. App. 490, 72 Pac. 683, holding count for damages for wrongful suing out writ of attachment could be joined with another count for malicious prosecution in procuring issuance of same writ; Spotswood v. Morris, 10 Idaho, 137, 77 Pac. 217, holding same claim for recovery of commission for sale of real estate properly set forth in several counts.

Distinguished in Harvey v. Southern Pac. Co., 46 Or. 511, 80 Pac. 1062, holding trial court had discretion to compel plaintiff to elect upon which of two counts he would proceed, one being for common-law negligence in killing cow, and other for failure to fence track.

61 Cal. 211-215, PAIGE v. CARROLL.

Action Against Sheriff and Sureties on his official bond must be brought in two years from accrual of right of action under section 339, Code of Civil Procedure.

Approved in Towle v. Sweeney, 2 Cal. App. 33, 83 Pac. 75, holding limitations run in favor of sureties on building contractor's bond as soon as in favor of contractor on same obligation.

61 Cal. 215-216, **PAIGE v. CARROLL.**

Judge Actually Holding Court is judge thereof within meaning of section 398, Code of Civil Procedure, and place of trial should not be changed merely because judge of superior court of county, who is not one sitting, is disqualified.

Distinguished in Remy v. Olds (Cal.), 42 Pac. 240, holding judge who is disqualified cannot call in another judge to sit at trial.

61 Cal. 216-220, **HOLBROOK v. McCARTHY.**

Agent to Sell Land must Keep strictly within his authority.

Approved in Colvin v. Blanchard, 101 Tex. 235, 106 S. W. 325, holding sale void when agent exceeded authority.

61 Cal. 221-232, **KING v. LA GRANGE.**

Instance of Application of Rule of Res Inter Alios Acta.

Cited in Moody v. Peirano (Cal. App.), 84 Pac. 784, applying rule in action for breach of warranty for sale of seed wheat to evidence of similar sales to other parties by defendant.

Instance of Application of Rule of law of case.

Approved in Westfall v. Wait, 165 Ind. 359, 73 N. E. 1091, decision of supreme court on appeal in will contest as to insufficiency of evidence to overthrow will is law of case on those facts.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 332.

When Public Officers Assuming to Act for government are subject to suit. See note, 108 Am. St. Rep. 839.

61 Cal. 234-237, **BALCH v. JONES.**

Where Appeal is Taken Within Sixty Days from rendition of judgment, exception to decision on ground it is not sustained by evidence may be reviewed.

Approved in Perkins v. Cooper (Cal.), 24 Pac. 377, holding appeal taken within sixty days after rendition of judgment although no bond filed in that time.

Tenant in Common cannot Maintain replevin for common property against cotenant unless property be divisible in nature, and ascertainable by measurement.

Approved in Adams v. Thornton, 5 Cal. App. 459, 90 Pac. 715, holding claim and delivery lies to recover share of crop from cotenant therein under cropping contract; Goldschmidt v. Maier (Cal.), 73 Pac. 985, trustee cannot maintain action against cotrustee to recover trust property.

61 Cal. 238-242, **WHITTIER v. STEGE.**

Vendor of Land may Maintain Action to recover possession when vendee refuses to pay balance of purchase price due and repudiates contract.

Approved in Hooper v. Young, 10 Cal. App. 595, 102 Pac. 952, one who claims land under vendee, who has not paid purchase price and has repudiated debt as outlawed, cannot maintain ejectment against

one claiming under vendor who retained legal title as security for debt; Gervaise v. Brookins, 156 Cal. 108, 103 Pac. 331, holding vendee could not continue in possession without payment of purchase price, although vendor's title had failed; Coles v. Meskimen, 48 Or. 57, 85 Pac. 68, holding vendor could not maintain action of ejectment against vendee not in default.

As to When Vendor may Recover Possession from vendee. See note, 107 Am. St. Rep. 725.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 782.

Where Vendee Refuses to Complete Contract of purchase, vendor may consider him as trespasser or tenant at will.

Approved in Mesa Market Co. v. Crosby, 174 Fed. 98, 98 C. C. A. 70, holding contract of purchase became lease on default of vendee.

Defendant in Ejectment may Set Up equitable defense against legal title of plaintiff.

Approved in Doherty v. Courtney, 150 Cal. 608, 89 Pac. 435, holding equitable defense offered in ejectment against legal title of plaintiff improperly denied.

Nature of Interest of Vendor or Vendee in land contract as real or personal property. See note, 57 L. R. A. 653.

Right of Grantee in Possession to question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 384.

61 Cal. 244–246, PEOPLE v. KERN.

Evidence as to Previous Conduct of Defendant held admissible in murder case, to show defendant's feelings toward deceased.

Approved in People v. Piercy, 16 Cal. App. 16, 116 Pac. 323, in prosecution for assault with intent to murder, evidence of prior quarrel and expression of hostility by accused toward complaining witness is admissible.

61 Cal. 246–250, PEOPLE v. MESSERSMITH.

It is Error for Court to Assume Existence of Fact not in evidence, or to be determined by jury on evidence, however slight or on conflict of evidence.

Approved in People v. Howland, 13 Cal. App. 366, 109 Pac. 895, holding use of word "murder" instead of "killing" by court in instructions did not necessarily prejudice defendant, where no showing is made as to evidence.

Presumption and Burden of Proof as to sanity. See note, 36 L. R. A. 727.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 739, 741.

61 Cal. 250–258, COUNTY OF SACRAMENTO v. CENTRAL PACIFIC R. R. CO.

Judgment for Gross Sum for Taxes Due state and county, but less than total of sums named in complaint, is invalid when it does not distinguish amounts due to each.

Approved in Lake County v. Sulphur Bank etc. Min. Co., 68 Cal. 16, 8 Pac. 594, following rule; Territory v. Gaines, 11 Ariz. 275, 277, 93 Pac. 282, 283, holding board of supervisors could not compromise action for collection of taxes.

Clerk Performs Only Ministerial Duty in entering judgment.

Approved in Old Settlers' Investment Co. v. White, 158 Cal. 246, 110 Pac. 927, holding judgment improperly entered by clerk in docket instead of judgment-book; McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 402, 84 Pac. 351, holding clerk had no authority to enter judgment against one defendant only when verdict was for plaintiffs generally, and there were two defendants, although evidence did not warrant joint verdict.

61 Cal. 259–262, HIMES v. JOHNSON.

Appropriator of Water of Stream upon Public Land in manner recognized by laws and decisions of state acquires right thereto superior to subsequent purchaser from government.

Reaffirmed in Land v. Johnston, 156 Cal. 256, 104 Pac. 450.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 671.

61 Cal. 268–269, NICKERSON v. CALIFORNIA RAISIN CO.

Affidavit of Merits, on Motion to Set Aside Default, must show that defendant fully and fairly stated facts of case to counsel before advice of latter can amount to prima facie showing of merits on defendant's behalf.

Approved in Jensen v. Dorr, 9 Cal. App. 19, 98 Pac. 46, holding insufficient affidavit of merits on motion to change place of trial when it recited merely that "all the facts" had been stated to counsel; Cooper-Power v. Hanlon, 7 Cal. App. 724, 95 Pac. 679, holding affidavit of merits on motion to open default insufficient in statement of facts of case to counsel; Johnson v. Walden (Cal.), 12 Pac. 258, holding defective affidavit of merits as to "stating case" to attorney on motion for change of venue.

61 Cal. 269–271, HECHT v. GREEN.

Right to Attach Property in Hands of assignee for creditors. See note, 26 L. R. A. 593.

61 Cal. 271–275, TRANTER v. CITY OF SACRAMENTO.

Municipal Corporations are not Liable for Damages caused by negligence of their agents in performance of public or governmental duties.

Distinguished in Davoust v. City of Alameda, 149 Cal. 75, 84 Pac. 763, 5 L. R. A. (n. s.) 536, holding city liable for damage resulting from negligence in conduct of electric light plant, operation of such being exercise of more private or proprietary right.

Municipal Liability to Persons Injured by defects in or want of repair of streets. See notes, 103 Am. St. Rep. 262; 20 L. R. A. (n. s.) 516, 517.

As to What Municipal Corporations are Answerable for injuries due to defects in streets and other public places. See note, 108 Am. St. Rep. 151, 160.

61 Cal. 276–282, DONAHUE v. GRAHAM.

Section 19, Article XI, Constitution, in regard to assessments for public inprovements, is self-executing.

Approved in Ex parte McNaught, 1 Okl. Cr. 265, 274, 23 Okl. 291, 100 Pac. 29, 32, holding section 17, article II, Constitution, relating to prosecution of felonies and misdemeanors, is self-executing; Ex parte

Show, 4 Okl. Cr. 429, 113 Pac. 1068, holding section 4a, article III, Constitution, prescribing educational qualification for certain voters, to be self-executing.

Self-executing Constitutional Provisions. See note, 16 L. R. A. 282.

61 Cal. 282–288, EBY v. FOSTER.

Judgment must be Properly Docketed to create a lien on property.

Reaffirmed in Huff v. Sweetser, 8 Cal. App. 697, 97 Pac. 708.

Judgment Lien Attaches to Property during smallest interval of time during which real interest may be vested in judgment debtor, while judgment, having been docketed, subsists.

Distinguished in Riverdale Mining Co. v. Wicks, 14 Cal. App. 536, 112 Pac. 900, holding judgment lien cannot attach to property held by judgment debtor as naked trustee of legal title.

Priority of Judgment Over Conveyance made after beginning of term. See note, 38 L. R. A. 248.

61 Cal. 296–301, LAPHAM v. CAMPBELL.

If Judgment is Obtained by Fraud, equity has jurisdiction over suit to set it aside.

Approved in Hanley v. Hanley, 4 Cof. Prob. 479, applying rule to order setting apart homestead.

61 Cal. 309–313, MAPPA v. LOS ANGELES.

Assessment for Street Work Completed after time limited and without extension is invalid.

Approved in Union etc. Co. v. Campbell, 2 Cal. App. 535, 84 Pac. 305, holding void assessment for street work not completed within time limited where no extension was granted within that time.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 915.

61 Cal. 313–326, STAUDE v. BOARD OF ELECTION COMMISSIONERS.

Constitution Gives All Cities Right to incorporate under general law to be passed by legislature, or to continue under existing charters, as they may elect.

Approved in Smith v. Strother (Cal.), 7 Pac. 803, following rule; Boise City Nat. Bank v. Boise City, 15 Idaho, 802, 100 Pac. 96, holding under section 2, article XXI, Constitution, special charters under which certain cities had been incorporated were continued in force.

Distinguished in People ex rel. McConnell v. Wilmington, 151 Cal. 652, 91 Pac. 524, holding legislature could pass special act repealing charter of city granted before Constitution of 1879, under which charter no organization was ever effected.

Act Authorizing District Judges to Appoint police commission is valid.

Approved in In re Appointment of Reviser, 141 Wis. 614, 124 N. W. 678, upholding act authorizing state library trustees, consisting of justices of supreme court and attorney general, to appoint reviser and fix salary.

As to Whether Appointment of Municipal Officers constitutionally delegable to courts or judges. See note, 19 L. R. A. (n. s.) 582.

61 Cal. 326–331, STRONG v. SACRAMENTO ETC. R. R. CO.

Person Using Street may Assume that all others using street will do so with due care, and failure to anticipate culpable negligence on part of another cannot be negligence.

Approved in Scott v. San Bernardino Valley etc. Co., 152 Cal. 613, 93 Pac. 680, holding driver of street-car should use same degree of care upon street as any other person; Hartman v. Chicago G. Western Ry. Co., 132 Iowa, 585, 110 N. W. 11, holding railroad liable for injury to traveler at crossing; Norris v. Atlantic Coast Line etc. R. R., 152 N. C. 511, 67 S. E. 1020, 27 L. R. A. (n. s.) 1069, holding railroad liable for injury to person on track when usual signals were not given; dissenting opinion in Hutson v. Southern California Ry. Co., 150 Cal. 707, 89 Pac. 1095, majority holding person approaching railroad crossing is not authorized to assume persons operating trains will not be negligent.

Where Negligence of Plaintiff Contributing to his injury amounts to want of ordinary care, he cannot recover.

Approved in Tobin v. Omnibus Cable Co. (Cal.), 34 Pac. 126, holding negligence of plaintiff in alighting from car did not amount to want of ordinary care.

61 Cal. 331–332, PERHAM v. KUPER.

Where There is No Specification in bill of exceptions of insufficiency of evidence to justify findings, it is presumed evidence justified findings.

Approved in Davis v. Lamb (Cal.), 35 Pac. 308, refusing to review denial of motion for new trial on ground of insufficiency of evidence where no specification of any particular deficiency appears in bill of exceptions on which motion was made.

61 Cal. 333–334, BELTIS v. TOWNSEND.

Sufficiency of Evidence to Justify Findings cannot be reviewed on appeal from judgment not taken within sixty days after its rendition.

Approved in In re Rose's Estate (Cal.), 20 Pac. 712, applying rule to appeal from decree settling administrator's account.

61 Cal. 337–338, GRAY v. SUPERIOR COURT.

Upon Appeal from Justice's Court, superior court has power to allow appellant to file new undertaking in lieu of undertaking insufficient in form.

Reaffirmed in Nobmann v. Superior Court (Cal.), 12 Pac. 869.

To What Tribunals Writ of Prohibition may issue. See note, 111 Am. St. Rep. 935.

61 Cal. 346–347, 44 Am. Rep. 553, DRUKE v. HEIKEN.

Promissory Note Payable to Order and not indorsed **is subject to** gift causa mortis.

Approved in Varley v. Sims, 100 Minn. 338, 117 Am. St. Rep. 694, 111 N. W. 271, 8 L. R. A. (n. s.) 828, delivery of check as gift causa mortis to one to be delivered to donee passes title to bank deposit; Foley v. Harrison, 233 Mo. 570, 136 S. W. 388, upholding as gift causa mortis, gift of contents of safe deposit box containing unindorsed notes; Blazo v. Cochrane, 71 N. H. 587, 53 Atl. 1027, upholding gift of unindorsed note.

Gifts Causa Mortis. See note, 99 Am. St. Rep. 909, 912.

61 Cal. 349–356, GERMANIA BUILDING ETC. ASSN. v. WAGNER.

Constitution of 1879 Did not Repeal the then existing lien laws.

Approved in Nofziger Lumber Co. v. Solomon, 13 Cal. App. 624, 110 Pac. 475, and Peckham v. Fox, 1 Cal. App. 308, 82 Pac. 92, both following rule.

Claim of Mechanic's Lien Relates Back to time work was done or materials furnished.

Approved in Purser v. Cady (Cal.), 49 Pac. 181, following rule.

Relation Back of Subcontractor's Lien to date of original contractor's. See note, 16 L. R. A. 336.

61 Cal. 360–361, EDE v. HAZEN.

When Statutory Remedy to Set Aside Judgment upon motion exists, equity cannot be invoked.

Approved in Estudillo v. Security Loan etc. Co., 149 Cal. 563, 87 Pac. 22, holding equity will relieve from judgment procured by fraud upon failure of motion to set aside; Brum v. Ivins, 154 Cal. 21, 129 Am. St. Rep. 137, 96 Pac. 878, holding execution on judgment will not be enjoined on grounds which would have been defense to original action in absence of showing of mistake or fraud; Chielovich v. Krauss (Cal.), 9 Pac. 946, in quiet title suit, where plaintiff's title is derived through fraudulent judgment, it must be shown that parties defrauded took proper steps under section 473, Code of Civil Procedure, to avoid consequence of fraud by having judgment set aside.

Equitable Jurisdiction in Regard to Injunctions against judgments. See note, 32 L. R. A. 324, 327.

Injunctions Against Judgments for Defenses existing prior to rendition. See note, 31 L. R. A. 772.

61 Cal. 364–365, MONT BLANC ETC. MIN. CO. v. DEBOUR.

In Action Under Section 2326, United States Revised Statutes, to determine right of possession of mining claim, only those who have filed claims to land in United States land office can be made parties to action.

Approved in Lily Mining Co. v. Kellogg, 27 Utah, 115, 74 Pac. 519, holding allegation by plaintiff that claim was filed, in due time and form, in land office, is essential to confer jurisdiction upon court to decide controversy in regard to right of possession of mining claim.

Denied in Nome-Sinook Co. v. Simpson, 1 Alaska, 586, 588, municipal corporation, though not adverse claimant in land office proceeding, may intervene in suit to determine right of possession of mining claim to protect its public property lying in mining location by showing neither party had complied with laws.

61 Cal. 367–374, PEOPLE v. MORINE.

Instructions Should be Read as a Whole in determining whether law was correctly given.

Approved in People v. Ruef, 14 Cal. App. 613, 114 Pac. 69, holding reading of code section to jury was harmless when they were otherwise specifically instructed on all material questions; People v. Webster, 13 Cal. App. 353, 109 Pac. 639, holding charge read as whole correctly presented law on subject of killing in self-defense; People v. Davis, 1 Cal. App. 14, 81 Pac. 718, and Humphrey v. Pope, 1 Cal. App.

376, 82 Pac. 224, both holding instructions construed together in light of evidence were not misleading nor prejudicial; State v. Bond, 12 Idaho, 443, 86 Pac. 49, holding instructions, taken as a whole, correctly stated law of case.

To Constitute Murder in First Degree, it is only necessary that act of killing be preceded by and the result of concurrence of will, deliberation, and premeditation on part of slayer.

Approved in People v. Maughs, 149 Cal. 263, 86 Pac. 191, holding incorrect same instruction but omitting words "and result of."

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 707.

Standpoint of Determination as to danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 536.

Stenographers' Notes as Evidence and right to read them to jury. See note, 81 Am. St. Rep. 363.

61 Cal. 377–378, PEOPLE v. FUQUA.

Where Defendant Pleads not Guilty and also former acquittal, verdict must be rendered on each plea to sustain judgment of conviction.

Approved in Ex parte King, 10 Cal. App. 283, 101 Pac. 811, State v. Kieffer, 17 S. D. 69, 95 N. W. 290, and State v. Creechley, 27 Utah, 144, 75 Pac. 385, all following rule; People v. O'Leary (Cal.), 16 Pac. 885, where pleas were "not guilty," "former acquittal," and "once in jeopardy," jury must find on all three as condition to judgment of conviction.

Distinguished in Storm v. Territory, 12 Ariz. 34, 94 Pac. 1102, holding acquittal on charge of embezzlement not to bar prosecution for other acts charged in original indictment when state had elected to stand upon one act only.

61 Cal. 378–380, PEOPLE v. HARDISSON.

Where There is an Appeal from a Judgment and also from an order denying new trial, reversal of order is in effect ordering new trial.

Reaffirmed in Ex parte Ballard, 149 Cal. 115, 84 Pac. 833, and People v. Ballard, 13 Cal. App. 513, 110 Pac. 352.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 75.

61 Cal. 380–381, PEOPLE v. LOCK WING.

Evidence and Instructions as to Character of accused. See note, 20 L. R. A. 611.

61 Cal. 387–396, PEOPLE v. HONG AH DUCK.

Indictment for Murder Need not Describe weapon used.

Reaffirmed in Molina v. Territory, 12 Ariz. 16, 95 Pac. 103.

Exclusion of Witnesses in Criminal Case from courtroom is in discretion of court.

Approved in People v. Oliver, 7 Cal. App. 604, 95 Pac. 174, holding court did not abuse discretion in refusing to exclude a particular witness from courtroom at request of defendant.

Section 1105, Penal Code, Requires Defendant to prove circumstances in mitigation or justification of killing by preponderance of evidence.

Overruled in People v. Button (Cal.), 38 Pac. 202, criticising instruction with reference to withdrawal of accused from combat; Anderson v. Territory, 9 Ariz. 53, 54, 76 Pac. 637, holding section 933, Penal Code, requires defendant to produce such proof in mitigation or justification of homicide as will raise reasonable doubt as to whether killing was justifiable.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 490.

61 Cal. 401–403, CHANDLER v. PEOPLE'S SAVINGS BANK.

Where Parties Themselves Settle Accounts without charging each other interest, interest cannot be allowed.

Approved in Bassick Co. v. Beardsley, 49 Colo. 277, 280, 112 Pac. 771, 772, 33 L. R. A. (n. s.) 852, following rule.

Miscellaneous.—Cited in Jacobs v. Walker (Cal.), 33 Pac. 92, holding where on appeal new trial is ordered without limitation for any specified reason, new trial should not be limited to the one issue discussed.

61 Cal. 404–405, PEOPLE v. CHEE KEE.

Party Objecting to Evidence must Specify Ground of objection.

Reaffirmed in People v. Walker, 15 Cal. App. 406, 114 Pac. 1011.

Facts of Which Courts will take judicial notice. See note, 124 Am. St. Rep. 49.

Scientific Books and Treatises as evidence. See note, 40 L. R. A. 561.

61 Cal. 405–430, DODGE v. MEYER.

Transfer of Bill of Lading Does not Pass Title where such was not intention of parties.

Approved in Giffen v. Selma Fruit Co., 5 Cal. App. 53, 89 Pac. 857, holding bill of lading did not pass title when evidence clearly showed such was not intention of parties.

Distinguished in Althouse v. McMillan, 132 Mich. 148, 92 N. W. 942, holding title passed by transfer of bill of lading.

Rights and Liabilities of Assignees of bills of lading. See note, 105 Am. St. Rep. 335, 341, 343, 366, 374.

It is not Necessary to a Conversion that there should be manual taking of thing by defendant, nor that he has applied it to his own use, but it is sufficient that he exercise dominion over it in exclusion of plaintiff's right.

Approved in Lowe v. Ozmun, 3 Cal. App. 394, 86 Pac. 732, where defendant notified owner that he no longer held property in pledge and asserted ownership, and subsequently sold it as his own, such acts and declarations amounted to conversion.

Distinguished in Tafft v. Presidio & Ferries R. Co. (Cal.), 22 Pac. 488, where attorney in fact of stockholder presents certificates with power of attorney to deal with stock and demands transfer to himself on books of corporation, in fraud of his client, corporation is not guilty of conversion in issuing another certificate in ignorance of fraud.

In Action by Bailor Against Bailee for conversion, bailee cannot set up title in third person.

Approved in Bondy v. American Transfer Co., 15 Cal. App. 750, 115 Pac. 966, following rule.

61 Cal. 432–435, BROWN v. MOORE.

Disobedience of Void Order as Contempt. See note, 16 L. R. A. (n. s.) 1065, 1068.

61 Cal. 436–437, EX PARTE McCLAIN.

Legislature may Prohibit Sale of Intoxicating Liquors within limits specified in section 172, Penal Code.

Distinguished in Reed v. Collins, 5 Cal. App. 499, 90 Pac. 975, holding refusal to grant license under county ordinance regulating liquor licenses must be on material grounds and for good reason.

61 Cal. 438–454, IN RE GROVE STREET.

Petition for Condemnation of Land for city street must be same in substance as that required by statute, to confer jurisdiction.

Approved in McCarty v. Southern Pacific Co., 148 Cal. 217, 82 Pac. 620, holding petition for condemnation of land signed by wrong party did not give jurisdiction to court; Canyon County v. Toole, 9 Idaho, 567, 75 Pac. 611, holding petition for establishing public road must contain substantially all facts required to be stated therein by sections 920 and 921, Revised Statutes of 1887, in order to confer jurisdiction on county commissioners.

Distinguished in County of Sacramento v. Glann, 14 Cal. App. 785, 113 Pac. 362, where jurisdiction of condemnation proceedings does not depend upon petition, inferior board may determine its own jurisdiction by determining facts on which it rests by evidence; State v. Ausherman, 11 Wyo. 432, 72 Pac. 205, under statute providing that when two or more joint owners of ditch are unable to agree as to its use, either may apply to district court for appointment of person to take charge thereof, answer to such petition denying joint interest does not devest court of jurisdiction; State v. Superior Court, 47 Wash. 14, 91 Pac. 242, finding of commissioners that petition for highway satisfies statute cannot be collaterally attacked.

Inferior Board may Determine Conclusively its own jurisdiction by adjudicating existence of facts on which its power depends.

Approved in State v. Schenkel, 129 Mo. App. 238, 108 S. W. 630, county court's decision as to whether public welfare required establishment of proposed road is not subject to review.

61 Cal. 455–461, ORNBAUM v. HIS CREDITORS.

Description in Declaration of Homestead need not be more particular than in conveyance.

Approved in Jones v. Gunn, 149 Cal. 690, 87 Pac. 578, holding description of homestead as certain tract and "other lands" owned by her husband is too indefinite when value given is for all lands.

61 Cal. 468–475, 44 Am. Rep. 555, ESTATE OF RAND.

Document Purporting to be Holographic Will but portions of which were printed, blanks in form being filled in by testator, is invalid as will.

Approved in Estate of Fay, 1 Cof. Prob. 429, denying probate to holographic will which by mistake bears date twenty-eight years prior to its execution; Baker v. Brown, 83 Miss. 797, 36 So. 540, a testamentary instrument in handwriting of testatrix, the words "my will" as caption thereto, is valid holographic will; In re Noyes' Estate, 40

Mont. 198, 105 Pac. 1019, 26 L. R. A. (n. s.) 1145, holding omission of date invalidates holographic will.

Holographic Wills. See notes, 104 Am. St. Rep. 26, 27, 1 Cof. Prob. 435, 436.

61 Cal. 478–481, PEOPLE v. COOK.

Where Girl Under Age of Eighteen was Placed in employ of certain party by father and she left there unknown to father and led dissolute life, and accused placed her in house of prostitution, girl was taken from custody of father within Penal Code, section 267.

Distinguished in People v. Flores, 160 Cal. 772, 118 Pac. 248, where girl less than eighteen years of age, who had been committed to home for incorrigible girls, escaped and became street-walker, and parents made no attempt to find her, accused, who procured her entrance to bawdy-house, did not violate Penal Code, section 267.

61 Cal. 481–487, WELTON v. COOK.

Lis Pendens Filed by Plaintiff in quiet title suit affects grantee of plaintiff with notice of cross-demand set up by defendant.

Approved in Bridger v. Exchange Bank, 126 Ga. 827, 115 Am. St. Rep. 118, 56 S. E. 100, 8 L. R. A. (n. s.) 463, holding lis pendens affects purchasers from parties and those who hold under them.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 346.

61 Cal. 498–507, MUIR v. GALLOWAY.

Court cannot Extend Time to Serve Statement on motion for new trial more than thirty days in all; and when one period of ten days ended on Sunday next, period of ten days could not begin on Monday following.

Cited in Johnston v. New Omaha etc. Electric Light Co., 86 Neb. 172, 125 N. W. 156, where last day for doing an act falls on Sunday, it may be done on Monday following.

Extension of Time When Last Day Falls on Sunday. See note, 14 L. R. A. 122.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 531, 569.

61 Cal. 522–524, MULREIN v. KALLOCK.

Validity of Contract for Material Patented or held in monopoly, where public letting to lowest bidder required. See note, 5 L. R. A. (n. s.) 683.

61 Cal. 524–526, HALL v. THEISEN.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 107.

Miscellaneous.—Cited in Hall v. Theisen, 61 Cal. 527, companion case; Hooper v. Patterson (Cal.), 32 Pac. 514, referring historically to principal case.

61 Cal. 527–529, PEOPLE v. CHEONG FOON ARK.

Instruction that Defendant must Prove his innocence of crime charged by preponderance of evidence is erroneous.

Approved in People v. Jones, 160 Cal. 371, 117 Pac. 182, reaffirming rule; People v. Morris, 3 Cal. App. 7, 84 Pac. 465, holding erroneous

instruction that defense of alibi must be proved by preponderance of evidence; State v. Schmidt, 19 S. D. 588, 104 N. W. 260, when accused introduces evidence of battery in self-defense, burden is not on him to substantiate defense by preponderance of evidence.

61 Cal. 538–540, PEOPLE v. SING LUM.

Unless It Appears to Contrary from Record, accused will be presumed to have been present in court at time required by statute.

Approved in State v. Swenson, 18 S. D. 205, 99 N. W. 1116, following rule; Wood v. State, 4 Okl. Cr. 461, 112 Pac. 21, holding presumption on appeal from judgment is that defendant was arraigned, although record does not specifically so state, when contrary does not appear.

61 Cal. 540–544, PEOPLE v. ROLFE.

It is not Error to Refuse to Strike Out incompetent testimony when no objection was taken when offered.

Approved in People v. Walker, 15 Cal. App. 406, 114 Pac. 1011, Marks v. Bodie Bank (Cal.), 8 Pac. 809, and People v. Ardell (Cal.), 66 Pac. 971, all following rule.

Where Witness Expresses Belief That Defendant is person seen, but does not identify him beyond doubt, such evidence is sufficiently certain to go to jury.

Approved in State v. Vanella, 40 Mont. 339, 106 Pac. 369, following rule; Craig v. State, 171 Ind. 323, 86 N. E. 400, holding sufficiency of circumstantial evidence as to identity of accused charged with robbery to be for jury to pass on; Roszczyniala v. State, 125 Wis. 418, 104 N. W. 114, upholding sufficiency of evidence as to identity of one charged with rape to go to jury.

Identity of Person is Presumed from identity of name.

Reaffirmed in People v. Mullen, 7 Cal. App. 548, 94 Pac. 867.

61 Cal. 544–547, PEOPLE v. HERBERT.

Where Evidence is not Before Court, there is nothing to show requested instruction had any application to case.

Approved in People v. Johnson (Cal.), 8 Pac. 690, following rule.

To Justify Homicide There must be Necessity, actual or apparent.

Approved in Wilson v. Territory of Arizona, 7 Ariz. 51, 60 Pac. 698, following rule; People v. Cyty, 11 Cal. App. 710, 106 Pac. 261, reversing judgment for refusal of requested instruction in regard to justifiability of homicide under menace of imminent danger, where evidence warranted such instruction.

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 688.

"Retreat to the Wall" in Homicide. See note, 2 L. R. A. (n. s.) 55.

Admissibility, on Trial for Murder, of testimony of accused at coroner's inquest. See note, 70 L. R. A. 46.

61 Cal. 548–554, PEOPLE v. COCHRAN.

Challenge of Juror Without Statement of ground of challenge must be disregarded.

Reaffirmed in Robinson v. Territory, 16 Okl. 250, 85 Pac. 454.

Fact That Juror has Formed unqualified opinion is not cause of challenge for bias.

Approved in Thomas v. State, 150 Ala. 40, 43 So. 374, juror not subject to challenge for having formed fixed opinion as to defendant's guilt.

Court had Discretion to Refuse Request to allow jury to take with them to jury-room papers used on trial.

Reaffirmed in State v. Young, 134 Iowa, 520, 110 N. W. 298.

It is not Error to Refuse to Allow Diagram used by some witnesses in testifying to be taken to jury-room.

Approved in Carman v. Mont. Cent. Ry. Co., 32 Mont. 142, 79 Pac. 692, holding it not error to refuse to allow map of place where injury occurred, which was not offered in evidence, but used as reference by witnesses, to be taken to jury-room, in action for killing stock by railroad; State v. Crea, 10 Idaho, 100, 76 Pac. 1017, holding it error to allow jury to take to jury-room, over defendant's objection, objects, other than documents, offered in evidence.

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 693.

61 Cal. 555–556, **AH GOON v. SUPERIOR COURT.**

Necessity for Notice of Intervention. See note, 123 Am. St. Rep. 290, 291.

61 Cal. 557–605, **CROSBY v. DOWD.**

Uncertainty in Description of Mortgaged Property should be corrected, if possible, in action for foreclosure of mortgage.

Approved in Marshall v. Livermore Spring Water Co. (Cal.), 5 Pac. 102, holding void decree of foreclosure directing sale of greater interest than defendant mortgaged.

Decree Foreclosing Mortgage must be in itself sufficient to describe property without referring to other records.

Overruled in Williams v. Bisagno (Cal.), 34 Pac. 641, upholding sufficiency of resolution to pave street which refers by number to ordinances for manner in which work is to be done, without reciting provisions of ordinances; Murray v. Nixon, 10 Idaho, 617, 79 Pac. 646, refusing to reverse judgment on ground that findings on which it rests refers to maps and plats on file in the case for complete and definite description of property involved, when capable of being made certain by such references.

Complaint in Foreclosure Proceedings must contain description prima facie sufficient for identification of property.

Approved in Hackfeld v. Monsarrat, 18 Haw. 334, upholding sufficiency of description in complaint on foreclosure.

61 Cal. 605–610, **BENJAMIN v. STEWART.**

When Motion for New Trial is Made on ground of irregularity in proceedings of jury, it must be made upon affidavits.

Distinguished in Zibbell v. Southern Pacific Co., 160 Cal. 252, 116 Pac. 520, arguendo.

A Trial of a Cause must embrace a decision by court, jury or referee.

Approved in Commonwealth v. Soderquest, 183 Mass. 201, 66 N. E. 802, holding arraignment and plea of guilty in criminal action is not a trial.

Inadequacy of Damages as Ground for setting aside verdict. See note, 47 L. R. A. 50.

Review of Ruling on Motion for New Trial in action for bodily injuries on ground of inadequacy of damages. See note, 28 L. R. A. (n. s.) 132.

61 Cal. 611–614, **WESTERN DEVELOPMENT CO. v. EMERY.**

Subscription to Provide Money to induce corporation to build railway is for benefit of corporation, and it may sue thereon as real party in interest.

Approved in Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 447, 108 Pac. 310, where subscription was made to be paid to bank as trustee, with provision that it be subscribed for stock of company in course of promotion, such corporation when organized may sue upon contract.

As to Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 596.

61 Cal. 620–622, **PEOPLE v. HEILBING.**

Where Defendant Pleads not Guilty and also former acquittal, verdict on both pleas is essential to judgment of conviction.

Approved in People v. Fuqua, 61 Cal. 377, following rule.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 78.

61 Cal. 622–625, **MARSTERS v. LASH.**

In Absence of Proof, Law of foreign state is presumed to be same as law of this state.

Approved in O'Sullivan v. Griffith, 153 Cal. 507, 95 Pac. 875, Allen v. Allen (Cal.), 27 Pac. 32, and Wilhite v. Skelton, 5 Ind. Ter. 631, 82 S. W. 835, all following rule; Estate of Mackay, 3 Cof. Prob. 341, applying rule to marriage in Colorado between whites and negroes.

Presumption as to Law of Other States. See note, 21 L. R. A. 468.

Oral Proof of Foreign Laws. See note, 25 L. R. A. 449.

How Case Determined When Proper foreign law not proved. See note, 67 L. R. A. 43.

61 Cal. 629–634, **FROMM v. SIERRA NEVADA ETC. MIN. CO.**

Damages for Conversion of Personal Property, where action is prosecuted with reasonable diligence, is highest market value between conversion and verdict without interest.

Distinguished in Clapp v. Vatcher, 9 Cal. App. 467, 99 Pac. 551, where action was for damages for sale of land by plaintiff's testator, induced when he was of unsound mind, and plaintiff sued for proceeds of sale, measure of damages is proceeds plus interest.

61 Cal. 634–638, **CLARK v. CLAYTON.**

Action on Injunction Bond cannot be maintained until suit in which injunction was issued is finally disposed of by final decree.

Approved in Howard v. Lindeberg, 2 Alaska, 303, holding right of action on injunction bond accrues when injunction is dissolved and is not stayed by appeal from final judgment; Dougal v. Eby, 11 Idaho, 797, 85 Pac. 104, holding court could not summarily enter judgment against sureties on injunction bond upon dissolution of injunction without sureties having their day in court.

61 Cal. 640–644, NORCROSS v. NUNAN.
Verdict Should Dispose of All Issues submitted to jury.
Reaffirmed in Woods v. Latta, 35 Mont. 22, 88 Pac. 406.

61 Cal. 645–651, NEWELL v. SEXTON.
Authority of Pledgee to Compromise Obligations held as collateral.
See note, 28 L. R. A. (n. s.) 982.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 62 CALIFORNIA.

62 Cal. 1–6, **CONDEE v. BARTON.**

Court may Change Its Conclusions of law at any time before final judgment is entered.

Approved in Brownell v. Superior Court, 157 Cal. 708, 109 Pac. 93, oral order of partial distribution subject to change until entered on official minutes; Ex parte Monckros Von Vetsera, 7 Cal. App. 139, 93 Pac. 1037, court may vacate oral order discharging prisoner on habeas corpus; Cline Piano Co. v. Sherwood, 57 Wash. 243, 106 Pac. 743, attorney's lien does not attach until written judgment is formally entered.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 625.

62 Cal. 9–18, **PRIET v. HUBERT.**

Miscellaneous.—Cited in Priet v. De La Montanya (Cal.), 22 Pac. 172, referring historically to cited case.

62 Cal. 19–20, **BAKER v. DICKSON.**

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 405.

62 Cal. 20–27, **CAMP v. GRIDER.**

Title to Public Land subsequently acquired by mortgagor inures to benefit of mortgagee.

Approved in Jones v. Chalfant (Cal.), 31 Pac. 258, reaffirming rule; Hafemann v. Gross, 199 U. S. 346, 26 Sup. Ct. 80, 50 L. Ed. 220, contract of pre-emptor to pay location fee and one-fourth of proceeds from sale of land acquired not invalid.

Meaning Should, if Possible, be given to every section of the code.

Approved in Primm v. Superior Court, 3 Cal. App. 212, 84 Pac. 788, construing sections 553 and 946, Code of Civil Procedure, together so as to permit attachment being continued in force pending appeal by plaintiff; Estate of Bedell, 3 Cof. Prob. 82, applying rule to code sections with reference to nominating administrator.

Mortgage upon Homestead of decedent must be presented as claim against his estate.

Approved in Hibernia Sav. etc. Society v. Laidlaw, 4 Cal. App. 629, 88 Pac. 731, reaffirming rule; Bull v. Coe (Cal.), 15 Pac. 124, 125, applying rule to deed absolute, intended as mortgage, executed by husband and wife upon wife's separate property, which had been declared a homestead; Knock v. Bunnell (Cal.), 21 Pac. 961, where homestead invalid, no claim need be presented.

Conveyance Recorded Before Grantor obtained title, as notice. See note, 23 L. R. A. 563.

62 Cal. 27–29, PEOPLE v. DOGGETT.

Evidence of Good Character to create doubt of guilt. See notes, 103 Am. St. Rep. 889, 892, 905; 20 L. R. A. 617.

62 Cal. 31–37, DOUGHERTY v. ROSENBERG.

Provision of Statute of Frauds as to agreements not to be performed within a year applies only to agreements which do not admit of valid execution within the year.

Approved in Ayotte v. Nadeau, 32 Mont. 520, 81 Pac. 151, reaffirming rule; Stewart v. Smith, 6 Cal. App. 158, 91 Pac. 670, upholding contract to will property in particular way.

Statute of Frauds—agreements not to be performed within a year. See note, 138 Am. St. Rep. 599.

62 Cal. 40–42, SANTA CRUZ GAP TURNPIKE JOINT STOCK CO. v. SANTA CLARA COUNTY.

Semble, That an Appeal Lies from judgment of superior court in case of prerogative writ.

Approved in Beaumont v. Samson, 4 Cal. App. 703, 89 Pac. 138, where petition for writ of review has been denied in superior court, subsequent petition to court of appeals will be refused on that ground.

Exclusiveness of Jurisdiction of Highest Court to issue remedial writs for prerogative purposes. See note, 13 L. R. A. (n. s.) 771.

62 Cal. 50–55, PEOPLE v. PICO.

Word "Horse" is Used in Generic Sense in section 487, Penal Code.

Approved in People v. Melandrez, 4 Cal. App. 398, 88 Pac. 372, reaffirming rule; State v. Collett, 9 Idaho, 615, 75 Pac. 273, information that charges larceny of one horse contains sufficient description; State v. Matejousky, 22 S. D. 37, 115 N. W. 99, no variance between information alleging larceny of horse and proof of larceny of gelding.

The Determination of the Question whether acquaintances are intimate so as to admit their opinions as to defendant's sanity is within the discretion of the court.

Distinguished in State v. Penna, 35 Mont. 541, 90 Pac. 790, holding newspaper reporters whose only acquaintance with defendant was half-hour's conversation shortly after homicide are not "intimate" acquaintances.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 733.

Where Defendant is Brought Up for judgment on conviction, court may refuse to submit issue of insanity to jury.

Approved in State v. Lyons, 113 La. 1001, 37 So. 905, where defendant has been convicted of murder in trial in which insanity was main issue and it is suggested in arrest of judgment that he is insane, method of inquiry is within discretion of court.

Insanity After Commission of Criminal Act. See note, 38 L. R. A. 587.

62 Cal. 60–65, STEVENSON v. SUPERIOR COURT.

Administration upon the Estate of a living person is totally void. Reaffirmed in Fay v. Costa, 2 Cal. App. 244, 83 Pac. 276.

Distinguished in Cunnius v. Reading School District, 198 U. S. 472, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121, Pennsylvania statute for administering estate of absentees does not violate fourteenth amendment.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 543.

Collateral Impeachability of Findings as to jurisdictional facts on which administration is based. See note, 18 L. R. A. 243.

Validity of Acts Under Letters Testamentary or of administration afterward revoked or held invalid. See note, 21 L. R. A. 148.

62 Cal. 69–119, SPRING VALLEY WATERWORKS v. SCHOTTLER.

The Right to Collect Rates for water supplied to counties, cities or towns, is a franchise.

Approved in San Joaquin etc. Irr. Co. v. Merced Co., 2 Cal. App. 599, 600, 84 Pac. 288, upholding assessment of special franchise to distribute and sell water; State v. Des Moines City Ry. Co., 135 Iowa, 705, 109 N. W. 872, street railway franchise may be attacked in quo warranto proceeding.

The Franchise of a Corporation is property, distinct from the property which it may acquire by the use of such franchise.

Approved in San Joaquin etc. R. R. Co. v. Merced Co., 2 Cal. App. 598, 84 Pac. 287, upholding assessment of corporate franchise and of special franchise to distribute and sell water; Southwestern etc. Tel. Co. v. San Antonio, 32 Tex. Civ. App. 102, 73 S. W. 860, franchises of telephone company are taxable; dissenting opinion in Stockton Gas etc. Co. v. San Joaquin Co., 148 Cal. 326, 83 Pac. 59, 5 L. R. A. (n. s.) 174, majority holding franchise of gas or electric light company to use streets is assessable only in place where right is actually exercised.

Right to be a Corporation as Within Provision subjecting franchises to taxation. See note, 28 L. R. A. (n. s.) 255.

The Value of a Corporate Franchise may be found by deducting the value of the tangible property from the market value of the stock.

Reaffirmed in Crocker v. Scott, 149 Cal. 592, 87 Pac. 109.

Everything Entering into and Giving Value to shares of stock should be included in the assessment of the corporate property.

Approved in Crocker v. Scott, 149 Cal. 588, 589, 590, 87 Pac. 107, 108, upholding assessment of shares of stock in national bank; San Joaquin etc. Irr. Co. v. Merced Co., 2 Cal. App. 595, 87 Pac. 286, upholding assessment of corporate franchise and of special franchise to distribute and sell water; Kaiser Land and Fruit Co. v.

Curry, 155 Cal. 651, 103 Pac. 346, upholding act of 1905, imposing license tax upon corporation; Stroh v. Detroit, 131 Mich. 113, 90 N. W. 1031, taxation of shares held by resident in foreign corporation, all of whose property is taxed in state, is invalid.

Distinguished in San Francisco Nat Bank v. Dodge, 197 U. S. 83, 25 Sup. Ct. 384, 49 L. Ed. 669, illegal discrimination results from taxation of national bank stock at its market value, under sections 3608–3610, California Political Code.

The Charter of a Corporation is the statute or statutes defining its powers, together with the instruments required to be executed by such statutes.

Approved in Treasurer v. Benson, Smith & Co., 18 Haw. 78, requiring statement from corporation.

Taxation of Franchises. See notes, 131 Am. St. Rep. 867, 880; 57 L. R. A. 37, 39, 73, 98, 99.

Taxation of Capital Stock of Corporations. See note, 58 L. R. A. 563, 566.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 333.

62 Cal. 120–123, PEOPLE v. HOIN.

Irresistible Impulse Does not Constitute that insanity which is a legal defense.

Reaffirmed in People v. Trebilcox, 149 Cal. 308, 86 Pac. 684.

Irresistible Impulse as Excuse for Crime. See note, 18 L. R. A. 225.

Insanity is Such a Diseased Condition of the mental faculties as renders a person incapable of distinguishing between right and wrong with reference to the act with which he is charged.

Approved in Davis v. State, 44 Fla. 49, 32 So. 827, reaffirming rule.

62 Cal. 139–145, PEOPLE v. SALORSE.

Court will not Reverse Where Erroneous Instruction was not calculated to mislead the jury.

Approved in Hayden v. Consolidated Min. etc. Co., 3 Cal. App. 139, 84 Pac. 423, instructions held not to be repugnant when construed together.

Embezzlement of Horse is a Felony, irrespective of its value.

Cited in In re O'Shea, 11 Cal. App. 574, 105 Pac. 778, upholding Penal Code, section 353a, punishing poolselling and making offense either felony or misdemeanor, by providing punishment either in county jail or state prison.

Nature and Elements of Embezzlement. See note, 87 Am. St. Rep. 23, 29.

62 Cal. 151–154, ROSENKRANZ v. WAGNER.

Complaint on Mechanic's Lien which does not allege that anything was due contractor or that premature payment had been made is insufficient.

Reaffirmed in Nason v. John, 1 Cal. App. 540, 82 Pac. 566.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

62 Cal. 160–163, BELCHER CONSOLIDATED GOLD MIN. CO. v. DEFFERARI.

The Rights of One Who Fails to perform work on mining claim are not lost where he resumes work before his claim is relocated.

Approved in Anderson v. Anvil Hydraulic Co., 3 Alaska, 505, reaffirming rule; Willitt v. Baker, 133 Fed. 947, where locators were at work on claim December 31st and intended to resume work next morning, location by another at 2 A. M. was invalid.

Abandonment and Forfeiture of Mining Claims. See note, 87 Am. St. Rep. 415.

Relocation of Mining Claim as abandoned or forfeited. See note, 68 L. R. A. 840.

62 Cal. 164–176, WILSON v. SOUTHERN PACIFIC R. R. CO.

In Action for Negligence, nonsuit should not be ordered unless there is no evidence at all or a mere scintilla of evidence.

Reaffirmed in Bygum v. Southern Pac. Co. (Cal.), 36 Pac. 415.

Burden of Proof as to Negligence of Carrier holding as warehouseman. See note, 22 L. R. A. (n. s.) 979, 980.

Where It Appears That Property stored was consumed by fire, burden is upon bailor to prove that warehouseman was negligent.

Approved in Yazoo & M. V. R. Co. v. Hughes, 94 Miss. 250, 47 So. 665, 22 L. R. A. (n. s.) 975, reaffirming rule.

62 Cal. 176–178, DUNN v. DUNN.

Drunkenness as Affecting Divorce. See note, 34 L. R. A. 449.

62 Cal. 180–181, SANTA CRUZ R. R. CO. v. COUNTY OF SANTA CLARA.

County is not Liable for neglect of duty by its officers.

Distinguished in McPherson v. San Joaquin County (Cal.), 56 Pac. 804, county cannot escape liability under its contract to furnish suitable casings for well because of neglect of duty by its officers in selecting casings.

Liability of Counties for Torts and Negligence. See note, 39 L. R. A. 71.

62 Cal. 181, VAUGHN v. WERLEY.

On Dismissal of Appeal for Failure to file transcript, damages cannot be imposed.

Approved in Kirby v. Harrington (Cal.), 13 Pac. 219, on dismissal of appeal, damages will not be awarded on respondent's affidavit that he believes appeal to be without merit.

62 Cal. 182–186, 45 Am. Rep. 659, ST. HELENA WATER CO. v. FORBES.

Riparian Rights may be Taken for a public use under power of eminent domain.

Approved in Northern Light etc. Co. v. Stacher, 13 Cal. App. 411, 422, 423, 424, 425, 109 Pac. 901, 902, 904, water may be condemned for purpose of generating and transmitting electricity; Prentice v. McKay, 38 Mont. 118, 98 Pac. 1083, water upon land in private ownership cannot be acquired by appropriation; Doyle v. San Diego Land etc. Co., 46 Fed. 711, deed to water in stream

will prevail against subsequent purchaser from grantor of land bordering on stream.

Condemnation of Waters of a Stream. See note, 81 Am. St. Rep. 419.

Power to Condemn Riparian Rights apart from land to which appurtenant. See note, 17 L. R. A. (n. s.) 1006.

By Selling Right to Divert Water on his land, owner conveys easement.

Approved in Duckworth v. Watsonville Water & Light Co., 158 Cal. 218, 110 Pac. 932, where plaintiff's predecessor has conveyed all water for irrigation of his land, plaintiff cannot acquire title thereto by appropriation.

62 Cal. 186–187, ESTATE OF HILL.

An Allowed Claim may be Contested at settlement of final account of administrator.

Approved in Haub v. Leggett, 160 Cal. 494, 117 Pac. 557, creditor of estate may, after having claim partially allowed by executors and partially approved by judge, sue for whole claim.

62 Cal. 190–203, GRIDLEY v. BOGGS.

Conclusiveness of Probate as Res Judicata. See note, 21 L. R. A. 685.

Expert Opinions as to Sanity or Insanity. See note, 39 L. R. A. 327.

62 Cal. 203–204, KITTS v. SUPERIOR COURT.

Order Allowing Amendment to Complaint, in case appealed from justice's court, is not in excess of jurisdiction of superior court.

Disapproved in Armantage v. Superior Court, 1 Cal. App. 134, 81 Pac. 1034, losing party in justice's court may have trial de novo in superior court whether or not there was trial of issues of fact in justice's court.

62 Cal. 204–209, PEOPLE v. YE PARK.

When an Attack is Made With Murderous Intent, the person attacked is under no obligation to flee.

Approved in People v. Maughs, 149 Cal. 260, 86 Pac. 190, where evidence shows self-defense, accused is entitled to instruction as to his right to stand his ground.

"Retreat to the Wall" in Homicide. See note, 2 L. R. A. (n. s.) 55, 70.

62 Cal. 209–237, PEOPLE v. STEPHENS.

The Provisions of the Constitution must receive a practical commonsense construction, with reference to the prior state of the law and the mischief to be remedied.

Approved in Older v. Superior Court, 157 Cal. 776, 109 Pac. 480, applying rule to constitutional provision as to change of venue in cases of criminal libel.

The Constitution Directly Grants Right to lay water or gas pipes in streets, without awaiting for legislative authority.

Approved in Madera Waterworks v. City of Madera, 185 Fed. 288, 293, franchise of water company not impaired by construction of com-

peting works by city; Sunset Telephone etc. Co. v. Pomona, 172 Fed. 833, 97 C. C. A. 251, under statute, telephone company may construct lines in streets without permission of municipal authorities; dissenting opinion in Stockton Gas etc. Co. v. San Joaquin Co., 148 Cal. 328, 83 Pac. 60, 5 L. R. A. (n. s.) 174, majority holding franchise of gas or electric light company to lay pipes or erect poles in city streets is assessable only in county where pipes or poles are situated.

Distinguished in Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 722, 84 Pac. 240, city may make reasonable rules as to location of electric light poles; Boca etc. R. R. v. Sierra Valleys R. R., 2 Cal. App. 559, 84 Pac. 304, one railroad, in order to cross another, must condemn right of way by eminent domain proceedings.

Existence of Public Use as question for courts. See note, 88 Am. St. Rep. 931.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 40.

Miscellaneous.—Cited in Roberts v. Southern Pac. Co., 186 Fed. 939, debates in Congress are sources of information from which court may discover meaning of language intended by Congress.

62 Cal. 210–237, **PEOPLE v. STEPHENS.**

Article XI, Section 19, of Constitution, relating to grant of privilege of laying water-pipes in city streets, was intended to prevent monopoly.

Reaffirmed in Clark v. Los Angeles, 160 Cal. 40, 116 Pac. 726.

62 Cal. 238, **WOODLAND v. STEPHENS.**

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 40.

62 Pac. 250–260, **UPHAM v. HOSKING.**

No Action is Necessary to Establish judicially forfeiture which has been declared by statute.

Approved in Kaiser Land and Fruit Co. v. Curry, 155 Cal. 650, 103 Pac. 345, failure of domestic corporation to pay license tax ipso facto works forfeiture of charter; Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 245, 125 Am. St. Rep. 54, 92 Pac. 491, 15 L. R. A. (n. s.) 1269, section 502, Civil Code, providing for forfeiture of street railroad franchise for failure to commence and finish work within prescribed periods, is self-executing.

Distinguished in Santa Rosa etc. R. R. Co. v. Central St. Ry. Co. (Cal.), 38 Pac. 990, Civil Code, section 502, is not self-executing.

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 554.

Title to Land Between High and Low Water Mark. See note, 45 L. R. A. 240.

Right of State to Grant Tide Lands. See note, 22 L. R. A. (n. s.) 337.

62 Cal. 260–263, **HENDY v. DESMOND.**

Subsequent Recollection by Witness called at trial is not ground for new trial.

Approved in Nicholson v. Metcalf, 31 Mont. 278, 279, 78 Pac. 484, affidavit for new trial must show specifically what acts of diligence were performed to produce evidence at trial.

62 Cal. 263–282, DODGE v. RIDENOUR.

Held, That Court Should have Granted Motion to set aside judgment.

Approved in Scottish etc. Ins. Co. v. Tomkies & Co., 28 Tex. Civ. 160, 66 S. W. 1110, failure of nonresident counsel to appear at trial held to be excused by their belief that case would not be reached.

62 Cal. 283–285, PIERCE v. SCHADIN.

Verdict as to Matters not in Issue should be disregarded.

Approved in Harris v. McLaughlin, 39 Colo. 462, 90 Pac. 94, where only issue was as to validity of note, verdict for less than amount due may be disregarded.

62 Cal. 286–289, TIERNAN v. HIS CREDITORS.

Owner of Double House is not entitled to homestead in portion thereof not occupied by him.

Approved in Hanley v. Hanley, 4 Cof. Prob. 475, but denying equitable relief against order setting apart probate homestead where time for appeal had elapsed; Potter v. Clapp, 203 Ill. 605, 96 Am. St. Rep. 322, 68 N. E. 85, homestead estate of widow in flat building is confined to flat occupied by her; Berends v. Bellevue Water & Fuel Gaslight Co., 119 Ky. 12, 82 S. W. 984, separate tenements in one building held to constitute houses within contract between city and water company as to water rates; dissenting opinion in Smith v. Guckenheimer & Sons, 42 Fla. 49, 27 So. 904, majority setting aside portion of building as homestead.

Disapproved in Adams v. Adams, 183 Mo. 404, 82 S. W. 68, premises exempt as homestead though house constructed with two separate living apartments, one of which was rented.

62 Cal. 291–299, PEOPLE v. HOPE.

Court may Permit Experiment in presence of jury.

Approved in State v. McKowen, 126 La. 1086, 53 So. 356, defendant may be asked to spell word in order to prove his authorship of letter.

Bare Fact of Juror Having, During Trial, visited premises, is not ground for discharging jury.

Approved in Zibbell v. Southern Pacific Co., 160 Cal. 253, 116 Pac. 520, where defeated party knew during trial that juror had visited scene of accident in issue, but he did not complain, misconduct not ground for reversal.

View by Jury. See note, 42 L. R. A. 395.

62 Cal. 299–303, McCARTHY v. LOUPE.

To Entitle a Broker to Commissions, he must show that he was employed by or on behalf of the owner to make the sale.

Distinguished in Sanchez v. Yorba, 8 Cal. App. 492, 97 Pac. 206, complaint in action for broker's commission need not allege that defendant was owner of land.

Unless a Broker's Authority to Sell Real Estate is evidenced by an agreement in writing, he is not entitled to recover his commissions.

Approved in Schuller v. Farquarson (Cal.), 6 Pac. 86, Czarnowski v. Holland, 5 Ariz. 123, 78 Pac. 891, and Covey v. Henry, 71 Neb. 124, 98 N. W. 436, all reaffirming rule; Perkins v. Cooper (Cal.), 24 Pac. 377, written authority from one of several executors, which shows that he was acting as executor, insufficient; Kennedy v. Merickel, 8 Cal. App. 380, 97 Pac. 82, memorandum need not state amount of commission, but recovery may be had upon quantum meruit; Beahler v. Clark, 32 Ind. App. 225, 68 N. E. 614, denying recovery on common count for selling real estate under oral employment; Keith v. Smith, 46 Wash. 134, 89 Pac. 474, memorandum silent as to amount of commission insufficient.

Distinguished in Bradford v. Laffey, 11 Haw. 464, and Friedman v. Suttle, 10 Ariz. 62, 85 Pac. 728, 9 L. R. A. (n. s.) 933, both holding, in absence of statute, agreement to compensate broker for selling real estate need not be in writing; Peirce v. Wheeler, 44 Wash. 329, 87 Pac. 362, broker's agreement of sale, though not authorized by writing, will bind his principal.

Necessity That Authority of Agent to purchase or sell realty be written to enable him to recover compensation. See note, 9 L. R. A. (n. s.) 935.

62 Cal. 303–310, PEOPLE v. WESTLAKE.

It is not Error to Charge that in order to justify homicide in self-defense, there must be a well-founded belief that it was absolutely necessary.

Disapproved in People v. Webster, 13 Cal. App. 353, 109 Pac. 639, but holding error cured by other instructions.

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 688, 691, 707, 709, 711.

Relative Position of Defendant and deceased when fatal shot was fired is not a matter for expert testimony.

Approved in People v. Overacker, 15 Cal. App. 633, 115 Pac. 760, and Jones v. State, 44 Fla. 80, 32 So. 795, both reaffirming rule; People v. Heacock, 10 Cal. App. 453, 455, 102 Pac. 544, 545, expert testimony as to whether or not death was accidental inadmissible; Price v. United States, 2 Okl. Cr. 452, 139 Am. St. Rep. 930, 101 Pac. 1038, expert evidence as to position of arm of deceased when he received fatal wound, inadmissible.

62 Cal. 311–319, REMINGTON SEWING MACHINE CO. v. COLE.

Rule as to Change of Venue stated.

Cited in Bartley v. Fraser, 16 Cal. App. 566, 117 Pac. 685, where there is party defendant who is not necessary party, his codefendant may have cause transferred to county of his residence; Read v. San Diego Union Co. (Cal.), 65 Pac. 568, where, in action against three defendants, two of whom are residents and third a nonresident of county, residents are proper parties, and there is no allegation of their refusal to join, nonresident is entitled to change of venue; Cochrane v. McDonald, 4 Cof. Prob. 545, to point that all defendants must join in motion to change venue under section 395, Code of Civil Procedure.

Plaintiff cannot, by Joining Unnecessary Parties, take away right to move for change of venue.

Approved in Cochrane v. McDonald, 4 Cof. Prob. 539, 542, but holding rule inapplicable to facts.

62 Cal. 320–336, NEHRBAS v. CENTRAL PACIFIC R. R. CO.

When It Clearly Appears from the Undisputed Facts that a party has not exercised due care, question is one of law for the court.

Approved in Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. 850, one who goes to sleep on a railroad track is guilty of negligence as a matter of law.

Contributory Negligence is an Affirmative Defense to be proved affirmatively by the defendant.

Approved in Wistrom v. Redlick Bros., Inc., 6 Cal. App. 675, 92 Pac. 1049, reaffirming rule.

In Action for Death of Children, damages are not limited to pecuniary injury from loss of their services.

Approved in Bond v. United Railroads, 159 Cal. 282, 113 Pac. 371, pecuniary loss from deprivation of services of child, reasonably to be expected after minority, may be considered.

Duty of Train Employees Approaching Crossing where traveler's view of track is obstructed. See note, 22 L. R. A. (n. s.) 234.

Miscellaneous.—Cited in Alder Co. v. Fleming, 159 Fed. 597, 86 C. C. A. 419, right of recovery for wrongful death exists in Montana under statute similar to section 377, California Code of Civil Procedure.

62 Cal. 339–342, DANIELWITZ v. SHEPPARD.

Contract of Administratrix and heir of estate to pay commission for sale of realty belonging thereto is invalid.

Approved in Cochran v. Zachery, 137 Iowa, 591, 126 Am. St. Rep. 307, 115 N. W. 488, 16 L. R. A. (n. s.) 235, contract by which executor and trustee named in will joined with other heirs and devisees to set it aside is invalid.

Liability of Estate for Commissions of Sales broker or agent. See note, 64 L. R. A. 555.

62 Cal. 343–348, DEWEY v. FRANK BROS. & CO.

Disappointment is not Surprise in legal sense.

Approved in Porter v. Anderson, 14 Cal. App. 726, 113 Pac. 350, adverse ruling upon question of law is not surprise; Kroger v. Ryan, 83 Ohio St. 307, 94 N. E. 431, motion properly denied where mover did not ascertain what his witness really knew, and did not ask for continuance to supply evidence.

62 Cal. 348–373, HAYWARD v. ROGERS.

A Sale of Stock Certificates Pledged will not amount to conversion, if pledgee has similar certificates ready for redemption.

Approved in Bell v. Bank of California, 153 Cal. 239, 94 Pac. 892, complaint asking for redemption of shares which have passed out of possession of pledgee must allege that defendant has other shares out of which performance may be adjudged.

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 739.

62 Cal. 377–385, PEOPLE v. HAMILTON.

Accused has No Right to Examine Jurors for avowed purpose of determining whether he will challenge them peremptorily.

Reaffirmed in People v. Trask, 7 Cal. App. 105, 93 Pac. 892.

Counsel's Right to Examine Juror on his voir dire to determine whether to exercise right of peremptory challenge. See note, 109 Am. St. Rep. 566.

Defense of Insanity in Criminal Case must be proved by clear preponderance of evidence.

Approved in Hurst v. State, 40 Tex. Cr. 387, 50 S. W. 721, holding instructions stated rule correctly.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 741, 742.

62 Cal. 385–394, MONTGOMERY v. MERRILL.

Where Answer is Frivolous court may grant motion for judgment on pleadings.

Approved in Crew v. Hutcheson, 115 Ga. 531, 42 S. E. 25, court may ex mero motu refuse to allow defendant to prove defense which is bad in law.

62 Cal. 394–398, OCCIDENTAL BLDG. & LOAN ASSN. v. SULLIVAN.

Fines in Building and Loan Associations. See note, 35 L. R. A. 218, 221.

62 Cal. 399–400, DOVE v. NUNAN.

In Order to Procure the Exemption of two horses under the sixth subdivision of section 690, Code of Civil Procedure, it must appear that exemptioner habitually earns his living thereby.

Approved in Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 751, 108 Pac. 718, same person cannot enjoy exemption as farmer under subdivision 3 and teamster under subdivision 6, section 690, Code of Civil Procedure.

62 Cal. 401–406, HORGAN v. AMICK.

Grain Harvested from Lands constituting homestead is not, as such, exempt from execution.

Approved in In re Sullivan, 148 Fed. 818, 78 C. C. A. 505, standing corn on homestead of bankrupt, which had fully matured at date of bankruptcy, is not exempt under Iowa statute.

Disapproved in Neblett v. Shackleton, 111 Va. 712, 69 S. E. 947, tobacco gathered from homestead is exempt from execution.

62 Cal. 407–410, FARMERS' CO-OPERATIVE UNION v. THRESHER.

The Legislature cannot Extend the Office of the writ of prohibition so as to include ministerial functions.

Approved in McGinnis v. San Jose, 153 Cal. 714, 96 Pac. 368, mandamus will not lie to control discretion of council in matter of advertising application for street railroad franchise; State v. Durand, 36 Utah, 102, 104 Pac. 763, legislature cannot convert writ of prohibition into mere writ of review.

Writ of Prohibition. See note, 111 Am. St. Rep. 943.

62 Cal. 411–413, PEOPLE v. MITCHELL.

It is Ground for Reversal for counsel to state facts pertinent to the issue, but not in evidence.

Approved in Danford v. State, 53 Fla. 25, 43 So. 600, error to permit prosecuting attorney to read from paper under circumstances suggesting that it contained testimony of witness at preliminary examination, though court instructed that paper was not evidence.

Distinguished in People v. McRoberts, 1 Cal. App. 27, 81 Pac. 735, where district attorney simply rebutted inference that might have been drawn from fact that certain evidence was not introduced.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 658, 671.

Counsel's Right to Refer in Argument to witness' refusal to testify as evidence of defendant's guilt. See note, 121 Am. St. Rep. 809.

62 Cal. 413–415, ESTATE OF LOSHE.

When Claim Against Estate of Decedent has been duly allowed, burden of proof is on contestant of such claim.

Approved in Thompson v. Bank of California, 4 Cal. App. 669, 88 Pac. 990, allowance of contingent claim against estate of decedent cannot be regarded as judgment on which payment may be ordered; Shiels v. Nathan, 12 Cal. App. 616, 108 Pac. 39, applying rule to stranger to estate; In re More's Estate (Cal.), 54 Pac. 150, judgment obtained by administrator against estate of decedent under section 1510, Code of Civil Procedure, is prima facie evidence of correctness of claim.

62 Cal. 426–440, HILL v. FINIGAN.

Pledgee cannot Purchase Property pledged, except by direct dealing with pledgor.

Approved in Reeves v. Bruening, 16 N. D. 401, 114 N. W. 314, vendor of personalty cannot buy same at sale held to enforce his lien.

62 Cal. 440–442, BARRETT v. SIMS.

Sale Under Order in Insolvency Proceedings for sale of homestead passes no title.

Approved in Boggs v. Dunn, 160 Cal. 287, 116 Pac. 745, judgment is not lien on property covered by valid declaration of homestead.

62 Cal. 448–464, HARMON v. PAGE.

Court of Equity will Compel Stockholder in insolvent corporation to pay in, for benefit of creditor, amount of capital stock which he has subscribed.

Approved in Turner v. Fidelity Loan Concern, 2 Cal. App. 135, 136, 138, 83 Pac. 67, 68, 69, before relief can be granted, assessment must be levied; Blood v. La Serena Land etc. Co., 150 Cal. 768, 89 Pac. 1092, creditor may sue any stockholder and recover from him his total debt.

Distinguished in Miller v. Lane, 160 Cal. 93, 116 Pac. 60, action in California against resident stockholder of insolvent Colorado corporation is governed by lex fori as to form of action and it is barred in three years.

Liability to Corporations of Subscribers to Stock. See note, 93 Am. St. Rep. 359.

Remedy by Bill in Equity to compel stockholders to pay in amount of capital stock is not taken away by concurrent statutory remedies.

Approved in Watkins v. Wilhoit (Cal.), 35 Pac. 649, creditor's bill to set aside void assignment for benefit of creditors.

Equitable Remedy to Subject Choses in Action to judgment after return of no property found. See note, 63 L. R. A. 693, 694, 701.

A Defendant cannot Avail Himself of statute of limitations by demurrer, unless it affirmatively appears from complaint that action is barred.

Approved in Palmtag v. Roadhouse (Cal.), 34 Pac. 112, reaffirming rule; Chemung Min. Co. v. Hanley, 9 Idaho, 794, 77 Pac. 228, bar of statute cannot be set up by general demurrer.

Limitation of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 479.

Effect of Transfer of Stock upon liability for unpaid subscription. See note, 47 L. R. A. 254.

62 Cal. 468–473, PEOPLE v. TAMKIN.

Threats Made by Deceased against defendant charged with homicide are admissible to determine who was assailant in fatal encounter, and are also admissible, if communicated to defendant, to determine whether he was justified in believing himself in imminent danger.

Approved in People v. Lamar, 148 Cal. 574, 575, 83 Pac. 997, evidence of reputation of deceased, known to defendant, as being quarrelsome and dangerous when intoxicated, is admissible.

Evidence of Antecedent Threats on trial for homicide. See note, 3 L. R. A. (n. s.) 524, 526.

Insulting Words or Conduct as provocation to homicide. See note, 4 L. R. A. (n. s.) 154.

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 697.

62 Cal. 479–482, HUERSTAL v. MUIR.

Remedies of Plaintiff Dispossessed after being put in possession under judgment in ejectment. See note, 135 Am. St. Rep. 649.

62 Cal. 482–483, PEOPLE v. GRIGSBY.

Admission of "Due Service" of notice of appeal is admission of service after filing.

Reaffirmed in People v. Schmitz, 7 Cal. App. 344, 94 Pac. 409.

62 Cal. 484–488, FESSENDEN v. SUMMERS.

In Determining Effect of Indorsement, code sections on negotiable instruments control those on guaranty.

Approved in State v. Campbell, 3 Cal. App. 605, 86 Pac. 841, section 395, Code of Civil Procedure, controls section 433, Political Code, as to place for trial of action to recover official moneys in hands of superintendent of state asylum; Rockfield v. First Nat. Bank, 77 Ohio St. 329, 83 N. E. 395, 14 L. R. A. (n. s.) 842, holding, under negotiable instruments act, that one placing his name on back of note at or before delivery is indorser.

Liability of Stranger Indorsing Commercial Paper before delivery. See note, 18 L. R. A. 33.

62 Cal. 490–491, **EX PARTE CLARK.**

Sections 284 and 285, Code of Civil Procedure, as to substitution of attorneys, have no application to a criminal case.

Reaffirmed in People v. Garnett, 9 Cal. App. 200, 98 Pac. 249.

62 Cal. 493–495, **PEOPLE v. AH FOOK.**

Crime of Offering to Bribe Executive Officer is complete without tender or production of money.

Approved in State v. Woodward, 182 Mo. 407, 81 S. W. 862, applying rule to prosecution for attempting to corrupt juror.

Bribery and Solicitation of Bribe. See note, 116 Am. St. Rep. 39.

62 Cal. 496–503, **BOSTWICK v. McEVOY.**

When Note Secured by Mortgage, though not due at commencement of action, falls due before trial, foreclosure may be decreed.

Distinguished in Kyle v. Hamilton (Cal.), 68 Pac. 486, where mortgage foreclosure is based on mortgage superseded by deed given as security, and mortgage contains attorney fee clause, not contained in deed, foreclosure decree allowing attorney's fee is erroneous.

Suretyship as Defense to Action on note must be pleaded in answer.

Reaffirmed in Osborn v. Hamilton, 16 Cal. App. 636, 117 Pac. 787.

Nature and Elements of Escrows. See note, 130 Am. St. Rep. 936, 966.

62 Cal. 503, **PEOPLE v. HARVEY.**

The Supreme Court has No Original Jurisdiction to try title to an office.

Distinguished in Potomac Oil Co. v. Dye, 10 Cal. App. 539, 102 Pac. 679, granting mandamus to compel ex-officer of private corporation to deliver books and papers to his successor.

62 Cal. 515–516, **ROEDING v. PERASSO.**

Judgment Reversed Because Findings do not respond to issues made by pleadings.

Approved in Dillon Implement Co. v. Cleaveland, 32 Utah, 7, 88 Pac. 672, reversing where court failed to find on all material issues.

Distinguished in Newman v. Maldonado (Cal.), 30 Pac. 834, judgment will not be reversed for failure to find on issues, unless appellant shows that evidence was presented thereon.

What is Community Property. See note, 126 Am. St. Rep. 120.

62 Cal. 516–518, **HEWES v. CARVILLE MFG. CO.**

Order of Serving and Filing Notice of appeal, under section 940, Code of Civil Procedure, is immaterial.

Approved in People v. Schmitz, 7 Cal. App. 343, 94 Pac. 409, applying rule to appeal in criminal case under section 1240, Penal Code.

62 Cal. 518–522, **PEOPLE v. NICHOLS.**

Instruction as to Credibility of Defendant, as witness, upheld.

Approved in People v. Ryan, 152 Cal. 368, 92 Pac. 855, refusing to reverse on account of similar instruction.

62 Cal. 524–534, EX PARTE BERNERT.

On Habeas Corpus on Behalf of One sentenced under void judgment, court will not direct that proper judgment be entered.

Distinguished in Matter of Smith, 152 Cal. 568, 93 Pac. 192, void judgment under which prisoner cannot be held does not have effect of vacating valid process under which he can be held.

Disapproved in Ex parte Tani, 29 Nev. 390, 91 Pac. 138, 13 L. R. A. (n. s.) 518, on habeas corpus, invalid direction as to place of imprisonment may be rejected as surplusage.

Effect of Excessive Sentence. See note, 45 L. R. A. 140, 143.

62 Cal. 534–536, EX PARTE CRITTENDEN.

Upon Judgment Imposing Fine for contempt, court may direct that party stand committed until fine is paid.

Approved in In re Davis, 11 Haw. 599, reaffirming rule; Ex parte Karlson, 160 Cal. 381, 117 Pac. 448, upholding judgment for contempt imposing fine and providing for imprisonment at rate of one day's imprisonment for each two dollars of fine; In re Sullivan, 3 Cal. App. 195, 84 Pac. 781, judgment imposing fine for assault with deadly weapon may direct that accused be imprisoned until fine is paid; Ex parte Dickens, 162 Ala. 285, 50 So. 222, court might commit surviving partner to prison until he obeyed order to deliver property in his hands to receiver.

Disapproved in dissenting opinion in Ex parte Karlson, 160 Cal. 387, 117 Pac. 451, majority upholding judgment for contempt imposing fine and providing for imprisonment until fine is paid at rate of one day's imprisonment for each two dollars of fine.

62 Cal. 538–542, EX PARTE CASINELLO.

Board of Supervisors may Prohibit dumping of garbage except in designated places.

Approved in Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 722, 84 Pac. 240, city authorities have power by reasonable regulations to compel electric lighting company to change location of its poles.

Municipal Power Over Nuisances affecting safety, health, and personal comfort. See note, 38 L. R. A. 315.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 653.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

62 Cal. 545, NEWMAN v. SUPERIOR COURT.

When Appeal may be Taken party is not entitled to certiorari.

Approved in St. Paul etc. Ry. Co. v. Blakemore, 17 N. D. 73, 114 N. W. 732, holding certain order made after judgment to be appealable and, therefore, not reviewable on certiorari.

62 Cal. 545–548, HOKE v. PERDUE.

Swamp Land District is public corporation.

Approved in People v. San Joaquin Valley Agricultural Assn., 151 Cal. 805, 91 Pac. 744, district agricultural association is public corporation; Whipple v. Tuxworth, 81 Ark. 402, 99 S. W. 90, improvement district organized by city council is corporation.

Legality of Swamp Land District cannot be collaterally attacked.

Approved in Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 409, 105 Pac. 281, legality of reclamation district cannot be attacked in proceeding to enforce lien of assessment.

62 Cal. 557–558, PEOPLE ex rel. HAINES v. HENRY.

Who are City Officers. See note, 14 L. R. A. 647.

62 Cal. 562, PEOPLE v. HARTMAN.

Evidence of Other Crimes in criminal cases. See note, 62 L. R. A. 197.

62 Cal. 580–602, SAN FRANCISCO GAS LIGHT CO. v. DUNN.

Delegation of Municipal Power as to License, franchise, and buildings. See note, 20 L. R. A. 726.

62 Cal. 602–610, COFFEY v. GREENFIELD.

Grounds of Motion for Nonsuit must be specified.

Approved in Schroeder v. Mauzy, 16 Cal. App. 450, 118 Pac. 462, reaffirming rule; De Leonis v. Hammel, 1 Cal. App. 396, 82 Pac. 352, reversing when record failed to show any specified ground of motion for nonsuit; Mackel v. Bartlett, 33 Mont. 132, 82 Pac. 798, on appeal from order of nonsuit, sufficiency of complaint will not be considered, where it was not made ground of motion for nonsuit.

Distinguished in Kavanaugh v. Flavin, 35 Mont. 136, 88 Pac. 766, where defense of laches is made out, court may dismiss case of its own motion.

The Pleading of an Intervener claiming to be an innocent purchaser without notice is insufficient, unless it contains proper averments to that effect.

Approved in Bechtol v. Bechtol, 2 Alaska, 399, petition in intervention must state facts sufficient, if admitted, to support decree for intervener; Howe v. Meriwether, 172 Fed. 869, 97 C. C. A. 288, one applying to be made party to action of ejectment must plead facts showing that he has a direct and immediate interest in the property.

Intervention. See note, 123 Am. St. Rep. 289.

62 Cal. 610–611, DILLA v. BOHALL.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

62 Cal. 611–613, ROGERS v. MAHONEY.

Whole Charge cannot be Excepted to Generally.

Approved in Love v. Anchor Raisin Vineyard Co. (Cal.), 45 Pac. 1046, reaffirming rule.

Acquittal or Discharge on Criminal Charge as evidence of want of probable cause. See note, 64 L. R. A. 478.

62 Cal. 613–614, ESTATE OF DEAN.

Order Setting Aside Decree of Settlement of final account of executor and vacating decree of distribution is not appealable.

Approved in In re Kelly's Estate, 31 Mont. 357, 78 Pac. 579, order refusing to vacate decree of distribution and settlement of final account is not appealable; dissenting opinion in Estate of Silva, 15 Haw. 17, majority holding order directing attorney to pay into court fee received from clients out of proceeds of final distribution to be appealable.

62 Cal. 618, CENTRAL PACIFIC R. R. CO. v. SUPERIOR COURT.

Writ of Prohibition. See note, 111 Am. St. Rep. 948.

62 Cal. 618–622, 45 Am. Rep. 663, MARTIN v. THOMPSON.

One in Adverse Possession of Lands under claim of title is entitled to grain sown and harvested by him.

Distinguished in Myer v. Roberts, 50 Or. 83, 126 Am. St. Rep. 733, 89 Pac. 1052, 12 L. R. A. (n. s.) 194, rule does not apply to one who wrongfully secures possession of land by injunction after landlord had re-entered for condition broken.

Title by Accession to Crops, Fruit, and Timber, wrongfully severed. See note, 32 L. R. A. 424.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 456.

It cannot be Said That the Court abused its discretion in denying leave to amend where there is no specification of any amendment.

Approved in Burling v. Newlands, 112 Cal. 500, 44 Pac. 817, reaffirming rule; Loeffler v. Wright, 13 Cal. App. 232, 109 Pac. 272, where plaintiff, after demurrer sustained without leave to amend, did not ask leave to file another amended complaint.

Trying Title to Land in Replevin. See note, 79 Am. St. Rep. 24.

Replevin by or Against One in Adverse Possession of land for things severed. See note, 69 L. R. A. 734.

62 Cal. 622–623, MARTIN v. DURAND.

Replevin by or Against One in Adverse Possession of land for things severed. See note, 69 L. R. A. 734.

62 Cal. 623–641, BRICKELL v. BATCHELDER.

Mortgage Held to Give Mortgagee power, upon default in monthly payment of interest, to bring action to foreclose.

Distinguished in Hall v. Jameson, 151 Cal. 613, 614, 121 Am. St. Rep. 137, 91 Pac. 521, 12 L. R. A. (n. s.) 1190, sale under power contained in mortgage, before maturity of note, did not operate to accelerate maturity of unpaid balance of note.

Miscellaneous.—Cited in Whelan v. Brickell (Cal.), 33 Pac. 397, subsequent phase of same litigation.

62 Cal. 641–646, SAN FRANCISCO GAS CO. v. BRICKWEDEL.

Tax has Force of Execution against person and lien has force of execution against property.

Approved in Estate of Johnson, 4 Cof. Prob. 509, executor must remove tax liens from property sold belonging to estate.

No Indebtedness Incurred by a Municipality in any one year can be paid out of the revenue of a future year.

Approved in County of Tehama v. Sisson, 152 Cal. 172, 178, 92 Pac. 67, 69, attempt to evade constitutional provision by fictitious sale and repurchase of county property.

What Constitutes "Indebtedness" of Municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 406.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 63 CALIFORNIA.

63 Cal. 3-5, MARTIN v. THOMPSON.

Recordation of Chattel Mortgage is equivalent to immediate delivery and continued change of possession.

Approved in Hopper v. Keys, 152 Cal. 493, 92 Pac. 1019, failure to record chattel mortgage in county to which property has been removed within thirty days invalidates mortgage as to creditors, unless possession is taken within that time.

Mortgagees' Right of Action against third persons for invasion of their rights. See note, 109 Am. St. Rep. 434.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 473.

63 Cal. 5-9, ESTATE OF SBARBORO.

Petition to Revoke Probate of Will must be delivered to clerk of court before expiration of year after probate.

Approved in Estate of Parsons, 159 Cal. 428, 114 Pac. 571, where petition to revoke probate was filed May 7, 1909, and order dismissing petition recited will admitted May 4, 1909, and order admitting will contained in transcript declared it was admitted on that date, but certificate of filing showed May 12, 1908, petition properly dismissed; Focha v. Estate of Focha, 8 Cal. App. 577, 97 Pac. 322, that petition for revocation of probate was filed only three days before expiration of year and citation delayed more than six months thereafter, ample ground for dismissal; Estate of Dalton, 2 Cof. Prob. 99, application for revocation of probate of will may be filed within year after probate though final decree of distribution has been made and executor discharged; Old Colony St. Ry. v. Thomas, 205 Mass. 537, 91 N. E. 1008, mere receipt of papers on appeal by clerk or assistant clerk at his residence is not entry in court.

63 Cal. 12-16, MOORE v. JONES.

What is Community Property. See notes, 126 Am. St. Rep. 101; 4 Cof. Prob. 43.

63 Cal. 16-18, DENNIS v. WINTER.

Proceedings With Reference to Sale of land belonging to decedent cannot be collaterally attacked except for want of jurisdiction.

Approved in Burris v. Kennedy (Cal.), 38 Pac. 972, refusing to set aside sale for want of allegation in petition as to value of property; Blackman v. Mulhall, 19 S. D. 544, 104 N. W. 252, order of court authorizing sale of real estate conclusive determination of sufficiency of petition.

63 Cal. 19–20, PEOPLE v. GARCIA.

Dying Declarations as Evidence. See note, 56 L. R. A. 431.

63 Cal. 21, EX PARTE COX.

Legislature has No Authority to confer upon board power to declare what acts shall constitute a misdemeanor.

Approved in United States v. Grimaud, 170 Fed. 212, holding void act making it criminal to violate any regulation of the Secretary of the Interior for the protection of forest reservations.

Quarantine Regulations. See note, 26 L. R. A. 489.

Authority of Legislature to Penalize Failure to obey health board. See note, 6 L. R. A. (n. s.) 144.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 455.

63 Cal. 22–27, ROBERTS v. COLUMBET.

In Ejectment, Under General Denial, defendant may show that legal title to the demanded premises had vested in him before the commencement of the action.

Approved in Jacob v. Carter (Cal.), 36 Pac. 382, defendant may show that plaintiff had no right of entry or possession when action was commenced.

63 Cal. 28–29, PEOPLE v. SCHMIDT.

Malice Aforethought must be Alleged in indictment for murder, either expressly or by words equivalent in their import.

Approved in State v. Gibbons, 142 Iowa, 99, 120 N. W. 475, indictment for murder in second degree need not allege that attempt to procure miscarriage was made with malice aforethought.

63 Cal. 30–33, McCREERY v. FULLER.

Judgment by Consent is just as conclusive as if case had been tried on the merits.

Approved in Hartford Fire Ins. Co. v. King, 31 Tex. Civ. App. 642, 73 S. W. 74, reaffirming rule.

63 Cal. 34–36, CERKEL v. WATERMAN.

Liability of Servant or Agent for Conversion, trespass, or other positive tort against third parties under orders. See note, 50 L. R. A. 655.

Liability of Agent Toward Principal and Third Person, respectively, for money or property received in course of agency. See note, 2 L. R. A. (n. s.) 660.

63 Cal. 36–38, ESTATE OF BURTON.

Adverse Claim of Title cannot be interposed to defeat application for probate homestead.

Approved in In re Tuohy's Estate, 33 Mont. 247, 83 Pac. 491, probate court cannot try title on application for sale of real estate; Caron

v. Old Reliable Gold Min. Co., 12 N. M. 223, 78 Pac. 66, probate court cannot determine title to property as between estate and stranger.

Order Setting Apart Probate Homestead for widow and minor children withdraws property from administration.

Approved in Estate of Hayes, 1 Cof. Prob. 552, reaffirming rule.

Duty of Probate Court to Set Apart Homestead to widow. See note, 1 Cof. Prob. 219, 556.

63 Cal. 38–39, HOLLISTER v. SHERMAN.

Property Administered by Regents of state university is exempt from taxes.

Approved in Henne v. Los Angeles County (Cal.), 59 Pac. 781, assessor should deduct amount of mortgage held by regents from assessed valuation of land.

Injunction Against Collection of illegal taxes. See note, 22 L. R. A. 705.

63 Cal. 44–47, HEINLEN v. CROSS.

A Judgment Granting a Perpetual Injunction is not suspended during the pendency of an appeal.

Approved in Wilkinson v. Dunkley-Williams Co., 141 Mich. 412, 104 N. W. 773, reaffirming rule; State v. Barnett, 111 Mo. App. 558, 86 S. W. 461, semble, that appeal from judgment forfeiting liquor license does not keep license in force pending appeal.

Distinguished in Clute v. Superior Court, 155 Cal. 18, 123 Am. St. Rep. 54, 99 Pac. 363, injunction restraining hotel manager from acting as such is suspended by appeal.

The Existence of Power to Punish Disobedience of injunction devolves upon court the duty to entertain proper application on the subject.

Approved in Hill v. Superior Court, 15 Cal. App. 314, 114 Pac. 808, allowing mandamus to compel judge to hear election contest after he had erroneously decided that he had no jurisdiction because notice prematurely issued; Scott v. Shields, 8 Cal. App. 18, 96 Pac. 388, court which has ordered issuance of subpoena to witness to appear before notary must compel witness to complete deposition; Beirne v. Modern Nat. Reserve, 42 Mont. 334, 111 Pac. 1033, court erred in holding that it had no discretion to permit plaintiff to reopen case after motion for nonsuit.

63 Cal. 47–50, MARTEL v. MEEHAN.

Nature and Elements of Unlawful Detainer. See note, 120 Am. St. Rep. 37, 55.

63 Cal. 50–51, WILLIAMS v. MORE.

Employment of One Member of Firm of attorneys is ordinarily employment of firm.

Distinguished in Ostrander v. Capitol Investment etc. Assn., 130 Mich. 315, 89 N. W. 965, attorney with standing retainer, who enters into partnership, may sue for salary in his own name, though partner assisted in services.

Implied Power of Attorney to Bind Client for expenses incidental to trial, including associate counsel fees. See note, 23 L. R. A. (n. s.) 707.

63 Cal. 53–55, PORTER v. HOPKINS.

Recovery on Injunction Bond of Attorneys' Fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 55, 66.

63 Cal. 56–62, MORAN v. ABBEY.

The Allowance of Leading Questions upon direct examination is within the discretion of the court.

Approved in Hefferlin v. Karlman, 29 Mont. 145, 74 Pac. 202, reaffirming rule; People v. Gregory, 8 Cal. App. 745, 97 Pac. 915, no abuse of discretion in permitting leading questions to child ten years old.

The Payment of a Note extinguishes the obligation, and cannot afterward be treated as a purchase.

Approved in Lynds v. Van Valkenburgh, 77 Kan. 40, 93 Pac. 621, reaffirming rule; Porter v. Title Guaranty etc. Co., 17 Idaho, 373, 106 Pac. 302, 27 L. R. A. (n. s.) 111, where money due mortgagor is paid upon mortgage, latter becomes liquidated and is no longer subject of transfer; Charnock v. Jones, 22 S. D. 134, 115 N. W. 1073, one who pays another's note by mistake is not entitled to subrogation.

Effect of Payment of Debt by Volunteer or Stranger to original undertaking. See note, 23 L. R. A. 120, 123, 124.

Subrogation of One Paying Stranger's Debt. See note, 16 L. R. A. (n. s.) 233.

63 Cal. 62–66, PEOPLE v. BARRY.

If the Matter Falsely Sworn to is circumstantially material or tends to give credit to the witness, it is perjury.

Approved in People v. Collins, 6 Cal. App. 500, 92 Pac. 517, indictment simply alleging that false testimony was material is sufficient; State v. Miller, 26 R. I. 287, 58 Atl. 884, testimony of accused that he was offered sum of money to keep away from court is material.

Distinguished in State v. Smith, 126 La. 138, 52 So. 245, statement by accused as to her motive for making statement out of court immaterial unless statement at variance with her testimony.

Miscellaneous.—Cited in People v. Chadwick, 4 Cal. App. 70, 87 Pac. 387, direct evidence in trial for perjury is not limited to denial in ipsissimis verbis of testimony given by defendant.

63 Cal. 66–67, KING v. FELTON.

In an Action by the Assignee of an insolvent debtor, the fact of assignment must be alleged in the complaint.

Approved in Denver etc. R. Co. v. Wagner, 167 Fed. 80, 92 C. C. A. 527, party suing, under statute, for wrongful death must plead giving of notice required by statute.

63 Cal. 66–70, KELLY v. TEAGUE.

If Tenant Remain in Possession after breach of covenant in lease, which cannot afterward be performed, unlawful detainer will lie without notice to perform.

Approved in Buhman v. Nickels & Brown Bros., 1 Cal. App. 269, 82 Pac. 86, when thirty days' notice to quit, provided for in lease, was given, further notice of three days not required to sustain unlawful detainer.

Unlawful Detainer. See note, 120 Am. St. Rep. 54, 63.

63 Cal. 73–75, LORENZ v. JACOB.

Right of Eminent Domain cannot be Exercised in favor of owners of mining claims to enable them to obtain water.

Approved in Sutter County v. Nicols, 152 Cal. 694, 93 Pac. 874, 15 L. R. A. (n. s.) 616, enjoining hydraulic mining, which caused damage, though authorized by act of Congress.

Uses for Which Power of Eminent Domain cannot be exercised. See note, 102 Am. St. Rep. 829.

Exercise of Eminent Domain for mining road. See note, 1 L. R. A. (n. s.) 978.

Exercisability of Eminent Domain for production of gold. See note, 15 L. R. A. (n. s.) 617.

Taking Property for Irrigating or draining private lands. See note, 1 L. R. A. (n. s.) 211.

Eminent Domain, Combination of Public and private uses. See note, 21 L. R. A. (n. s.) 540.

Existence of Public Use as question for courts. See note, 88 Am. St. Rep. 934.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 26, 156.

63 Cal. 78–79, SHARPSTEIN v. FRIEDLANDER.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 327.

Miscellaneous.—Cited in Thompson v. Bank of California, 4 Cal. App. 667, 88 Pac. 989, trust enforceable against all who, with notice thereof, come into possession of trust property.

63 Cal. 81–86, NEWBILL v. WHITFIELD.

Location of Mining Claims. See note, 7 L. R. A. (n. s.) 863.

63 Cal. 86–95, 49 Am. Rep. 78, COLE v. SUPERIOR COURT.

Court may Fix Compensation of attorney employed by guardian ad litem.

Approved in Lund v. Superior Court, 159 Cal. 440, 114 Pac. 570, denying writ of review to determine jurisdiction of probate judge to fix fee of attorney for guardian ad litem alleged to have been fixed by judge of court in which services rendered, where record shows last judge did not fix fee but that attorney relies on contract with guardian; Estate of Lund, 1 Cof. Prob. 154, applying rule to attorney employed by administrator to sue for damages for death of intestate; Aronson v. Levison, 148 Cal. 367, 83 Pac. 155, arguendo.

Guardian ad Litem. See note, 84 Am. St. Rep. 948.

Rights, Duties and Powers of guardians ad litem of infants. See notes, 97 Am. St. Rep. 1002; 3 Cof. Prob. 22.

Control of Guardian ad Litem or next friend over suit. See note, 16 L. R. A. 507.

63 Cal. 96–97, TRASK v. CALIFORNIA ETC. R. R. CO.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 69.

63 Cal. 97–103, LOUP v. CALIFORNIA ETC. R. R. CO.

Where Defendant is Sued as a corporation, an averment of its corporate existence is necessary.

Distinguished in Fegtly v. Village Blacksmith Min. Co., 18 Idaho, 540, 111 Pac. 130, complaint simply referring to defendant as a corporation is sufficient as against general demurrer.

Where Contract for Railroad Construction provided for payments to be made upon estimates of engineer, complaint upon contract insufficient which did not allege such estimates.

Approved in Davisson v. East Whittier Land etc. Co., 153 Cal. 85, 96 Pac. 89, upholding provision in building contract for arbitration as to value of extra work.

Distinguished in Castagnino v. Balletta (Cal.), 21 Pac. 1097, 1099, no allegation of performance of conditions precedent necessary where complaint amended so as to state cause of action in assumpsit; Wyman v. Hooker, 2 Cal. App. 40, 83 Pac. 81, where builder has completed contract and owner has taken possession, he is entitled to balance due, though architect wrongfully withholds final certificate; Coplew v. Durand, 153 Cal. 279, 95 Pac. 38, 16 L. R. A. (n. s.) 791, architect's certificate unnecessary where work was completed to his satisfaction, but he, without warrant, refused to issue certificate.

Agreements to Arbitrate. See note, 15 L. R. A. 144.

Assumption by Train Employee of Risks due to defects in tracks or roadbed. See note, 28 L. R. A. (n. s.) 1258.

Entry or Record Necessary to Complete Judgment or order. See note, 28 L. R. A. 626.

Writ of Prohibition. See note, 111 Am. St. Rep. 938.

63 Cal. 104–105, HILLS v. OHLIG.

The Words "Time Given," in section 1187, Code of Civil Procedure, mean time of payment.

Approved in California Powder Works v. Blue Tent Con. Hydraulic Gold Mines (Cal.), 22 Pac. 392, date of contract unnecessary in notice of lien.

63 Cal. 105–106, SAVINGS & LOAN SOCIETY v. CHASE.

Parties cannot Agree That Unpaid Interest shall bear greater rate of interest than principal debt.

Approved in Bell v. San Francisco Savings Union, 153 Cal. 75, 94 Pac. 230, provision for greater rate renders whole interest void.

63 Cal. 106–107, ESTATE OF KELLEY.

An Executrix may Appeal from an Order directing a partial distribution.

Approved in Estate of Young, 149 Cal. 176, 85 Pac. 146, bill of exceptions to order dismissing petition for partial distribution must be served on devisees who opposed petition.

63 Cal. 107–112, MARKS v. RYAN.

Upon the Execution of a New Lease, the lessee is in the same situation as if the landlord, being seised of the land, had leased both land and fixtures to him.

Distinguished in Woods v. Bank of Haywards, 10 Cal. App. 96, 106 Pac. 732, construing continued occupancy as extension of lease, save as modified in respect to monthly rent.

Effect of Renewing Tenancy Without Reserving Right to remove fixtures. See note, 1 L. R. A. (n. s.) 1195.

63 Cal. 112–113, CENTRAL PACIFIC R. R. CO. v. MEAD.

An Offer by One in Possession to pay for land, within statutory period, is answer to claim of adverse possession.

Approved in Jensen v. Hunter (Cal.), 41 Pac. 17, applying rule to ditch diverting water from stream.

63 Cal. 113–117, LAUGHLIN v. WRIGHT.

Property Used Primarily and Chiefly as a hotel cannot be homestead.

Distinguished in Holn v. Pauly, 11 Cal. App. 730, 106 Pac. 268, incidental use of homestead to make precarious living by keeping boarders will not invalidate it; Harlan v. Schulze, 7 Cal. App. 292, 295, 94 Pac. 381, 382, homestead not invalidated because used incidentally by wife for purpose of prostitution; dissenting opinion in Smith v. Guckenheimer & Sons, 42 Fla. 49, 27 So. 904, majority holding that when building claimed as homestead was not entirely devoted to residence and business purposes of owner, it should be subdivided.

63 Cal. 117–118, GIBBS v. BARTLETT.

When It is Clearly the Duty of the board of election commissioners to call an election, they cannot refuse to do so because there may not be sufficient funds to defray the expense thereof.

Reaffirmed in Rizer v. People, 18 Colo. App. 46, 69 Pac. 316.

63 Cal. 118–119, FARRIS v. MERRITT.

No Judgment can be Taken against party sued by fictitious name, unless complaint is amended by inserting his true name.

Approved in San Francisco v. Burr (Cal.), 36 Pac. 771, reaffirming rule.

Statute of Limitations is not Available on demurrer unless all facts required in plea of statute appear on face of complaint.

Approved in Palmtag v. Roadhouse (Cal.), 34 Pac. 112, when complaint leaves question in doubt, plea of statute should be resorted to.

63 Cal. 127–129, PEOPLE v. POTTER.

Officer De Facto is not Entitled to compensation to exclusion of officer de jure.

Approved in Bannerman v. Boyle, 160 Cal. 199, 116 Pac. 732, applying rule under amendment of 1891 to Political Code, sections 936, 937.

Distinguished in Chubbuck v. Wilson, 151 Cal. 165, 166, 174, 90 Pac. 526, 528, under statutory amendment, successful contestant cannot recover from incumbent compensation received by him pending contest; Merkley v. Williams, 3 Cal. App. 270, 84 Pac. 1016, under statutory amendment, party holding certificate of election and performing duties is entitled to compensation pending contest.

De Facto Officers. See note, 140 Am. St. Rep. 192, 193.

Section 907, Political Code, prescribing time for officer-elect to qualify, has no application during pendency of a contest.

Approved in People ex rel. McCarty v. Wilson, 6 Cal. App. 130, 91 Pac. 664, reaffirming rule; Murdoch v. Strange, 99 Md. 114, 57 Atl. 632, ordinance requiring bond to be filed within ten days after election did not apply pending contest.

Vacancy in Office by Failure to File Bond within time prescribed. See note, 16 L. R. A. 140.

63 Cal. 143–150, HAYES v. CAMPBELL.

One Contracting With Agent is put upon inquiry as to the extent of his authority.

Approved in Davis v. Trachsler, 3 Cal. App. 559, 86 Pac. 612, purchaser of real estate from professed agent must ascertain scope of his authority; Perkins Co. v. American Express Co., 99 Mass. 566, 85 N. E. 896, contract between consignee and carrier cannot be varied by subsequent agreement between consignor and carrier.

63 Cal. 150–154, PACIFIC MUTUAL ETC. INS. CO. v. STROUP.

Adverse Possession of Land for the statutory period vests the occupant with an absolute title.

Approved in Rennert v. Shirk, 163 Ind. 554, 72 N. E. 550, offer to buy land made after statute had run does not affect title acquired by adverse possession; Boe v. Arnold, 54 Or. 66, 102 Pac. 294, one claiming title by adverse possession for ten years against all but United States may assert such adverse possession against one claiming to be owner under prior grant.

Owner in Possession of Land who accepts lease thereof without ever having received possession from lessor and misapprehending his rights, is not estopped thereby.

Distinguished in Strong v. Baldwin, 154 Cal. 161, 129 Am. St. Rep. 149, 97 Pac. 183, lease cannot operate to devest title by prescription already acquired.

An Offer by One in Possession to pay for land within statutory period is answer to claim of adverse possession.

Approved in Jensen v. Hunter (Cal.), 41 Pac. 17, applying rule to ditch diverting water from stream.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 51, 90.

63 Cal. 157–158, NORTHERN INS. Co. v. POTTER.

Partners are Jointly Liable for partnership debts.

Cited in Clements v. Miller, 13 N. D. 180, 100 N. W. 240, arguendo.

One of Several Joint Debtors is not discharged from liability by a release to the others.

Approved in Enscoe v. Fletcher, 1 Cal. App. 665, 82 Pac. 1078, joint maker to whom notes have been distributed as heir of payee can enforce one-half of liability thereon against estate of deceased comaker.

Release of One Joint or joint and several obligor. See note, 138 Am. St. Rep. 839.

63 Cal. 159–160, ODELL v. WILSON.

The Validity of a Tax Title cannot be determined in a suit for foreclosure.

Approved in Brown v. Atlanta Nat. Building etc. Asso., 46 Fla. 496, 35 So. 404, reaffirming rule.

Distinguished in Excelsior Springs v. Henry, 99 Mo. App. 454, 73 S. W. 945, under statute, suit for city taxes properly brought against purchaser, who acquired title under tax deed after city tax lien accrued.

63 Cal. 160–161, LA SOCIETE FRANCAISE v. BEARDSLEE.

Supreme Court will not Entertain Appeal from consent judgment.

Approved in Hibernia Savings etc. Society v. Waymire, 152 Cal. 287, 92 Pac. 646, reaffirming rule.

63 Cal. 162–165, LAMBERT v. McCLOUD.

Rights and Remedies of Conditional Seller on buyer's default in payment. See note, 133 Am. St. Rep. 565, 568.

63 Cal. 165–166, PEOPLE v. DE LA COUR SOTO.

An Information for Murder is Sufficient if it charges the offense in the language of the statute defining it.

Approved in State v. Lu Sing, 34 Mont. 35, 85 Pac. 523, use of word "deliberatedly" instead of "deliberate" in defining murder in the first degree will not invalidate information.

Conviction of Lower or Different Degree in prosecution for homicide. See note, 21 L. R. A. (n. s.) 5.

63 Cal. 167–168, PEOPLE v. WELSH.

Admission of Child's Testimony without prior examination as to his competency held not prejudicial error.

Approved in People v. Gregory, 8 Cal. App. 744, 97 Pac. 915, ruling of court admitting testimony of child will not be disturbed on appeal.

Competency of Children as Witnesses. See note, 19 L. R. A. 609.

It is the Animus With Which an Act is done which constitutes its criminality.

Approved in People v. Bunkers, 2 Cal. App. 205, 84 Pac. 368, witnesses who engage in scheme to detect and punish crime are not accomplices.

Evidence of the Escape, Flight and Recapture of the defendant immediately after his arrest is admissible.

Approved in People v. Petruzo, 13 Cal. App. 579, 63 Pac. 328, evidence that defendant attempted to escape from county jail admissible; Grant v. State, 122 Ga. 742, 50 S. E. 947, evidence that accused, some months after alleged offense, fled on seeing chief of police, admissible.

63 Cal. 168–170, PEOPLE v. JONES.

Drunkenness is No Excuse for Crime, but circumstance to be considered in determining degree thereof.

Reaffirmed in State v. Johnny, 29 Nev. 223, 87 Pac. 9.

63 Cal. 170–173, DOUGHERTY v. DORE.

Cause of Action upon Injunction Bond does not accrue until final determination of the action.

Approved in Howard v. Lindeberg, 2 Alaska, 303, right of action on injunction bond accrues upon dissolution of injunction; Dongal v. Eby, 11 Idaho, 797, 85 Pac. 104, court cannot summarily enter judgment against sureties upon dissolution of injunction.

63 Cal. 174–178, HULL v. SUPERIOR COURT.

Mandamus to Compel Surrender of Office. See note, 31 L. R. A. 352, 364.

63 Cal. 179–181, SAN JOSE SAVINGS BANK v. SIERRA LUMBER CO.

Director of Corporation, Who Ceases to be stockholder but continues to act as director, is director de facto.

Approved in Robinson v. Blood, 151 Cal. 507, 91 Pac. 259, reaffirming rule; Sherwood v. Wallin, 154 Cal. 742, 99 Pac. 194, de facto directors may call special meeting to increase capital stock.

63 Cal. 182–183, DONNELLY v. STRUEVEN.

Notice of Motion to Discharge Attachment on ground that undertaking "is insufficient in form and substance" is not sufficiently specific.

Approved in Jackson v. Barrett, 12 Idaho, 469, 86 Pac. 272, motion to dismiss appeal on ground "that no sufficient undertaking on said appeal was ever filed," is insufficient; Cupit v. Bank of Park City (Utah), 40 Pac. 707, notice of motion to discharge attachment must state grounds of motion.

63 Cal. 185, HEWLETT v. MILLER.

Miscellaneous.—Cited in Miller v. Thayer, 74 Cal. 352, 16 Pac. 188, holding judgment-roll in cited case to be estoppel.

63 Cal. 193, STEDMAN v. SAN FRANCISCO.

City is not Liable for Wrongful Arrest and detention of property by police officers.

Distinguished in Davoust v. City of Alameda, 149 Cal. 75, 84 Pac. 763, 5 L. R. A. (n. s.) 536, city liable for negligence of its servants in operating electric-light plant.

Liability of Municipal Corporation for false imprisonment and unlawful arrest. See note, 44 L. R. A. 797.

63 Cal. 196–208, COX v. McLAUGHLIN.

Where Contract Provides That Payments shall be made upon estimates of engineer, proof of such estimates is essential to recovery.

Approved in Pettit v. Forsyth, 15 Cal. App. 159, 113 Pac. 896, but holding that complaint sufficiently showed that assessments were levied for specified purposes.

Distinguished in Coplew v. Durand, 153 Cal. 279, 95 Pac. 38, 16 L. R. A. (n. s.) 791, when work is completed to satisfaction of architect, who without warrant refuses his certificate, production of latter is dispensed with.

Mere Failure to Pay Installments as they become due or exercise of right secured by contract itself does not constitute prevention of performance.

Cited in Fairchild-Gilmore-Wilton Co. v. Southern etc. Co., 158 Cal. 273, 110 Pac. 955, arguendo.

Agreements to Arbitrate. See note, 15 L. R. A. 144.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 323.

63 Cal. 208–218, McLAUGHLIN v. HEID.

In Ejectment Based upon Patent purporting to have been issued under congressional grant, defendant may show that land was excepted from grant.

Approved in Williams v. San Pedro, 153 Cal. 48, 94 Pac. 236, certificate of purchase of tide lands within city of San Pedro is void; United Land Assn. v. Knight (Cal.), 23 Pac. 271, patent of private land claim void in so far as it included land not covered by decree.

63 Cal. 219–220, PEOPLE v. JORDAN.

Sustaining of Demurrer to Information is bar to another prosecution, unless filing of new information directed.

Approved in People v. Disperati, 11 Cal. App. 476, 105 Pac. 620, requirement that reasons for dismissal shall be set forth in order entered upon minutes is mandatory; People v. O'Leary (Cal.), 22 Pac. 25, court need not give opinion that objection to information can be overcome by filing another; State v. Second Jud. Dist. Court, 36 Utah, 404, 104 Pac. 285, new information cannot be filed on dismissal of action and discharge of accused after plea; dissenting opinion in Ex parte Dodson, 3 Okl. 526, 107 Pac. 455, majority holding sustaining of demurrer to indictment charging misdemeanor is no bar to subsequent prosecution by information for same offense.

63 Cal. 220–223, GRAY v. NUNAN.

Notice of Intention to Move for new trial may be waived.

Approved in Gibson v. Berryman, 14 Cal. App. 333, 111 Pac. 927, notice waived by stipulation for new trial.

63 Cal. 234–235, SHARON v. NUNAN.

Replevin Lies to Recover Coins, sealed in canvas bag and tagged with name of owner.

Approved in Eddings v. Boner, 1 Ind. Ter. 178, 38 S. W. 1111, replevin will lie to recover belt containing purse and money.

As to Where Replevin or Claim and delivery is sustainable. See note, 80 Am. St. Rep. 757.

63 Cal. 235–239, HILLER v. COLLINS.

Where an Answer is Used on motion to dissolve an injunction, it is treated as an affidavit, and plaintiff may use affidavits in opposition thereto.

Reaffirmed in Thayer v. Bellamy, 9 Idaho, 5, 71 Pac. 545.

63 Cal. 241–242, THIELE v. KOSTER.

A Ruling to Which No Exception was taken cannot be reviewed on appeal.

Reaffirmed in Randall v. Freed, 154 Cal. 301, 97 Pac. 670.

63 Cal. 247–252, SULLIVAN v. SHANKLIN.

A Ministerial Duty is One in respect to which nothing is left to discretion.

Approved in State v. Brooks, 14 Wyo. 411, 84 Pac. 490, 6 L. R. A. (n. s.) 750, duty of governor to grant certificate of election to state officers is ministerial.

63 Cal. 257–261, PEOPLE ex rel. FLINT v. HARRINGTON.

The Majority of a Quorum of a Board of supervisors may act.

Approved in Swedback v. Olson, 107 Minn. 423, 120 N. W. 754, board of county commissioners may act though one of its members failed to qualify.

63 Cal. 261-268, CENTRAL PACIFIC R. R. CO. v. SHACKLEFORD.

The Parts of Amended Sections which are unchanged are considered to have been the law all along and the new provisions to have been enacted at the time of the amendment.

Approved in Estate of McGee, 154 Cal. 207, 97 Pac. 300, applying rule to conflict between section 1265, Civil Code, and section 1474, Code of Civil Procedure, as to succession to homesteads; Louisville Property Co. v. Nashville, 114 Tenn. 218, 84 S. W. 811, applying rule to statutes relating to foreign corporations; dissenting opinion in People v. McNulty (Cal.), 28 Pac. 823, majority holding statute changing place of inflicting death penalty to state prison void as applying to past as well as future cases.

63 Cal. 269-276, ASTON v. NOLAN.

Where the Necessary Effect of a Contract is to produce result complained of, property owner cannot maintain that act is that of contractor.

Approved in Walker v. Strosnider, 67 W. Va. 63, 67 S. E. 1098, where owner left contractors no discretion as to where or how retaining wall should be constructed.

General Rules as to Absence of Liability of employer for torts of independent contractor. See note, 65 L. R. A. 640, 648.

Liability for Removal of Lateral or Subjacent Support of land in its natural condition. See note, 68 L. R. A. 680, 684, 690, 695.

63 Cal. 281-282, ESTATE OF DORLAND.

The Opinion of Professional Witnesses upon the value of an attorney's services are not binding upon the court.

Reaffirmed in Spencer v. Collins, 156 Cal. 307, 104 Pac. 323.

Conclusiveness of Testimony of Experts. See note, 42 L. R. A. 768.

Miscellaneous.—Cited in dissenting opinion in In re Magoon, 15 Haw. 259, to point that attorney who says nothing about a fee is entitled only to what his services are reasonably worth.

63 Cal. 286-288, HUTCHINSON v. AINSWORTH.

Where Acknowledgment was Properly Made but defectively certified, judgment may be had correcting the certificate.

Distinguished in Forrester v. Reliable Transfer Co., 59 Wash. 94, 109 Pac. 315, in absence of statute, evidence other than certificate is inadmissible to show acknowledgment of lease.

As to When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 569.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 875, 914.

63 Cal. 288-296, PEOPLE v. HURTADO.

Where Defendant's Wife Confessed to him that she had been guilty of adultery with deceased, evidence that she and deceased visited house of ill-fame inadmissible, where confession not impeached.

Approved in Shipp v. Commonwealth, 124 Ky. 657, 99 S. W. 949, 10 L. R. A. (n. s.) 335, where homicide was alleged to have been caused by decedent's intimacy with defendant's wife, but wife's confession not in evidence, evidence of her good reputation for chastity inadmissible.

Admissibility in Criminal Cases of Evidence of truth or falsity of alleged statement to corroborate or disprove fact that it was made. See note, 10 L. R. A. (n. s.) 336.

To Make Homicide Manslaughter, provocation must have been sufficient to excite irresistible passion in reasonable person.

Distinguished in Johnson v. State, 129 Wis. 159, 108 N. W. 60, 5 L. R. A. (n. s.) 809, instruction that "heat of passion" means temporary dethronement of reason, is erroneous.

Heat of Passion Which will Mitigate or reduce degree of homicide. See note, 5 L. R. A. (n. s.) 825.

Killing of Adulterer. See note, 92 Am. St. Rep. 219.

63 Cal. 302-303, YOUNG v. MILLER.

A Denial in the Conjunctive Raises No Issue.

Approved in Toomey v. Knobloch, 8 Cal. App. 588, 97 Pac. 530, denial in conjunctive of allegation as to ownership of two lots.

63 Cal. 304, BUCKNER v. VEUVE.

Writ of Prohibition. See note, 111 Am. St. Rep. 940.

63 Cal. 305-310, EASTON v. O'REILLY.

Where an Amended Complaint is Filed, the commencement of the action dates from the filing of the original complaint and the identity of the cause of action remains.

Approved in Collins v. Gray, 3 Cal. App. 726, 86 Pac. 985, finding of five years' adverse user presumed to date from filing of original complaint.

63 Cal. 312-317, WALKER v. BUFFANDEAU.

A Finding, Stated as a Conclusion of Law and based upon facts previously found, but not justified thereby, is a mere conclusion of law.

Distinguished in In re Bullard's Estate (Cal.), 31 Pac. 1120, findings not vitiated because intermixed with evidence, argument and conclusions of law.

63 Cal. 317-319, O'KANE v. DALY.

Notice of Appeal Should be Served on all parties who would be affected by a reversal of the judgment.

Approved in De Arnaz v. Jaynes (Cal.), 34 Pac. 224, reaffirming rule; Estate of Young, 149 Cal. 175, 85 Pac. 145, bill of exceptions to order dismissing petitions for partial distribution must be served on devisees.

63 Cal. 332-333, DUFFICY v. SHIELDS.

Chattel Mortgage of Furniture in Hotel to secure anything except purchase price thereof is invalid.

Approved in Bank of Ukiah v. Gibson (Cal.), 39 Pac. 1071, chattel mortgage on cattle, executed before statutory amendment permitting such mortgage, does not become valid by recordation thereafter.

63 Cal. 333-340, PEOPLE v. BLANDING.

The Limitation on the Power of the legislature when convened in extra session applies only to acts of legislation.

Approved in Long v. State, 58 Tex. Cr. 211, 127 S. W. 209, limitations on power of legislature in extra session should be strictly construed.

Appointment of Successor on Day predecessor's term expired is valid.

Approved in Yerger v. State, 91 Miss. 819, 45 So. 852, where term of clerk would expire while trustees were lawfully in office, they might elect successor though term not yet expired; Tilton v. Sterling Coal & Coke Co., 28 Utah, 182, 107 Am. St. Rep. 689, 77 Pac. 761, lessee might exercise option at any time during day on which lease terminated.

63 Cal. 340–341, SAVAGE v. SWEENEY.

A Motion for New Trial on Ground of insufficiency of the evidence is addressed to the sound discretion of the court.

Approved in Kellenberger v. Market St. etc. Ry. Co. (Cal.), 33 Pac. 90, reaffirming rule; Hammel v. Stone (Cal.), 14 Pac. 675, applying rule where motion is made before judge other than the one who presided at trial.

63 Cal. 341–343, BLUM v. SUNOL.

Every Intendment Prevails in Favor of order granting new trial, though made by judge other than one who tried the case.

Approved in Hammel v. Stone (Cal.), 14 Pac. 675, reaffirming rule.

63 Cal. 343–345, BRIGGS v. HAYCOCK.

Refusal to Deliver Personal Property upon demand by the owner amounts to a conversion.

Approved in Missouri Pac. Ry. Co. v. Peru-Van Zandt Implement Co., 73 Kan. 308, 117 Am. St. Rep. 468, 87 Pac. 82, 6 L. R. A. (n. s.) 1058, refusal of carrier to deliver goods when amount of damage thereto exceeds freight charge is conversion.

Failure to Produce Warehouse Receipt is no defense in action for conversion where refusal to deliver was based on another ground.

Reaffirmed in Duffy v. Wilson, 44 Colo. 342, 98 Pac. 827.

63 Cal. 345–346, PEOPLE v. GIESEA.

Section 1382, Penal Code, Relating to Dismissal for delay of prosecution, has no application where demurrer to indictment has been sustained and people have appealed.

Approved in State v. Campbell, 73 Kan. 695, 85 Pac. 784, 9 L. R. A. (n. s.) 533, applying rule under similar statute.

Delay of Prosecution as Ground for Discharge. See note, 56 L. R. A. 518, 543.

63 Cal. 349–351, ESTATE OF ROSE.

The Final Account of an Administrator should be supported by proper vouchers.

Approved in Rice v. Tilton, 14 Wyo. 118, 82 Pac. 581, reasonable explanation for nonproduction of vouchers is necessary.

63 Cal. 352–353, CASSIDY v. CASSIDY.

Defendant in Divorce Suit may Plead in bar facts constituting cause for divorce against plaintiff.

Approved in Day v. Day, 71 Kan. 390, 80 Pac. 976, rule of recrimination applies to all causes for divorce.

Recrimination as Defense in Divorce Proceeding. See note, 86 Am. St. Rep. 333, 334, 339.

Findings must Respond to all material issues.

Approved in Bordeaux v. Bordeaux, 30 Mont. 42, 75 Pac. 526, reversing decree in divorce suit where no findings on recriminatory allegations of answer.

63 Cal. 355-357, 49 Am. Rep. 92, BANK OF SONOMA CO. v. GOVE.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 785.

63 Cal. 357-359, CONGDON v. CHAPMAN.

Parties may Contract That Payment shall be made out of special fund.

Approved in Village of Park Ridge v. Robinson, 198 Ill. 585, 92 Am. St. Rep. 276, 65 N. E. 109, contractor who expressly agrees to look to fund raised by special tax cannot sue city in assumpsit.

The Court cannot Make or Enforce any other contract than the one declared upon.

Approved in Schultz v. McLean (Cal.), 25 Pac. 430, reaffirming rule.

63 Cal. 359-365, ANGLO-CALIFORNIAN BANK v. GRANGERS' BANK.

Duty of Corporations to Transfer Stock on their books. See note, 136 Am. St. Rep. 1032.

Corporate By-laws as Notice. See note, 25 L. R. A. 49.

63 Cal. 366-367, BARTLETT v. COTTLE.

Where Mortgage is Given to Secure Note, action cannot be had on note alone unless security is valueless.

Approved in Moore v. Gould, 151 Cal. 731, 91 Pac. 619, simple contract debt cannot be set off against mortgage; Crisman v. Lanterman, 149 Cal. 651, 117 Am. St. Rep. 167, 87 Pac. 90, mortgagee cannot release mortgage and preserve personal remedy against mortgagor.

Distinguished in Kinsel v. Ballou, 151 Cal. 761, 91 Pac. 623, indorser of note secured by mortgage may be sued without foreclosing mortgage.

63 Cal. 367-369, FISK v. MILLER.

One Who Writes His Name on the Back of a note before its maturity is liable as an indorser.

Approved in Rockfield v. First Nat. Bank, 77 Ohio St. 329, 83 N. E. 395, 14 L. R. A. (n. s.) 842, reaffirming rule; O'Conor v. Clarke (Cal.), 44 Pac. 483, applying rule to bill of exchange.

63 Cal. 369-370, SUNOL v. MOLLOY.

Mortgagee of Growing Crop Cultivated on shares succeeds only to interest of mortgagor.

Approved in Abernethy v. Uhlman, 52 Or. 364, 369, 93 Pac. 938, 97 Pac. 540, mortgage by lessee under cropping contract only makes mortgagee tenant in common with lessor to extent of mortgage.

Distinguished in Stockton Savings etc. Soc. v. Purvis (Cal.), 42 Pac. 442, oral agreement between landlord and tenant that title to crops should be in landlord until rent paid does not create lien.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 470.

63 Cal. 371–374, SCHMIDT v. NUNAN.

In Replevin, Interest on Value of Property is allowable from date of wrongful taking.

Approved in Webster v. Sherman, 33 Mont. 460, 84 Pac. 882, interest only allowable where only evidence of value of property relates to time of unlawful taking.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 37.

Passing of Title to Property by Delivery to carrier for transportation to consignee or vendee. See note, 22 L. R. A. 425.

63 Cal. 375–379, 49 Am. Rep. 94, BRYCE v. JOYNT.

Partnership Books of Account as Evidence. See note, 52 L. R. A. 834, 835, 836.

63 Cal. 379–381, TRENOUTH v. GORDON.

Defendants in Ejectment Might Defeat recovery by showing legal title in third persons without connecting themselves with such title.

Reaffirmed in Rogers v. Clark Iron Co., 104 Minn. 209, 116 N. W. 743, and Gibson v. Pekarek, 25 S. D. 298, 126 N. W. 604.

63 Cal. 387–390, DINAN v. FITZ GIBBON.

Right to Use Deadly Weapon in resisting trespass. See note, 22 L. R. A. (n. s.) 726.

63 Cal. 390–391, FINNIGAN v. HIBERNIA SAV. & LOAN SOCIETY.

What is Community Property. See notes, 126 Am. St. Rep. 115; 4 Cof. Prob. 57.

63 Cal. 391–394, JOHNSON v. BROWN.

Continuous Adverse Possession for Five Years vests occupant with title.

Approved in Boe v. Arnold, 54 Or. 66, 102 Pac. 294, one claiming title adversely against all but United States may assert such adverse possession against one claiming under prior grant.

Where Adjacent Owners have Acquiesced in Division Line for statutory period, either is estopped from afterward questioning it.

Reaffirmed in Loustalot v. McKeel, 157 Cal. 642, 108 Pac. 710.

63 Cal. 394–396, QUIMBY v. LYON.

In Action for Money had and Received, allegation of demand therefor is not necessary.

Approved in Young v. Kimber, 44 Colo. 452, 98 Pac. 1133, reaffirming rule; Smith v. Farmers' & Merchants' Bank, 2 Cal. App. 381, 84 Pac. 349, one who has money which he knows belongs to another may be sued for money had and received.

63 Cal. 396–397, PETTIGREW v. DOBBELAAR.

Conveyance of Lands by Reference to Map is sufficient if there is such a map in existence.

Approved in Powers v. Scharling, 64 Kan. 345, 67 Pac. 822, deed is not void which may be made certain by extrinsic evidence.

Deed Conveying All Lands Belonging to grantor wherever same may be situated is valid.

Approved in Chemung Min. Co. v. Hanley, 11 Idaho, 308, 81 Pac. 621, reaffirming rule; Borchard v. Eastwood (Cal.), 65 Pac. 1048, deed conveying all "the lands owned by the grantor" in certain county, with certain exceptions, is sufficient; Staples v. May (Cal.), 23 Pac. 712, mortgage of all mineral lands belonging to mortgagor in designated county is sufficient; Harriss v. Howard, 126 Ga. 330, 55 S. E. 61, devise of "all of my lands" sufficient to operate as color of title to part of testator's plantation; Tilton v. Flormann, 22 S. D. 333, 117 N. W. 381, admitting extrinsic evidence to identify land covered by placer mining location certificate; Holley's Executor v. Curry, 58 W. Va. 73, 112 Am. St. Rep. 944, 51 S. E. 136, holding description sufficient though names of county and state omitted.

63 Cal. 402–404, ESTATE OF PALOMARES.

Where Inventory and Appraisement show that estate does not exceed fifteen hundred dollars in value, court must assign the whole thereof to widow.

Reaffirmed in Wills v. Booth, 6 Cal. App. 200, 91 Pac. 760.

Notice to Creditors is not Necessary in order to set aside whole estate where value is less than fifteen hundred dollars.

Approved in Estate of Adamson, 5 Cof. Prob. 399, reaffirming rule.

Setting Apart Entire Estate to widow and children. See note, 5 Cof. Prob. 400.

63 Cal. 409–410, PEOPLE v. DE PELANCONI.

Action on Forfeited Bail Bond may be brought in the name either of the people or of the county.

Approved in Malheur County v. Carter, 52 Or. 619, 98 Pac. 490, action brought by county.

63 Cal. 410–414, ARMSTRONG v. SUPERIOR COURT.

Motion to Change Venue cannot be Resisted on ground of convenience of witnesses, where defendant appears by demurrer only.

Approved in Wong Fung Hing v. S. F. Relief etc. Funds, 15 Cal. App. 539, 115 Pac. 332, plaintiff cannot successfully resist such motion where testimony of witnesses, whose convenience is sought to be subserved, would not be material or competent.

Order Granting Change of Venue, upon payment of certain costs, is order denying motion unless costs are paid.

Distinguished in Chase v. Superior Court, 154 Cal. 795, 796, 99 Pac. 357, 358, court granting change of venue cannot vacate order for failure of moving party to pay fees.

63 Cal. 414–417, ESTATE OF MAGEE.

Section 1387, Civil Code, Relating to Illegitimates, is a statute of descent.

Approved in Hall v. Gabbert, 213 Ill. 213, 72 N. E. 808, illegitimate child, whose parents have intermarried and whose father has ac-

knowledged him, can inherit land in Illinois, though he could not in state where father resided at his birth.

Estate of Illegitimate Goes to Mother or her heirs at law.

Approved in Estate of De Cigaran, 150 Cal. 685, 686, 89 Pac. 834, 835, illegitimate half-sister of illegitimate woman will inherit her estate to exclusion of husband; Berry v. Powell, 47 Tex. Civ. App. 601, 105 S. W. 346, dividing estate of illegitimate between his wife and illegitimate sister.

Rights of Lineal Descendants to Inherit through illegitimate. See note, 27 L. R. A. (n. s.) 221.

Inheritance by, Through, or from Illegitimate Persons. See note, 23 L. R. A. 757.

63 Cal. 417–421, ADAMS v. DOHRMANN.

Statement on Motion for New Trial, without certificate of judge, is nullity.

Approved in Finnall v. Merriman, 13 Cal. App. 611, 110 Pac. 463, statement of case without certificate of judge is no part of record.

Rehearing in Bank cannot be Granted after thirty days, though last day falls on Sunday.

Approved in People v. Ruef, 14 Cal. App. 625, 114 Pac. 50, after thirty days from time judgment became final in district court of appeal, supreme court cannot grant rehearing.

63 Cal. 421–426, PEOPLE v. RATEN.

When Homicide is Shown Defendant must prove by preponderance of evidence that killing was justifiable.

Disapproved in People v. Button (Cal.), 38 Pac. 202, and Anderson v. Territory, 9 Ariz. 54, 76 Pac. 637, sufficient proof to raise reasonable doubt is all that is required.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 490.

Instruction as to Self-defense held not erroneous.

Approved in Wilson v. Territory, 7 Ariz. 51, 60 Pac. 698, instruction held not erroneous as ignoring right of defendant to act upon apparent danger.

Homicide in Resisting Arrest, or of officers of justice. See note, 66 L. R. A. 365, 366.

63 Cal. 426–428, THOMAS v. DESMOND.

Complaint Which Merely States Evidence is demurrable.

Approved in Ahlers v. Smiley, 11 Cal. App. 346, 104 Pac. 998, averment of contract cannot be supplied by exhibit attached to complaint.

63 Cal. 429–431, McINTYRE v. TRAUTNER.

If Additional Work is Performed at owner's request he is estopped to assert that work was already completed.

Approved in Hubbard v. Lee, 6 Cal. App. 609, 92 Pac. 746, and Hubbard v. Lee, 10 Cal. App. 483, 102 Pac. 530, both reaffirming rule; Pacific Hardware Co. v. Lincoln, 12 Haw. 361, materialman may file lien within three months after building completed by owner, when abandoned by contractor; Salt Lake Hardware Co. v. Chainman Min. etc. Co., 137 Fed. 635, contract to furnish and install machinery and

materials for mill not completed so long as work of putting them in condition required by contract was going on.

Distinguished in Santa Clara Valley Mill & Lumber Co. v. Williams (Cal.), 31 Pac. 1129, holding building completed at given date, though slight alterations made later at request and expense of owners.

Notice of Lien Setting Forth that certain person acted as agent of owner is not vitiated by statement that he acted "as a contractor."

Approved in Western Sash & Door Co. v. Heiman, 71 Kan. 48, 80 Pac. 18, holding word "contractor" in statement of lien to be mere descriptio personae.

Work Done, or Material Furnished, in Perfecting Original Work, as lienable items to establish period for filing claim. See note, 12 L. R. A. (n. s.) 865.

63 Cal. 431–434, MACDOUGALL v. CENTRAL R. R. CO.

Contributory Negligence on Part of plaintiff is matter of defense.

Approved in Wistrom v. Redlick Bros., 6 Cal. App. 675, 92 Pac. 1049, reaffirming rule; Nichols v. Baltimore etc. R. Co., 33 Ind. App. 241, 71 N. E. 172, there is no presumption of contributory negligence where plaintiff was injured at railroad crossing.

Presumption of Exercise of Care. See notes, 116 Am. St. Rep. 116; 16 L. R. A. 267.

63 Cal. 435–436, CURTIS v. SUPERIOR COURT.

Prohibition will not Lie to Correct Error of court within its jurisdiction.

Approved in Beaulieu Vineyard v. Superior Court, 6 Cal. App. 250, 91 Pac. 1018, where jury trial denied as to certain issue.

Where Defendant in Justice's Court denied all allegations of complaint, but did not appear at trial, on appeal on questions of law alone new trial was properly ordered in superior court.

Approved in Armantage v. Superior Court, 1 Cal. App. 135, 81 Pac. 1035, superior court has jurisdiction of appeal from justice's court, though justice did not give notice of trial required by section 850, Code of Civil Procedure.

Distinguished in Maxson v. Superior Court (Cal.), 54 Pac. 520, 521, on appeal from default judgment in justice's court, there cannot be a trial de novo.

63 Cal. 442–445, KENNEY v. KELLEHER.

Granting or Refusal of Leave to renew motion is within the discretion of the court.

Approved in Lawson v. Lawson, 15 Cal. App. 500, 115 Pac. 463, permitting renewal of motion to exempt earnings from payment of alimony.

63 Cal. 445–447, 49 Am. Rep. 96, EGGERS v. HINK.

What Words or Phrases may Constitute a valid trademark. See note, 85 Am. St. Rep. 115.

Right to Protection in Use of Geographical Name. See note, 26 L. R. A. (n. s.) 83.

Competition in Business, Use of Trademark. See note, 17 L. R. A. 131.

63 Cal. 447–450, DYER v. HARRISON.

Entire Street Assessment is Invalidated by omission of three lots.

Distinguished in Dowling v. Altschul (Cal.), 33 Pac. 496, decision of board of supervisors on question of assessing lots at end of cul-de-sac is final.

63 Cal. 450–451, MATTHEW v. CENTRAL PACIFIC R. R. CO.

Husband and Wife are Necessary Parties to action for personal injuries to wife.

Approved in Gomez v. Scanlan, 2 Cal. App. 580, 84 Pac. 50, and Gomez v. Scanlan, 155 Cal. 530, 102 Pac. 13, both applying rule to action for false imprisonment of wife.

63 Cal. 454–457, ESTATE OF HUDSON.

A Decree of Distribution is Binding upon parties in interest.

Approved in Simmons v. Rowe, 4 Cal. App. 758, 89 Pac. 624, judgment for defendant in foreclosure suit is res adjudicata in subsequent partition suit that plaintiff had no interest in property; Goldtree v. Thompson (Cal.), 20 Pac. 414, complaint asking for construction of trusts in will should set forth decree of distribution.

Superior Court Sitting in Probate cannot set aside decree of distribution for fraud after time specified in Code of Civil Procedure, section 473.

Approved in Estate of Walker, 160 Cal. 549, 117 Pac. 511, reaffirming rule; Estate of Byrne, 3 Cof. Prob. 70, applying rule to application to set aside order settling administrator's account; Estate of McLaughlin (No. 2), 1 Cof. Prob. 262, superior court sitting in probate has no jurisdiction to revoke probate of will because procured by fraud; Estate of Maxwell, 1 Cof. Prob. 137, superior court sitting in probate has no jurisdiction over petition to declare void a devise alleged to have been procured through fraud and to make distribution to heirs; Estate of Johnson, 4 Cof. Prob. 500, arguendo.

Where Decree of Distribution was Procured by fraud, court of equity can charge distributers as trustees.

Approved in Bacon v. Bacon, 150 Cal. 481, 89 Pac. 319, relieving against decree of distribution based upon mistake in reading will; Hanley v. Hanley, 4 Cof. Prob. 479, applying rule to order for probate homestead.

63 Cal. 458–460, ESTATE OF BEECH.

Nonresident cannot Nominate Administrator.

Approved in Estate of Bedell, 3 Cof. Prob. 81, upholding appointment of nominee of parents as against public administrator.

Public Administrator is Entitled to Letters as against nominee of nonresident son of decedent.

Reaffirmed in Estate of Griffiths, 3 Cof. Prob. 547, 552.

Distinguished in Estate of Bergin, 3 Cof. Prob. 291, public administrator is not entitled to letters as against resident devisee in foreign will who files authenticated copy thereof and of its foreign probate, with petition for letters.

Right of Nonresident to Act as executor or administrator. **See notes, 113 Am. St. Rep. 564; 1 L. R. A. (n. s.) 347.**

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1163.

63 Cal. 460–462, CROWLEY v. DAVIS.

Land Owner cannot Enjoin Obstruction of street, unless his injury will be different in kind from that of the general public.

Distinguished in Sloss-Sheffield Steel & Iron Co. v. Johnson, 147 Ala. 387, 119 Am. St. Rep. 89, 41 So. 908, 8 L. R. A. (n. s.) 226, enjoining obstruction of street by dumping of slag thereon, at suit of abutting land owner.

63 Cal. 464–467, KANE v. DESMOND.

Gift by Husband to Wife is Valid, except as to existing creditors of husband.

Approved in Sawyer v. Metters, 133 Wis. 359, 113 N. W. 686, conveyance by husband to wife, in payment of existing debt, is valid as to future creditors of husband.

Attacks by Creditors on Conveyances made by husbands to wives. See note, 90 Am. St. Rep. 517.

Nothing is Presumed in Favor of jurisdiction of justice's court.

Approved in Harlan v. Gladding, McBean & Co., 7 Cal. App. 53, 93 Pac. 401, written request is essential to jurisdiction of justice to hold court in another township; Ferguson v. Basin Consolidated Mines, 152 Cal. 715, 93 Pac. 869, entry of service of summons in justice's docket is no evidence thereof.

63 Cal. 467–470, 49 Am. Rep. 98, SAN FRANCISCO v. CENTRAL PACIFIC R. R. CO.

The Roadbed is the Bed or Foundation on which the superstructure of the railroad rests.

Approved in Atchison etc. Ry. Co. v. County of Los Angeles, 158 Cal. 440, 111 Pac. 251, where actual right of way of railroad consisted of continuous strip thirty feet wide, with here and there added lands contiguous to strip, such added lands not part of roadway of inter-county road assessable by state board of equalization; Shreveport v. Shreveport Belt Ry. Co., 107 La. 787, 32 So. 190, applying definition to statute fixing proportion of paving to be paid for by railroad.

Steamers Used by Railroad Company in transporting freight-cars should be assessed by local assessors.

Approved in San Francisco etc. R. R. Co. v. Stockton, 149 Cal. 86, 88, 92, 84 Pac. 772, 773, 774, land used for railroad purposes, adjoining right of way, is assessable exclusively by city assessor; Pacific Coast Ry. Co. v. Ramage (Cal.), 37 Pac. 534, terminal wharf of railroad is assessable by county.

As to Where Ships are Taxable. See note, 37 L. R. A. 518.

Nature of Railroad as Realty or Personalty. See note, 66 L. R. A. 37.

63 Cal. 470–473, SAN FRANCISCO v. FRY.

Shares of Stock in Corporation, tangible property of which is situated in another state, are subject to taxation as property of resident of this state.

Approved in Chesebrough v. San Francisco, 153 Cal. 564, 96 Pac. 290, shares of stock may be assessed in so far as property is situated

outside of state; Wright v. Louisville etc. R. Co., 195 U. S. 222, 25 Sup. Ct. 16, 49 L. Ed. 167, shares of stock in railroad outside state are assessable when owned by domestic corporation.

Distinguished in Stroh v. Detroit, 131 Mich. 114, 117, 90 N. W. 1031, 1032, shares of stock held by resident of Michigan in foreign corporation are not assessable where all corporate property located in Michigan.

Taxation of Property in Different States as Double. See note, 15 L. R. A. (n. s.) 143.

63 Cal. 473–478, DEAN v. SUPERIOR COURT.

After Lapse of Six Months from Its Rendition, superior court sitting in probate cannot set aside order on ground of fraud in its procurement.

Approved in Estate of Maxwell, 1 Cof. Prob. 137, reaffirming rule; Hanley v. Hanley, 4 Cof. Prob. 478, applying rule to order setting apart probate homestead; Estate of Byrne, 3 Cof. Prob. 70, probate court cannot vacate order settling administrator's account on ground of fraud; Estate of McLaughlin (No. 2), 1 Cof. Prob. 262, probate court cannot revoke probate of will because procured by fraud.

A Decree of Distribution Obtained by frauds or artifices may be set aside in equity.

Approved in Estate of Walker, 160 Cal. 549, 117 Pac. 511, reaffirming rule; Bacon v. Bacon, 150 Cal. 481, 89 Pac. 319, relieving against decree of distribution based upon mistake in reading will.

Trustees' Account. See note, 94 Am. St. Rep. 45.

63 Cal. 483–485, WOLFORD v. LYON GRAVEL ETC. MIN. CO.

Inadequacy of Damages as Ground for setting aside verdict. See note, 47 L. R. A. 45.

Miscellaneous.—Cited in Alder Co. v. Fleming, 159 Fed. 597, 86 C. C. A. 419, statute held to create cause of action for wrongful death.

63 Cal. 485–489, SAN FRANCISCO v. TALBOT.

A Vessel Registered Out of the State, and never here except transiently, is not subject to assessment in the state.

Distinguished in Okon v. San Francisco, 148 Cal. 86, 113 Am. St. Rep. 191, 82 Pac. 853, 2 L. R. A. (n. s.) 197, 7 Ann. Cas. 443, vessel taxable at "home port," though physically absent therefrom and registered in another state.

As to Where Ships are Taxable. See note, 37 L. R. A. 519.

63 Cal. 491–492, EX PARTE RAYE.

Necessity of Entry of Judgment. See notes, 129 Am. St. Rep. 746; 28 L. R. A. 622.

63 Cal. 494–497, MERRILL v. HURLBURT.

Evidence Held not to Show Immediate Delivery and continued change of possession.

Approved in Kennedy v. Conroy (Cal.), 44 Pac. 796, sale of cattle void as to creditors where parties continued to live together on farm.

63 Cal. 497–498, **HOLMES v. McCLEARY.**

Order Denying Motion to Vacate Order is not appealable.

Approved in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 487, 114 Pac. 839, denying appeal from order refusing to vacate appointment of receiver.

63 Cal. 500–501, **WATKINS v. DEGENER.**

Where Action is not One of those mentioned in sections 392 and 393, Code of Civil Procedure, defendant is entitled to have it removed to county of his residence.

Approved in State v. Campbell, 3 Cal. App. 605, 86 Pac. 841, rule applicable to action brought by state to recover official moneys from superintendent of insane asylum.

63 Cal. 501–503, **CANNEY v. SOUTH PACIFIC COAST R. R. CO.**

Authority to Employ Medical Services for employee or other person. See note, 20 L. R. A. 696.

63 Cal. 503–505, **CUMMINGS v. HOWARD.**

No Special Demand is Necessary before bringing suit for money due under contract on happening of particular event.

Approved in Heweth v. Dean (Cal.), 25 Pac. 755, where note secured by mortgage provides that, upon failure to pay annual interest both principal and interest shall become due, bringing suit to foreclose is sufficient demand.

63 Cal. 505–509, **THOMPSON v. WHITE.**

There can be but One Final Judgment in a cause.

Approved in Dondell v. Shoo, 159 Cal. 454, 114 Pac. 582, applying rule in partnership accounting.

63 Cal. 514–517, **HAVEN v. HAWS.**

Qualified Pre-emptor can Initiate valid claim to entire quarter section by settling on one-half of it while the other half is occupied by another.

Distinguished in Gragg v. Cooper, 150 Cal. 586, 89 Pac. 346, rule does not apply where entire land entered upon is in possession of another.

Miscellaneous.—Cited in Bakz v. Liebinow, 4 Ariz. 234, 236, 36 Pac. 211, 212, dissenting opinion, to point that successful party to contest in land office acquires right of possession.

63 Cal. 538–543, **PIERCE v. WHITING.**

Recitals in Undertaking as to Ownership of property attached are conclusive between the parties.

Approved in Dackich v. Barich, 37 Mont. 502, 97 Pac. 935, recital that levy was made is binding between parties.

Where Obligation of Bond is Conditional upon demand made on principal, such demand must be alleged.

Reaffirmed in Kanouse v. Brand, 11 Cal. App. 673, 106 Pac. 122.

Distinguished in Ex parte Howitz, 2 Cal. App. 754, 84 Pac. 230, where defendant promised to pay money on demand, bringing of suit is sufficient demand.

Miscellaneous.—Cited in Elmore v. Thaggard, 130 Ga. 708, 61 S. E. 728, as to necessity for procuring architect's certificate in

order to recover expense of completion of building after abandonment by contractor.

63 Cal. 544–545, PEOPLE v. WONG AH TEAK.

One Who Attacks Another, but afterward really and in good faith declines further combat, may subsequently justify killing in self-defense.

Approved in concurring opinion in State v. Shockley, 29 Utah, 87, 80 Pac. 886, majority holding question did not arise where deceased attempted to arrest defendant, who had just attempted robbery.

Right of Self-defense by Original Aggressor. See notes, 109 Am. St. Rep. 809; 45 L. R. A. 707.

63 Cal. 547–549, SANFORD v. CAL. FARMERS' MUTUAL FIRE INS. ASSN.

Policy of Insurance Issued by Mutual Company is not forfeited by failure to pay assessment, unless such forfeiture is provided for in contract of insurance.

Approved in Haas v. Mutual Life Ins. Co., 84 Neb. 692, 121 N. W. 1000, failure to pay annual premiums will not result in forfeiture, where policy contains no provision to that effect.

63 Cal. 550–553, BERSON v. NUNAN.

Attachment of Property Covered by chattel mortgage without payment of latter is wrongful.

Approved in Sousa v. Lucas, 156 Cal. 465, 105 Pac. 415, attempted attachment without such payment does not create any lien.

The Object of Requiring Recordation of chattel mortgages is the same as that of providing for registration of mortgages of real estate.

Approved in Fette v. Lane (Cal.), 37 Pac. 916, unrecorded chattel mortgage is valid against subsequent mortgagee with notice.

Effect of Failure to Execute and record chattel mortgages. See note, 137 Am. St. Rep. 49.

The Recording of a Chattel Mortgage is equivalent to immediate delivery and continued change of possession.

Approved in Hopper v. Keys, 152 Cal. 493, 92 Pac. 1019, failure to record mortgage within thirty days in county to which property has been removed ipso facto exempts it from mortgage as to creditors; Bank of Ukiah v. Gibson (Cal.), 39 Pac. 1070, amendment permitting chattel mortgage of cattle does not validate chattel mortgage already executed; Irwin v. McDowell (Cal.), 34 Pac. 710, chattel mortgage not released by executory contract for pledge; Pierson v. Hickey, 16 S. D. 49, 91 N. W. 340, unrecorded chattel mortgage void as against execution based on judgment upon debt incurred before mortgage was executed.

Judgment in Replevin must be in the alternative.

Approved in Holmberg v. Hendy (Cal.), 10 Pac. 394, and Hynes v. Barnes, 30 Mont. 27, 75 Pac. 523, both reaffirming rule.

63 Cal. 575–577, HALLIDIE v. SUTTER ST. R. R. CO.

Effect of Agreement to Perform Undertaking to certain person's satisfaction. See note, 17 L. R. A. 208.

Implied Warranty of Fitness of Property bought for special purpose. See note, 22 L. R. A. 196.

63 Cal. 578–581, JOHNSON v. SUPERIOR COURT.

Defendant in Divorce Suit cannot be Denied Process to obtain testimony of witnesses outside of state on ground that he has not complied with order of court to pay plaintiff costs and counsel fees.

Approved in McNamara v. McNamara, 86 Neb. 635, 126 N. W. 95, 27 L. R. A. (n. s.) 1062, order of court, striking out defendant's answer because he did not comply with previous order to pay temporary alimony is void.

Contempt Proceedings to Compel Payment of Alimony. See note, 24 L. R. A. 436, 437.

63 Cal. 581–584, DAVIS v. SUPERIOR COURT.

Validity of Statute Under Constitution of 1849 will not be passed upon in mandamus proceeding.

Approved in Dean v. Dimmich, 18 N. D. 400, 122 N. W. 246, in mandamus against county officers to compel them to move their offices, court will not pass upon validity of act providing for vote upon relocation of county seat.

Distinguished in State v. Candland, 36 Utah, 415, 104 Pac. 289, officer may attack validity of statute in mandamus proceeding to compel him to comply with its provisions.

Unconstitutionality of Statute as Defense against mandamus to compel enforcement. See note, 47 L. R. A. 516.

63 Cal. 586–598, 49 Am. Rep. 100, UNGER v. MOONEY.

To Set Statute of Limitations in Motion, there must be hostile possession, open, notorious and with intent to usurp place of true owner.

Distinguished in Barnes v. Davech, 7 Cal. App. 491, 94 Pac. 781, adverse use of highway need be only such as is inconsistent with owner's right to exclusive use of land.

To Acquire Title by Prescription, possession must be open, hostile, under claim of right and continuous for five years, with payment of taxes.

Approved in Big Three Min. and Mill Co. v. Hamilton, 157 Cal. 140, 137 Am. St. Rep. 118, 107 Pac. 306, holding evidence showed possession interrupted; Alper v. Tormey, 7 Cal. 10, 93 Pac. 403, evidence held to show that right of way for spur track was held adversely and under claim of right; Steckter v. Ewing, 6 Cal. App. 766, 93 Pac. 288, title by adverse possession may be acquired, though adverse possession began under a mistake; Spotswood v. Spotswood, 4 Cal. App. 714, 89 Pac. 363, findings against adverse possession held supported by evidence; Bashore v. Mooney, 4 Cal. App. 281, 87 Pac. 555, prescriptive right to use ditch to convey limited quantity of water may be acquired; Jensen v. Hunter (Cal.), 41 Pac. 17, one who offered to pay for ditch cannot claim title to same by adverse possession; Dietz v. Mission Transfer Co. (Cal.), 25 Pac. 426, evidence held not to show claim of right.

The Possession of One Tenant in Common is the possession of his cotenant.

Approved in Southern Cal. R. Co. v. Slauson (Cal.), 68 Pac. 108, possession of railroad entering under permission is not adverse to owner.

One Cotenant may Acquire Title by adverse possession against another, where the hostile character of such possession is manifest.

Approved in Gurnsey v. Antelope Creek etc. W. Co., 6 Cal. App. 391, 92 Pac. 328, presumption of knowledge follows from open possession; Tabler v. Caverill, 4 Cal. App. 677, 88 Pac. 996, possession of community property by divorced wife did not become prescriptive until notice of hostility; Bath v. Valdez (Cal.), 7 Pac. 488, but holding that adverse character of cotenant's possession was not made known; Thompson v. Ferry, 6 Ariz. 308, 56 Pac. 744, where cotenants did not protest against sale of mining claims and their relocation and development.

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 624, 626.

Necessity of Color of Title, not Expressly Made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1185, 1187, 1188, 1189, 1194, 1196, 1208.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 124, 125.

Miscellaneous.—Cited in Boe v. Arnold, 54 Or. 66, 102 Pac. 294, one recognizing superior title of United States government may assert adverse possession against claimant under prior grant.

63 Cal. 607–614, SOUTHERN PACIFIC R. R. CO. v. SUPERIOR COURT.

Writ of Prohibition. See note, 111 Am. St. Rep. 948.

63 Cal. 614–615, PEOPLE v. BURNS.

Indictment for Burglary With Intent to commit rape is sufficient, though it does not allege under what circumstances rape was intended to be committed.

Distinguished in People v. Miles, 9 Cal. App. 317, 101 Pac. 527, information for rape must allege that prosecutrix was not wife of accused.

63 Cal. 616–620, CARPENTER v. NATOMA WATER ETC. CO.

Judgment in Ejectment Does not Stop running of statute of limitations, but actual entry is necessary.

Cited in Mossman v. Dole, 14 Haw. 367, arguendo.

63 Cal. 620–623, ESTATE OF ROBINSON.

A Municipal Corporation may Take Property in trust for the care of its indigent women and children.

Distinguished in Stearns v. The Newport Hospital, 27 R. I. 315, 62 Atl. 134, municipality has no supervisory power over funds given to other trustees for charitable purposes.

Perpetuities may be Created for charitable purposes.

Approved in Spence v. Widney (Cal.), 46 Pac. 466, reaffirming rule.

Enforcement of General Bequest for charity or religion. See note, 14 L. R. A. (n. s.) 66, 103, 112.

63 Cal. 623–643, CROSS v. ZELLERBACH.

Rule of the Law of the Case is not applicable where facts on second appeal are materially different.

Reaffirmed in Adams v. Thornton, 5 Cal. App. 458, 90 Pac. 714.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 345.

Miscellaneous.—Cited in Cross v. Zellerbach (Cal.), 8 Pac. 714, 715, 716, same case on subsequent appeal.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 64 CALIFORNIA.

64 Cal. 2-3, 27 Pac. 787, LOW v. McCALLAN.

Order Granting New Trial will not be Reversed when evidence is conflicting.

Approved in Kellenberger v. Market St. etc. Ry. Co. (Cal.), 33 Pac. 90, following rule.

64 Cal. 5-9, 27 Pac. 788, CANAVAN v. GRAY.

Where Owner of Real Property having right of possession makes forcible entry, person in possession cannot maintain action of trespass, but remedy provided by statute for forcible entry is exclusive.

Approved in Walker v. Chanslor, 153 Cal. 128, 129, 131, 132, 126 Am. St. Rep. 61, 94 Pac. 610, 611, 17 L. R. A. (n. s.) 455, action does not lie in favor of trespasser who sought forcibly to prevent entry by owner, to recover damages for personal injuries inflicted by owner in dispossessing trespasser.

64 Cal. 14-22, 49 Am. Rep. 679, 27 Pac. 942, HICKS v. LOVELL.

It is Only Where Answer Admits or leaves undenied material facts alleged in complaint that judgment can be rendered on pleadings.

Approved in Casci v. Ozalli, 158 Cal. 283, 110 Pac. 933, where complaint in quiet title suit alleged ownership and possession, and answer denied allegation, judgment was wrongly rendered on pleadings; Finley v. Tucson, 7 Ariz. 113, 60 Pac. 873, upholding judgment on pleadings.

Vendee in Possession Under Contract of Sale may repudiate contract and forfeit his rights thereunder.

Approved in Alexander v. Jackson (Cal.), 25 Pac. 417, holding homestead declared by wife on land purchased under executory contract of sale was of no effect when husband refused to complete purchase and acquire legal title.

Vendor and Vendee. See note, 96 Am. St. Rep. 1013.

Right of Grantee in Possession to Question Right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 384.

Vendee Who Takes Possession under vendor's title cannot question it.

Approved in Garvey v. Lashells, 151 Cal. 532, 91 Pac. 501, and Gervaise v. Brookins, 156 Cal. 107, 103 Pac. 331, both following rule; Dunn v. Mills, 70 Kan. 660, 79 Pac. 148, holding vendee in possession under contract of sale could not resist payment of purchase price on ground of defect in vendor's title.

Equitable Title to Land Such as Gives Holder right of possession in equity is sufficient defense in ejectment as against holder of legal title.

Reaffirmed in Doherty v. Courtney, 150 Cal. 608, 89 Pac. 435.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 782, 789.

Equitable Defense in Ejectment must be pleaded.

Approved in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987, holding evidence under equitable defense improperly admitted when defense was not pleaded.

Suggesting That Defendant Waives His Rights under judgment pleaded in bar by contesting plaintiff's claim upon its merits.

Overruled in Harding v. Harding, 148 Cal. 402, 83 Pac. 436, holding defendant waives no right under judgment pleaded in bar by contesting claim on its merits and may plead all defenses he may have.

Where Vendor may Recover Possession from Vendee. See note, 107 Am. St. Rep. 723, 729, 730.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 362.

64 Cal. 23–24, 27 Pac. 960, FERRIER v. FERRIER.

Assignments of Error Unsupported by substantive part of bill of exceptions are not evidence that statement therein is true.

Approved in Estate of Higgins, 156 Cal. 266, 104 Pac. 10, rejecting assignment of error as unsupported by bill of exceptions.

64 Cal. 24–27, 28 Pac. 107, FORRESTER v. FLORES.

Payment of Purchase Money Alone is not such part of performance as justifies specific enforcement of oral contract to convey land.

Approved in Davis v. Judson, 159 Cal. 131, 113 Pac. 152, Cooley v. Miller & Lux, 156 Cal. 514, 105 Pac. 982, and Chamberlain v. Abrams, 36 Wash. 592, 79 Pac. 206, all following rule.

Distinguished in Stewart v. Smith, 6 Cal. App. 161, 91 Pac. 671, enforcing oral agreement of mother to convey by will real property when real property had been conveyed to her in consideration thereof.

64 Cal. 27–29, 28 Pac. 106, PEOPLE v. STANFORD.

Information for Larceny of Hog, Describing Property Stolen, as a certain hog, the property of A, is sufficient.

Approved in People v. Machado (Cal.), 63 Pac. 67, following rule; State v. Collett, 9 Idaho, 615, 75 Pac. 273, upholding information charging larceny of one horse.

64 Cal. 29–32, 49 Am. Rep. 684, 28 Pac. 109, EX PARTE MARKS.

Governor may Pardon Prisoner on Condition that he leave state and remain away from it, and such pardon is revocable for condition broken.

Approved in State v. Horne, 52 Fla. 139, 42 So. 393, 7 L. R. A. (n. s.) 719, conditional pardon may provide for summary arrest and

recommitment for remainder of unexpired terms upon breach of condition; Spencer v. Kees, 47 Wash. 282, 91 Pac. 965, sustaining pardon on condition that prisoner be supported by relatives; In re Prout, 12 Idaho, 498, 86 Pac. 276, 5 L. R. A. (n. s.) 1064, prisoner who was paroled and returned for breach entitled to discharge at end of time of original sentence; Ex parte Ridley, 3 Okl. Cr. 362, 106 Pac. 554, where governor had paroled convict on conditions, prisoner was entitled to habeas corpus on rearrest to determine whether condition was broken.

Distinguished in State v. Hunter, 124 Iowa, 574, 104 Am. St. Rep. 361, 100 N. W. 512, governor cannot impose as condition to suspension of sentence that prisoner forfeit time earned by good conduct upon revocation of suspension at governor's discretion.

Conditional Pardons. See note, 111 Am. St. Rep. 113.

Suspension of Sentence for Good Behavior, conditional pardons, and parole of prisoner. See note, 14 L. R. A. 286, 287, 288.

As to Whether Time Prisoner is Out on Parole or conditional pardon should be deducted from term. See note, 16 L. R. A. (n. s.) 306.

64 Cal. 32–33, 27 Pac. 785, COX v. HAYES.

Miscellaneous.—Cited in Cox v. Hayes (Cal.), 7 Pac. 761, on another appeal.

64 Cal. 35–41, 30 Pac. 571, LACOSTE v. SPLIVALO.

Administrator's Bond is Security Against Breach of duty, and breach occurs when there is failure to pay over money on order of court.

Approved in Greer v. McNeal, 11 Okl. 539, 69 Pac. 897, following rule; Ellyson v. Lord, 124 Iowa, 139, 99 N. W. 588, administrator's bond held security for final accounting of all funds coming into his hands during administration though partly received before execution of bond.

Sureties or Administrator's Bond given pursuant to order of court requiring "further and additional security" are liable for devastavit of administrator occurring before their obligations.

Reaffirmed in Greer v. McNeal, 11 Okl. 537, 69 Pac. 897.

64 Cal. 42–44, 27 Pac. 1104, CHESTER v. BAKERSFIELD TOWN HALL ASSOCIATION.

Only One Undertaking is Required on Appeal from judgment and from order denying new trial.

Approved in Kinney v. Brotherhood of Am. Yeomen, 15 N. D. 27, 106 N. W. 46, in single notice appeal from judgment and appeal from order after judgment denying motion for judgment non obstante verdict may be joined.

64 Cal. 54–56, 28 Pac. 115, WARRING v. FREEAR.

Verdict in Equity Case is Merely Advisory.

Approved in Diamond Coal Co. v. Cook (Cal.), 61 Pac. 580, and Evans v. Ross (Cal.), 8 Pac. 89, both following rule; Costello v. Scott, 30 Nev. 65, 93 Pac. 4, calling of jury in equity case is at discretion of judge.

What Special Verdict must Contain. See note, 24 L. R. A. (n. s.) 65, 66.

64 Cal. 57–60, 28 Pac. 116, STOCKMAN v. RIVERSIDE LAND ETC. CO.

Fact That Ditch was Constructed at Heavy Cost and maintained and used for more than five years with knowledge of true owner and without objection is not sufficient to constitute estoppel in pais.

Approved in Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 674, 93 Pac. 1029, sinking of wells with knowledge of owner did not estop him, when he merely passively acquiesced.

Where Decree Awarded Costs to Plaintiffs and on appeal they reversed part of decree favorable to defendants, costs received by plaintiff must be returned, with interest.

Approved in Walnut Irrigation District v. Burke, 158 Cal. 168, 110 Pac. 518, following rule.

64 Cal. 60–61, 28 Pac. 112, PEOPLE v. STEWART.

When Juror Becomes Sick During Trial and new one is sworn in, each side has right to full number of challenges.

Approved in State v. Ronk, 91 Minn. 427, 98 N. W. 337, in such case consent of defendant to selection of twelfth juror from special venire held to waive objection that entire panel was not discharged; Turner v. Territory, 15 Okl. 562, 82 Pac. 652, when new juror was sworn in during trial on account of illness of juror, granting of full number of challenges by court was in effect impaneling new jury.

Right to Proceed With Criminal Trial after substituting another for disabled or incompetent juror. See note, 25 L. R. A. (n. s.) 38.

Trial Commences When Case is Called for trial unless case is then postponed.

Approved in State v. Johnson, 24 S. D. 601, 124 N. W. 852, calling of case for trial and drawing of juror is beginning of trial, before which affidavit of prejudice must be filed.

64 Cal. 62–64, 28 Pac. 113, RICHARDS v. DOWER.

Construction of Tunnel Through Land of Another is such irreparable injury that injunction lies to prevent its wrongful construction.

Approved in Pavkovich v. Southern Pacific R. R. Co., 150 Cal. 50, 87 Pac. 1100, where deed expressly limits purposes for which rock from quarry may be used, injunction lies to prevent its removal for any other use; Trade Dollar Consol. Min. Co. v. Fraser, 148 Fed. 593, 79 C. C. A. 37, granting injunction to prevent threatened irreparable injury by diversion of water; California Development Co. v. New Liverpool Salt Co., 172 Fed. 817, 97 C. C. A. 214, granting injunction to prevent diversion of water from stream by means of canals, whereby property of complainant was flooded and threatened with irreparable injury; dissenting opinion in Jacobs v. Lakeside Lumber Co., 134 Wis. 187, 114 N. W. 445, majority holding laying of steam pipe across plaintiff's premises not such irreparable injury as to justify injunction.

Distinguished in Drew v. Hicks (Cal.), 35 Pac. 565, holding right to maintain private nuisance could be acquired by prescription.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 743.

64 Cal. 65–67, 28 Pac. 445, WHITING v. PLUMAS COUNTY.

Fees Paid by County Officer into county treasury under void law may be recovered back.

Reaffirmed in Ketchum v. County of Plumas (Cal.), 10 Pac. 115.

Accord and Satisfaction by Part Payment. See note, 20 L. R. A. 811.

64 Cal. 69–72, 28 Pac. 496, WEAVERVILLE ETC. ROAD CO. v. TRINITY COUNTY.

Miscellaneous.—Cited in People v. Lowden (Cal.), 8 Pac. 69, referring historically to principal case.

64 Cal. 72–73, 28 Pac. 61, BURNS v. HODGDON.

Judgment in Ejectment is not Bar as against title not in issue in the action.

Reaffirmed in Nemo v. Farrington, 7 Cal. App. 446, 94 Pac. 875.

64 Cal. 73–74, 28 Pac. 61, BYERS v. BOURRET.

Partnership Doing Business Under Name not showing names of partners cannot commence action until they have filed certificate and made publication required by section 2468, Civil Code.

Approved in Nicholson v. Auburn Gold Min. etc. Co., 6 Cal. App. 548, 549, 92 Pac. 651, Sweeny v. Stanford (Cal.), 6 Pac. 668, Baker v. Van Ness, 25 Okl. 36, 105 Pac. 661, and Sutton v. Coast Trading Co., 49 Wash. 701, 96 Pac. 431, all following rule; Choctaw Lumber Co. v. Gilmore, 11 Okl. 465, 68 Pac. 735, holding such publication must be for full time before action is commenced; Drake v. Great Northern R. R. Co., 24 S. D. 23, 123 N. W. 84, failure to file and publish such certificate cannot be cured after action brought.

Distinguished in Alaska Salmon Co. v. Standard Box Co., 158 Cal. 577, 112 Pac. 458, in action by corporation, averment in answer that it has not paid license tax does not give it burden of proving its payment.

64 Cal. 75–77, 28 Pac. 446, GREEN v. ROBERTSON.

Contract to Pay Money upon Happening of given event matures on instant event happens.

Approved in Smith v. Lumber Co., 142 N. C. 31, 54 S. E. 790, 5 L. R. A. (n. s.) 439, where wages were due upon expiration of term of service, suit therefor could be brought at end of day term expired.

Fraud and Secret Dealings or Interest of real estate brokers as affecting commissions. See note, 45 L. R. A. 52.

64 Cal. 78–80, 28 Pac. 60, DEAN v. WALKENHORST.

Where One Sells Cattle to Woman Without Change of possession and parties to sale afterward marry, and husband sells cattle again at direction of wife but without change of possession, such sale is void as against creditors of husband while he remained in possession.

Distinguished in Asbill v. Standley, Sheriff (Cal.), 31 Pac. 738, holding when mares were sold by husband to wife without change of pasture, but branded with wife's brand, and bill of sale given, sale is valid as against husband's creditors.

Attacks by Creditors on Conveyances made by husbands to wives. See note, 90 Am. St. Rep. 545.

As to Whether Presumption of Fraud flowing from retention of chattel by vendor may be overcome. See note, 24 L. R. A. (n. s.) 1139.

64 Cal. 80–83, 28 Pac. 114, PHELAN v. TYLER.

Death of Party Pending Appeal does not render void judgment of appellate court, although there was no substitution of his representatives.

Reaffirmed in Twaddle v. Winters, 29 Nev. 108, 89 Pac. 290.

Validity and Effect of Judgment for or against deceased person. See note, 126 Am. St. Rep. 626.

64 Cal. 83–85, 28 Pac. 62, FLINT v. CADENASSO.

A Conveys Land to B in Consideration of B's agreement to pay A's note to third party, secured by mortgage on land. B conveys to C on consideration of C's agreement to pay note of A. Upon payment of note by A, a cause of action for amount arises in his favor against C.

Approved in Whitney v. American Ins. Co. (Cal.), 56 Pac. 52, holding contract of insurance company to pay losses under policies issued by another company as promptly as losses under its own renders it directly liable to insured.

As to Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 597.

64 Cal. 85–87, 27 Pac. 862, PEOPLE v. MITCHELL.

Constitutional Right of Accused to be confronted by witnesses. See note, 129 Am. St. Rep. 31.

64 Cal. 87–92, 2 Pac. 393, PEOPLE v. WILLIAMS.

Courts Take Judicial Notice of census returns.

Approved in Burks v. Walker, 25 Okl. 362, 109 Pac. 547, following rule; Priddy v. Boice, 201 Mo. 337, 119 Am. St. Rep. 762, 99 S. W. 1061, 9 L. R. A. (n. s.) 718, certified copies of census returns admitted to show ages of members of decedent's family at time of execution of deed.

Distinguished in People v. Michigan Central R. Co., 145 Mich. 155, 106 N. W. 777, court, on considering demurrer to information filed by attorney general to collect taxes from railroad, cannot take judicial notice of reports of company to state and proceedings had thereon, for purpose of overcoming charge that officer of company concealed from state amount of capital stock.

Facts of Which Courts will Take Judicial Notice. See note, 124 Am. St. Rep. 40.

64 Cal. 99–101, 27 Pac. 940, BROWN v. BURBANK.

Conveyance of Land by Young Girl to her grandparents, under whose control she has been from infancy, considered and set aside as fraudulent.

Approved in Chamberlain v. Chamberlain, 7 Cal. App. 639, 95 Pac. 661, holding enforceable as constructive trust deed procured by misrepresentation as to grantor's liability to creditors.

Distinguished in Broaddus v. James, 13 Cal. App. 473, 110 Pac. 162, refusing to set aside deed of aged widow to her daughter to exclusion of children of another daughter.

64 Cal. 102–106, 28 Pac. 108, CURTIS v. SACRAMENTO.

Award is Void Unless Both Parties have notice of time and place of meeting of arbitrators and opportunity to be heard.

Reaffirmed in Tiffany v. Coffey, 142 Mo. App. 213, 125 S. W. 1179.

64 Cal. 110–116, 29 Pac. 511, BUTTE COUNTY v. BOYDSTON.

Necessary Cost of Fencing is Element of Damage of owner in condemnation of land for road.

Distinguished in Farley v. Moran (Cal.), 31 Pac. 160, where railroad violates bond to construct fence along line, plaintiff need not construct fences before bringing action on bond.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 304.

64 Cal. 116–117, 28 Pac. 64, PEOPLE v. McNUTT.

Evidence of Other Crimes in Criminal Cases. See note, 62 L. R. A. 197.

64 Cal. 117–123, 28 Pac. 110, MITCHELL v. BECKMAN.

Charter of Bank Considered and held to constitute bank liable as commercial bank.

Cited in State v. People's Nat. Bank, 75 N. H. 30, 70 Atl. 544, national bank cannot receive deposits to be held in trust and invested for depositor.

Stockholders of Commercial Banking Corporation are primary debtors to depositors.

Approved in Cutting Packing Co. v. Packers' Exchange, 86 Cal. 579, 21 Am. St. Rep. 63, 25 Pac. 54, 10 L. R. A. 369, reaffirming rule; Bank of Yolo v. Weaver (Cal.), 31 Pac. 160, holding stockholders liable for loan made by corporation, although resolution therefor was not spread on minutes.

Duties of Savings Banks Toward Depositors. See note, 105 Am. St. Rep. 735.

Stoppage of Payment by Bank gives depositors immediate right of action against bank and stockholders.

Approved in Bennett v. Thorne, 36 Wash. 267, 78 Pac. 941, 68 L. R. A. 113, following rule.

Liability of Commercial Bank and of Stockholders to depositors commences at same time.

Reaffirmed in Miller v. Lane, 160 Cal. 93, 116 Pac. 60.

Statute of Limitations in Actions against corporate officers and stockholders. See note, 96 Am. St. Rep. 974.

Subscriber for Shares of Stock in Corporation is responsible as stockholder, although stock is not paid for nor certificates issued.

Approved in Mountain Waterworks v. Holme, 49 Colo. 431, 113 Pac. 507, reaffirming rule; San Francisco etc. Agency v. Miller, 4 Cal. App. 293, 87 Pac. 631, holding defective complaint against stockholders which did not aver whole number of shares of subscribed capital stock; Cotter v. Butte R. V. Smelting Co., 31 Mont. 133, 77 Pac. 510, holding one could be stockholder and vote stock subscribed for although certificates had not been issued to him.

64 Cal. 123–134, 28 Pac. 447, SPRING VALLEY WATERWORKS v. SAN MATEO WATERWORKS.

Right of Water Company to Condemn private lands is limited to real necessity for appropriation.

Approved in Kinney v. Citizens' Water etc. Co., 173 Ind. 258, 90 N. E. 131, denying right of water company to condemn land for switch to its plant to become part of railway system.

Existence of Public Use as question for courts. See notes, 88 Am. St. Rep. 946; 11 L. R. A. (n. s.) 946.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 48, 58, 60, 61, 157, 158.

Acquisition of Water Supply by Eminent Domain. See note, 58 L. R. A. 244.

64 Cal. 134–150, 49 Am. Rep. 686, 27 Pac. 863, McCORD v. OAKLAND QUICKSILVER MIN. CO.

Action for Waste Lies against tenant in common.

Approved in Scarborough v. Woodill, 7 Cal. App. 41, 93 Pac. 384, granting injunction to prevent cutting down trees.

Cotenants in Mines. See note, 91 Am. St. Rep. 867, 869, 870, 872, 873, 874, 877, 880.

"Waste" must be Applied With Reference to quantity or quality of estate, nature and species of property, and relation to it of person charged with waste.

Approved in Chapman v. Cooney, 25 R. I. 660, 57 Atl. 929, holding failure to make repairs on mortgaged premises does not amount to waste.

Waste. See note, 81 Am. St. Rep. 811.

64 Cal. 152–153, 28 Pac. 231, MATTER OF TROIA.

It is Only When Testimony of Material Witness for people, taken before committing magistrate, is clearly shown to be false, that prisoner should be discharged on habeas corpus.

Approved in In re Vandiveer, 4 Cal. App. 653, 88 Pac. 994, following rule; In re Thomas, 1 Okl. Cr. 18, 19, 20 Okl. 171, 172, 93 Pac. 981, 982, holding bail in capital case properly refused where there was evident proof of guilt, although testimony was conflicting.

64 Cal. 153–155, 28 Pac. 232, PEOPLE v. BOYLE.

Allegation in Information of Former Conviction is not distinct charge of another triable offense.

Approved in State v. Gordon, 35 Mont. 464, 90 Pac. 175, holding allegations of former convictions material for describing offense charged, and plea of not guilty puts in issue all such allegations.

Enhancing Penalty for Crimes by habitual criminals or prior offenders. See note, 34 L. R. A. 400.

64 Cal. 155–156, 30 Pac. 613, GRADY v. SUPERIOR COURT.

Opinion of Superior Court on Habeas Corpus is in no way binding upon any other judge or court should same question arise on same or similar facts.

Approved in Ex parte White, 2 Cal. App. 729, 84 Pac. 244, holding no appeal lies from order discharging prisoner on habeas corpus.

64 Cal. 157–163, 30 Pac. 620, PEOPLE v. MARKHAM.

Demurrer will not Lie to Information on ground that it is uncertain.

Approved in People v. Garcia (Cal.), 59 Pac. 576, following rule.

Police Officer Who Receives Money in Consideration of promise not to arrest any one of class of offenders against criminal laws is

guilty of receiving bribe, and information need not allege crime was committed or arrest not made.

Approved in State v. Gardiner, 88 Minn. 142, 92 N. W. 534, following rule; State v. Butler, 178 Mo. 319, 77 S. W. 572, such bribery must be accomplished after law goes into effect.

Bribery and Solicitation of Bribe. See note, 116 Am. St. Rep. 39, 42.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 27.

64 Cal. 166–184, 30 Pac. 613, MOULTON v. PARKS.

Section 21 of Act of March 25, 1868, in regard to levee districts, is void.

Distinguished in People v. Levee District No. 6 (Cal.), 63 Pac. 342, holding levee district formed under void act acquired legal existence by recognition by legislature.

Liability for Damming Back Stream. See note, 59 L. R. A. 858.

64 Cal. 185–197, 30 Pac. 623, ANAHEIM WATER CO. v. SEMITROPIC WATER CO.

In Order to Constitute Right by Prescription, there must have been such invasion of rights of party against whom claimed that he would have had cause of action against intruder.

Approved in Perry v. Calkins, 159 Cal. 178, 113 Pac. 138, use of water diverted from stream at point below land of riparian proprietor is not adverse to him unless his use is interfered with by alleged adverse use below; Richard v. Hupp (Cal.), 37 Pac. 921, holding prescriptive right to maintain flume on land of another lost by abandonment; Anderson v. Bassman, 140 Fed. 26, holding that so long as there was such quantity of water in stream that use of portion of it by defendants did not affect use of quantity to which plaintiffs were entitled, statute did not run against action by plaintiffs to establish priority of right; Talbott v. Butte City Water Co., 29 Mont. 27, 73 Pac. 1113, holding use of water not required by plaintiffs could not be adverse to right of plaintiffs.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 718, 725.

Mere Use of Water of Stream During Season of abundant flow, without objection of proprietor, cannot ripen into title as adverse user.

Approved in Meng v. Coffee, 67 Neb. 520, 108 Am. St. Rep. 697, 93 N. W. 720, 60 L. R. A. 910, following rule.

64 Cal. 197–203, 30 Pac. 629, CORNELL v. CORBIN.

Instance of Corporation Held to be Mere Agency in carrying out agreement between parties.

Approved in Baldwin v. Miller & Lux, 152 Cal. 457, 92 Pac. 1034, upholding validity of corporation formed to take over partnership assets and settle up business; Western Lumber etc. Co. v. Merchants' Amusement Co., 13 Cal. App. 11, 108 Pac. 894, holding owner who acted through agent, a corporation, to secure construction of building on his land in agent's name not entitled to give notice of nonresponsibility under section 1192, Code of Civil Procedure; Kelly v. Ning Yuen Ben. Assn., 2 Cal. App. 463, 84 Pac. 322, holding auxiliary cemetery corporation merely agency in carrying out purposes of benevolent association; Turner v. Fidelity Loan Concern, 2 Cal. App. 131, 83 Pac. 66, sustaining incorporator's agreement in regard to issuance

of paid-up stock adopted by corporation when directors adopting same, though trustees, were sole beneficiaries.

64 Cal. 211, 27 Pac. 1104, PEOPLE v. WHITELY.

Verdict of "Guilty as Charged" sufficiently finds degree of crime on trial of charge of grand larceny.

Approved in State v. McDonald, 16 S. D. 83, 91 N. W. 448, holding verdict of guilty as charged sufficiently finds degree of arson when charged as arson in third degree by burning barn.

Denied in McLane v. Territory, 8 Ariz. 155, 156, 71 Pac. 939, 940, holding void judgment founded on verdict of "guilty as charged" in trial for grand larceny.

64 Cal. 213-226, 30 Pac. 633, HUBERT v. MENDHEIM.

Bonds Given to Individuals and private corporations are subject of private contract by which parties may bind themselves in any manner not in violation of law.

Approved in Humboldt Sav. & Loan Soc. v. Wennerhold (Cal.), 20 Pac. 555, holding sureties on bond of officer of building association liable, under terms of bond, for money received and entered on pass-books of depositors, but not on company's books, and converted by officer.

Sureties on Official Bond of Deputy are liable only for breach during term of office of principal.

Approved in Priet v. De La Montanya (Cal.), 22 Pac. 172, holding sureties liable on official bond for money illegally paid out by officer's deputy; Wapello State Bk. v. Colton, 133 Iowa, 151, 110 N. W. 451, 11 L. R. A. (n. s.) 493, holding sureties on bond of bank cashier released when indefinite term of employment was ended by fixing of definite term.

Liability of Sureties on official bond after expiration of term of office. See note, 103 Am. St. Rep. 940.

Liability of Surety Under Fidelity Bond for defalcations subsequent to reappointment made before expiration of original term, or during indefinite term. See note, 11 L. R. A. (n. s.) 495.

64 Cal. 226-227, 30 Pac. 437, ESTATE OF McKINNON.

Miscellaneous.—Cited in Estate of Herold, 2 Cof. Prob. 273, to point that fact that petition was filed first does not give priority to letters of administration.

64 Cal. 228, 30 Pac. 804, ESTATE OF HYDE.

Public Administrator is Entitled to Letters as against nominee of nonresident heir.

Approved in Estate of Griffiths, 3 Cof. Prob. 547, reaffirming rule; Estate of Bedell, 3 Cof. Prob. 81, nominee of parents is entitled to letters as against public administrator, though he in own right is not.

Distinguished in Estate of Bergin, 3 Cof. Prob. 291, public administrator is not entitled to letters as against resident devisee in foreign will who files authenticated copy thereof and of its foreign probate with petition for letters.

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1163.

64 Cal. 229–230, 30 Pac. 805, PEOPLE v. APPLEGARTH.

In Action to Annul Certificate of Purchase of school lands for nonpayment of interest, service of summons by publication must be made in accordance with provisions of Code of Civil Procedure.

Approved in People v. Ray (Cal.), 12 Pac. 161, following rule.

The Four Codes Constitute but One Statute and must be read together.

Approved in Sunset Telephone etc. Co. v. Pomona, 172 Fed. 834, 97 C. C. A. 251, under section 591, Penal Code, section 4480, Political Code, and section 536, Civil Code, construed together, telephone lines may be constructed along any highway in state.

64 Cal. 233–245, 30 Pac. 806, EX PARTE REIS.

Acts Authorizing Appointment and Payment of court reporters are valid.

Approved in Smith v. Strother (Cal.), 7 Pac. 802, upholding act of 1885 relative to compensation of shorthand reporters.

County Treasurer must Pay phonographic reporter's compensation fixed by courts without approval or audit by any city or county officer.

Approved in Trower v. San Francisco, 157 Cal. 766, 109 Pac. 619, holding fees paid to county clerk under unconstitutional act may be recovered from county without being presented for audit.

64 Cal. 245–246, 30 Pac. 811, ROSS v. BRUSIE.

On Trial of Question Whether Deed absolute upon face was mortgage, declarations of party to deed and suit, made after execution of deed, are competent evidence against himself.

Approved in Wagg v. Herbert, 19 Okl. 562, 92 Pac. 264, admitting extraneous evidence to show deed to be mortgage.

64 Cal. 249–250, 29 Pac. 510, CARMAN v. ROSS.

What Special Verdict must Contain. See note, 24 L. R. A. (n. s.) 51.

64 Cal. 253–256, 28 Pac. 233, PEOPLE v. FONG AH SING.

Proof Tending to Establish Alibi is for consideration of jury, and if it raises reasonable doubt of guilt, jury should acquit.

Approved in Glover v. United States, 147 Fed. 432, 77 C. C. A. 450, instruction that defense of alibi must show that accused at very time of commission was so far away he could not have participated in offense, is erroneous; Tucker v. Territory, 17 Okl. 64, 87 Pac. 309, holding instruction that defense of alibi must show accused to be so far away from place of crime that he could not have reached it at time by ordinary exertion cured by further instruction in regard to reasonable doubt arising from all evidence.

Burden and Measure of Proof of Alibi. See note, 41 L. R. A. 530, 532, 536.

Dying Declarations are Restricted to act of killing, and to circumstances immediately attending it and forming part of res gestae.

Approved in People v. Cyty, 11 Cal. App. 708, 106 Pac. 260, admitting dying declarations relating to matters immediately antecedent to and having direct connection with assault.

Admissibility of Dying Declarations. See note, 86 Am. St. Rep. 647, 648, 652.

64 Cal. 256–260, 30 Pac. 813, PEOPLE v. LANGTREE.

One Spouse cannot be Witness for or against another in criminal case without consent.

Approved in State v. Burt, 17 S. D. 10, 106 Am. St. Rep. 759, 94 N. W. 410, 62 L. R. A. 172, wife cannot testify against husband over his protest in prosecution for incest; State v. Kniffen, 44 Wash. 486, 120 Am. St. Rep. 1009, 87 Pac. 838, in bigamy trial first wife not competent to testify against husband.

Distinguished in People v. Loper, 159 Cal. 12, 13, 14, 112 Pac. 722, 723, accused's former wife who had lived with him a year after marriage could testify in homicide case as to his sanity.

Wife of Party Jointly Indicted with defendant is competent witness for prosecution.

Approved in State v. Nelson, 39 Wash. 227, 81 Pac. 723, holding husband of defendant's paramour competent witness against him.

Effect of Agreement for Immunity of Accomplice testifying for prosecution. See note, 24 L. R. A. (n. s.) 443.

64 Pac. 260–265, 30 Pac. 814, PEOPLE v. SCHMIDT.

Section 995, Penal Code, Enumerates all grounds upon which indictment or information may be set aside on motion.

Approved in People v. Hatch, 13 Cal. App. 526, 109 Pac. 1099, refusing to set aside indictment for alleged irregularity in impanelment of grand jury; State v. Lough, 12 N. D. 430, 96 N. W. 1026, statute specifies all grounds on which indictment may be set aside on defendant's motion.

Where Judgment of Conviction of Murder was reversed and remanded because of defective information, and action dismissed under section 1385, Penal Code, defendant cannot plead once in jeopardy in bar to new information.

Approved in People v. Disperati, 11 Cal. App. 474, 105 Pac. 619, holding dismissal of information after failure of jury to agree under section 1385, Penal Code, was not bar to another prosecution for same offense under new information.

64 Cal. 266–267, 28 Pac. 234, CASSIDY v. SULLIVAN.

Jury is not Matter of Right in divorce.

Approved in Hewel v. Hogin, 3 Cal. App. 255, 84 Pac. 1005, 1007, jury cannot be demanded as matter of right in mandamus proceeding.

Party Charged With Same Offense as defendant, who becomes witness, may be asked whether he expected leniency on his own trial for having testified for prosecution.

Reaffirmed in Stevens v. People, 215 Ill. 601, 74 N. E. 789.

64 Cal. 267–271, 30 Pac. 816, EX PARTE CARPENTER.

It is No Defense to Prosecution for Perjury that oath was taken in irregular manner.

Reaffirmed in People v. Collins, 6 Cal. App. 502, 92 Pac. 517.

64 Cal. 272–273, 28 Pac. 235, HIRSHBERG v. STRAUSS.

In Action for Damages for Wrongful Taking of property, it is error to instruct jury in regard to exemplary damages when taking is malicious, when there is no evidence to show taking is of that character.

Approved in Potts v. Knerr, 11 Cal. App. 100, 103 Pac. 1094, instruction in regard to negligence of fellow-servant when there was no evidence in regard to such negligence is erroneous.

64 Cal. 273-274, 30 Pac. 818, RICHMOND v. LATTIN.

Setoff on Mortgage Foreclosure. See note, 21 L. R. A. 323.

64 Cal. 275-283, 30 Pac. 842, McPHERSON v. MESTON.

Transfer of Note for Collection Only, without consideration, is valid as against indorser.

Approved in Ingham v. Weed (Cal.), 48 Pac. 320, assignee of mortgage may sue to foreclose, although bound by collateral arrangement to account to another for proceeds; dissenting opinion in Stewart v. Price, 64 Kan. 208, 67 Pac. 558, 64 L. R. A. 581, majority holding assignee of account for collection only cannot maintain action thereon.

64 Cal. 283-284, 30 Pac. 846, WHITTIER v. HOLLISTER.

Complaint on Mechanic's Lien must allege that money is due or to become due from owner to contractor.

Approved in Nason v. John, 1 Cal. App. 540, 82 Pac. 566, and Doggett v. Bellows (Cal.), 6 Pac. 421, both following rule.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

64 Cal. 284-287, 30 Pac. 818, HAHN v. SCHMIDT.

One Who Makes, Before Committing Magistrate, affidavit of facts conceded to be true, which magistrate believes to constitute crime and issues warrant thereon, is not liable in damages to person arrested.

Approved in Johnson v. Southern Pacific Co., 157 Cal. 339, 107 Pac. 613, where committing magistrate upon taking evidence adjudges party probably guilty and binds him over to superior court, it is prima facie evidence of probable cause for prosecution; Van Meter v. Bass, 40 Colo. 83, 90 Pac. 638, 18 L. R. A. (n. s.) 49, state board of medical examiners not liable for malicious prosecution for action instituted in good faith against osteopath practicing without license, although such license was adjudged unnecessary.

Distinguished in Navarino v. Dudrap, 66 N. J. L. 622, 50 Atl. 354, holding one who makes false affidavit to committing magistrate liable for malicious prosecution.

64 Cal. 287-290, 30 Pac. 820, DERBY v. STEVENS.

Superior Court has No Jurisdiction over action to recover money claim of less than three hundred dollars.

Approved in Evans v. Bailey (Cal.), 6 Pac. 424, applying rule where there are several defendants and claim against each is less than three hundred dollars; Holmes v. Warren (Cal.), 9 Pac. 71, no appeal lies from judgment in superior court on action originally brought in justice's court where amount is less than three hundred dollars.

64 Cal. 290-291, 30 Pac. 845, PAULSON v. NUNAN.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

64 Cal. 291-293, 30 Pac. 846, EX PARTE BENNINGER.

Limit of Amount of License Fees. See note, 30 L. R. A. 436.

Amount of Liquor License Fee as characterizing statute or ordinance imposing it as prohibitory or regulative. See note, 14 L. R. A. (n. s.) 794.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

64 Cal. 293–296, 30 Pac. 847, PEOPLE v. COLLINS.

Declarations of Co-conspirators to Commit Robberies generally are admissible against one charged with murder committed in pursuance of design of robbery.

Distinguished in Barkly v. Copeland (Cal.), 25 Pac. 405, in action for slander in charging plaintiff with associating with another in cattle thieving, declarations made by such other after alleged transaction are inadmissible to show such association.

Miscellaneous.—Cited in Jones v. United States, 162 Fed. 426, 89 C. C. A. 303, as illustration of facts of continuing conspiracy.

64 Cal. 296–299, 30 Pac. 849, HARVEY v. FOSTER.

Regularity of Writ of Attachment or Affidavit on which issued, cannot be questioned collaterally by one not party to action.

Approved in Hillman v. Griffin (Cal.), 59 Pac. 195, following rule; Bailey v. Aetna Indemnity Co., 5 Cal. App. 745, 91 Pac. 418, holding surety on bond to release attachment cannot question writ on affidavit in suit on bond.

Right of Creditors to Question Validity of attachment. See note, 35 L. R. A. 767, 777.

64 Cal. 299–300, 30 Pac. 848, LIVERMORE v. BRUNDAGE.

Judge Who is Party to Action Pending in his court has no power to act except to make order transferring case to another court.

Approved in Parrish v. Riverside Trust Co., 7 Cal. App. 96, 93 Pac. 686, holding disqualified judge must transfer case to nearest and most accessible court whose judge is not disqualified; Gamble v. District Court, 27 Nev. 244, 74 Pac. 531, judge who has been of counsel to party to action must transfer cause without delay; State v. Clancy, 30 Mont. 542, 77 Pac. 316, upholding act of December 10, 1903, providing that judge be disqualified upon filing of affidavit of prejudice by party.

Distinguished in Gage v. Downey (Cal.), 19 Pac. 119, where disqualified judge had transferred case to another judicial district, but not the nearest, judgment of court in such district cannot be collaterally attacked on ground of lack of jurisdiction.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 898.

64 Cal. 327–330, 30 Pac. 979, SAMSON v. SAMSON.

Decree Annulling Probate of Will upon application made by minor heir operates upon interest of applicant only.

Approved in Estate of Dalton, 2 Cof. Prob. 106, and Spencer v. Spencer, 31 Mont. 637, 638, 79 Pac. 321, 322, both following rule.

Distinguished in Clements v. McGinn (Cal.), 33 Pac. 921, where contest of will is initiated within statutory time, and will found invalid, it must be set aside in entirety.

64 Cal. 330–334, 30 Pac. 980, THOMPSON v. SAMSON.

Validity of Acts Under Letters Testamentary or of administration afterward revoked or held invalid. See note, 21 L. R. A. 152, 155.

64 Cal. 330–334, 30 Pac. 980, THOMPSON v. SAMPSON.

Decree Annulling Will After Distribution of estate upon application of one of several heirs operates only on right of applicant.

Approved in Estate of Dalton, 2 Cof. Prob. 106, following rule.

64 Cal. 334–337, 30 Pac. 981, GULZONI v. TYLER.

Lessor of Steamboat is not Liable for injury to passenger due to negligence of lessee.

Approved in Phelps v. Windsor Steamboat Co., 131 N. C. 13, 42 S. E. 336, following rule.

Comparison of Handwriting. See note, 62 L. R. A. 836, 853, 865.

Who are Independent Contractors. See note, 65 L. R. A. 457.

64 Cal. 338–341, 30 Pac. 1028, PEOPLE v. KING.

Where Defendant in Criminal Case is Accused of former conviction, both charges must be proven, even though defendant admits former conviction.

Approved in State v. Smith, 129 Iowa, 715, 106 N. W. 189, 4 L. R. A. (n. s.) 539, prior conviction must be proven to warrant longer term sentence.

Overruled in People v. King, 4 Cal. App. 215, 87 Pac. 401, upon plea of guilty to former conviction, court may withhold evidence thereof from jury upon trial of new offense.

Enhancing Penalty for Crimes by habitual criminals or prior offenders. See note, 34 L. R. A. 405.

64 Cal. 343–345, 30 Pac. 1030, EX PARTE KELLOGG.

Disposition of Personal Property by Judgment Debtor in anticipation of levy of alias execution already issued is contempt of court.

Approved in Merrimack River Sav. Bank v. City of Clay Center, 219 U. S. 536, 31 Sup. Ct. 297, 55 L. Ed. 325, willful destruction of subject matter of litigation pending appeal held contempt of court; Clay v. Waters, 178 Fed. 391, 399, 101 C. C. A. 645, disposition of notes to innocent purchaser by bankrupt after adjudication of bankruptcy, for purpose of concealing property from trustee, held to be criminal contempt.

64 Cal. 346–351, 30 Pac. 575, DANIEL v. SMITH.

Actual Transfer of Possession is Essential to validity of gift causa mortis.

Approved in Estate of Curtis, 1 Cof. Prob. 535, 536, and O'Neil v. First Nat. Bank, 43 Mont. 512, 117 Pac. 890, both following rule; Beebe v. Coffin, 153 Cal. 177, 94 Pac. 768, holding delivery of release of mortgage to mortgagor with intent that it should take effect only at death of donor not valid gift causa mortis; Stout v. McNab, 157 Cal. 360, 107 Pac. 1006, holding assignment of life insurance policy to be gift causa mortis; Knight v. Tripp (Cal.), 49 Pac. 839, holding void transfer by deed and gift of property by one about to undergo surgical operation, when it was understood that donor was to have beneficial use during life.

Gifts Causa Mortis. See note, 99 Am. St. Rep. 891, 895, 900.

64 Cal. 352–354, 28 Pac. 118, FARMERS' ETC. BANK OF SAVINGS v. COLBY.

Note Signed by Officers of Corporation considered and held to be note of corporation.

Distinguished in Hall v. Jameson, 151 Cal. 610, 121 Am. St. Rep. 137, 91 Pac. 519, 12 L. R. A. (n. s.) 1190, holding trustee giving note signed by himself as trustee for benefit of trust personally liable thereon; Nunnemacher v. Poss, 116 Wis. 448, 92 N. W. 376, note signed by officer and reciting "G. Association," and "We, the undersigned, promise to pay," held to bind officers and corporation jointly.

Personal Liability of Officers on Note made for corporation. See note, 19 L. R. A. 679.

Liability of Principal on Negotiable Paper executed by agent. See note, 21 L. R. A. (n. s.) 1066.

64 Cal. 354–363, 30 Pac. 609, BIDDELL v. BRIZZOLARA.

Admission to Stranger of Existence of Debt is not such acknowledgment as will toll statute of limitations.

Approved in President etc. California College v. Stephens, 11 Cal. App. 527, 528, 105 Pac. 615, 616, holding acknowledgment of mortgage debt in return to assessor before statute had run did not toll the statute; Visher v. Wilbur, 5 Cal. App. 590, 90 Pac. 1067, holding acknowledgment of debt to heir of creditor, who did not represent his estate, could not toll statute.

Acknowledgment or New Promise to Suspend Running or remove bar of statute of limitations. See note, 102 Am. St. Rep. 756.

Person to Whom Acknowledgment or New Promise must be made to toll statute or remove bar of limitations. See note, 25 L. R. A. (n. s.) 808.

Personal Judgment cannot be Given on Debt secured by mortgage until mortgage security is exhausted.

Approved in Moore v. Gould, 151 Cal. 731, 91 Pac. 619, and Boucofski v. Jacobsen, 36 Utah, 178, 104 Pac. 122, both following rule; Crisman v. Lanterman, 149 Cal. 651, 654, 117 Am. St. Rep. 167, 87 Pac. 90, 92, where mortgage was released to make effective sale under deed of trust, estate of deceased mortgagor not consenting thereto cannot be made liable for deficiency arising in application of proceeds of sale to mortgage debt; Herbert Kraft Co. v. Bryan, 140 Cal. 81, 73 Pac. 747, discussing but not deciding whether action can be maintained on debt secured by deed of trust independently of sale under deed; Howe v. Sears, 30 Utah, 349, 84 Pac. 1108, holding right of action on deficiency judgment on foreclosure of mortgage accrues when deficiency is ascertained.

Right of Mortgagee to Enforce purchaser's promise to pay mortgage when grantor or promisee was not himself liable. See note, 22 L. R. A. (n. s.) 494.

64 Cal. 363–369, 28 Pac. 118, MURRAY v. GREEN.

Where Granting Clause of Deed purports to convey title in fee, later clause prohibiting grantee from conveying without consent of grantor is void.

Approved in Kessner v. Phillips, 189 Mo. 527, 107 Am. St. Rep. 368, 88 S. W. 69, deed providing land should not be liable for ex-

isting debt of grantee, and that grantee could not sell or encumber for certain period, held to convey fee, and other provisions are void; Sprinkle v. Leslie, 36 Tex. Civ. App. 357, 81 S. W. 1019, devise of land held to give only life estate to devisee, but restriction in will as to devisee's power to alienate her estate was void; Totten v. Pocahontas Coal & Coke Co., 67 W. Va. 643, 68 S. E. 375, holding deed providing for life maintenance of grantor and distribution of land on his death, conveyed only estate for his life.

Distinguished in Burnett v. Piercy, 149 Cal. 188, 190, 86 Pac. 607, conditions and limitations of deeds considered and held not to render them invalid.

Validity of Conditions and restrictions in deeds. See note, 95 Am. St. Rep. 217.

Miscellaneous.—Porter v. Murray (Cal.), 12 Pac. 426, referring to principal case.

64 Cal. 369–372, 30 Pac. 608, PEOPLE v. MURBACK.

Appeal from Judgment Deprives such judgment of its effect as estoppel.

Approved in People v. Gibbs (Cal.), 33 Pac. 631, following rule.

Distinguished in Contra Costa Water Co. v. Oakland, 165 Fed. 529, on application for preliminary injunction, judgment between parties in state court, although appealed from, may be considered as pertinent to matters therein determined, although it does not operate as estoppel.

Instance of Proper Instructions in murder case as to discretion to inflict death penalty.

Cited in State v. Noah, 20 N. D. 294, 124 N. W. 1127, holding it error in murder case to charge that penalty may be reduced by court if jury inflict death penalty.

Insulting Words or Conduct as provocation to homicide. See note, 4 L. R. A. (n. s.) 154.

64 Cal. 372–373, 28 Pac. 121, REYNOLDS v. SUPERIOR COURT.

When Time to Appeal from Judgment has elapsed, remedy by certiorari is also barred.

Reaffirmed in Hall v. Justice's Court, 5 Cal. App. 149, 89 Pac. 872, and State v. Superior Court, 42 Wash. 688, 85 Pac. 674.

64 Cal. 373–376, 1 Pac. 156, PEOPLE v. ROBINSON.

Purchase of Stock not Transferred on books of corporation has only equitable title and cannot vote shares.

Approved in People's Home Savings Bank v. Stadtmuller, 150 Cal. 108, 88 Pac. 281, holding distributee of stock of bank which still stands in decedent's name is not liable as stockholder for assessments.

Distinguished in Hawaiian Commercial etc. Co. v. Waikapu Sugar Co., 9 Haw. 696, holding pledgor may vote stock when transfer appears on books to be as pledge only.

Duty of Corporations to Transfer Stock on their books. See note, 136 Am. St. Rep. 1036.

64 Cal. 378, 1 Pac. 158, HEINLEN v. SULLIVAN.

Constitutional Power of Courts or Judges to appoint officers. See note, 16 L. R. A. 737.

64 Cal. 380–383, 1 Pac. 347, PEOPLE v. SHEM AH FOOK.

Information may be Set Aside on motion of defendant, if before filing thereof defendant was not legally committed by magistrate.

Approved in People v. Toal (Cal.), 23 Pac. 203, setting aside information on ground that committing magistrate had no authority.

In Absence of Specific Objection to alleged misstatements of counsel for people in argument, they cannot be considered by appellate court.

Approved in People v. Osborn, 12 Cal. App. 150, 106 Pac. 891, following rule; People v. Walker, 15 Cal. App. 404, 114 Pac. 1010, holding accused could not complain of statements made before jury in argument between counsel and district attorney unless objection was made at time; People v. Amer, 8 Cal. App. 143, 96 Pac. 404, holding improper remarks of counsel not prejudicial when jury were instructed to disregard them; People v. Ye Foo, 4 Cal. App. 743, 89 Pac. 454, holding district attorney did not transcend limits of legitimate argument.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 645, 646.

Uncontradicted Statement in Presence of accused as confession. See note, 25 L. R. A. (n. s.) 547, 561, 566.

64 Cal. 383–386, 1 Pac. 385, MORROW v. SUPERIOR COURT.

Creditor of Life Insurance Company Incorporated under act of 1866 may sue individual stockholder for his proportion of debt due from corporation to creditor.

Cited in Gardiner v. Bank of Napa, 160 Cal. 588, 117 Pac. 671, arguendo.

64 Cal. 388–394, 49 Am. Rep. 705, 1 Pac. 349, BARSTOW v. SAVAGE MIN. CO.

Certificate of Corporate Stock is not a negotiable instrument.

Approved in Perkins v. Cowles, 157 Cal. 632, 137 Am. St. Rep. 158, 108 Pac. 713, and Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 377, 90 Am. St. Rep. 586, 64 N. E. 521, 58 L. R. A. 620, both following rule; O'Dea v. Hollywood Cemetery Assn., 154 Cal. 72, 97 Pac. 9, holding purchaser took stock subject to all equities in favor of corporation.

Bona Fide Purchaser of Stolen Stock Certificates, which stand on books in name of one person, but are owned by another, acquire no title against true owner.

Approved in Menardi v. Wacker, 32 Nev. 173, 105 Pac. 288, one who buys stock with money of employers without their knowledge or consent cannot pledge it for own debt so as to defeat employers' right to recover it from pledgee.

Title Acquired by Bona Fide Purchaser of stolen property. See note, 103 Am. St. Rep. 980, 982.

Validity of Pledge or Other Transfer of Stock when not made in books of corporation, as against attachments, executions, or subsequent transfers. See note, 67 L. R. A. 660.

64 Cal. 397–400, 1 Pac. 479, SCHULER v. SAVINGS ETC. SOCIETY.

Property Acquired and Held by Husband and Wife during continuance of marriage relation is presumed to be community property.

Approved in Strong v. Eakin, 11 N. M. 115, 118, 66 Pac. 541, holding community property liable for debts incurred during continuance of marriage relation.

What is Community Property. See notes, 126 Am. St. Rep. 120; 4 Cof. Prob. 62.

64 Cal. 401–405, 1 Pac. 490, PEOPLE v. LEWIS.

Discretion of Court is not Arbitrary, but is to be exercised in accordance with principles of law and analogies.

Approved in dissenting opinion in Bates v. Gregory (Cal.), 22 Pac. 687, majority refusing, on ground of limitations, mandamus to compel issue of bonds in place of former issue.

When Both an Offense and Former Conviction are charged in indictment, plea of not guilty to indictment is sufficient.

Approved in State v. Gordon, 35 Mont. 464, 90 Pac. 175, holding plea of not guilty to indictment put in issue former convictions charged therein.

Enhancing Penalty for Crimes by habitual criminals or prior offenders. See note, 34 L. R. A. 400, 405.

It is not Error to Refuse Continuance on account of absence of witness, when it does not appear that absent witness can be procured in reasonable time.

Reaffirmed in People v. Barnnovich, 16 Cal. App. 431, 117 Pac. 574.

64 Cal. 405–410, 1 Pac. 487, PRESTON v. HOOD.

Sections 540 and 544, Code of Civil Procedure, provide two methods for releasing property from attachment by giving undertaking.

Approved in S. F. Sulphur Co. v. Aetna Indem. Co., 11 Cal. App. 699, 106 Pac. 112, holding attachment released under section 540.

64 Cal. 423–426, 1 Pac. 493, SWIFT v. SHEPARD.

Injunction for Purpose of Maintaining Subject of litigation in statu quo is not suspended by appeal.

Distinguished in Clute v. Superior Court, 155 Cal. 18, 123 Am. St. Rep. 54, 99 Pac. 363, holding mandatory injunction compelling affirmative action could not be enforced pending appeal.

64 Cal. 427–428, 1 Pac. 701, ESTATE OF BILLINGS.

Instrument Offered as Holographic Will with portion of date printed is invalid.

Approved in Estate of Plumel, 151 Cal. 79, 121 Am. St. Rep. 100, 90 Pac. 193, following rule; Estate of Fay, 1 Cof. Prob. 429, refusing probate to holograph which by mistake bears date twenty-eight years prior to its execution; In re Noyes' Estate, 40 Mont. 199, 105 Pac. 1019, 26 L. R. A. (n. s.) 1145, holding omission of date rendered invalid instrument purporting to be holographic will.

Holographic Wills. See notes, 104 Am. St. Rep. 27; 1 Cof. Prob. 432, 436.

Effect of State Constitutions and Statutes upon inheritance by or from alien. See note, 31 L. R. A. 87.

64 Cal. 429–430, 1 Pac. 703, PLUMMER v. BROWN.

Grantees of Land Which is Subject Matter of action are legal representatives of grantor under section 473, Code of Civil Procedure, and may represent him and defend action in his name.

Approved in Coffin v. Ontonagon, 140 Mich. 425, 103 N. W. 837, holding grantee of defendant in quiet title suit is embraced within word "representatives"; Brown v. Massey, 13 Okl. 678, 76 Pac. 228, holding assignees of real property subject of quiet title suit entitled to defend as representatives of defendants.

Legal Representatives of Party to Action are entitled to relief from default taken against him through mistake, inadvertence, surprise, or excusable neglect.

Denied in Leslie v. Gibson, 80 Kan. 509, 133 Am. St. Rep. 219, 103 Pac. 116, one purchasing interest of party after judgment has only same right as such party to open judgment.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 762.

Availability to Privies of Remedy of Party to open default judgment. See note, 26 L. R. A. (n. s.) 1064.

As to Who may Proceed to Set Aside Judgments against other parties. See note, 54 L. R. A. 767.

64 Cal. 431–434, 1 Pac. 881, IN RE ROBB.

Upon Question of Legality of Arrest on governor's warrant issued upon requisition of governor of another state, writ of error in habeas corpus proceedings in superior court lies to federal circuit court.

Approved in Kutz v. Moffitt, 115 U. S. 489, 6 Sup. Ct. 148, 29 L. Ed. 458, holding such writ of error lies to federal circuit court from superior court on question of legality of arrest by local police of deserter from army.

64 Cal. 434–440, 1 Pac. 884, MATTER OF TYLER.

Imprisonment may be Imposed as means of collecting fine for contempt.

Approved in Ex parte Karlson, 160 Cal. 380, 381, 117 Pac. 448, reaffirming rule; In re Sullivan, 3 Cal. App. 195, 84 Pac. 781, holding valid, as to fine, judgment imposing fine for assault and providing for imprisonment in state prison as means of enforcement.

64 Cal. 440–442, 1 Pac. 889, PEOPLE v. DAVIS.

When Proof of Guilt of Accused depends upon circumstantial evidence, such evidence must be inconsistent with any other rational explanation.

Approved in Horn v. State, 12 Wyo. 158, 73 Pac. 725, holding erroneous instruction to effect that proof of guilt by circumstantial evidence must be beyond possibility of doubt.

64 Cal. 443–445, 1 Pac. 891, HALL v. RICE.

Suit for Specific Performance of Contract of decedent to convey lands may be brought in superior court within six months after dismissal without prejudice in probate court.

Approved in Free v. Little, 31 Utah, 465, 88 Pac. 413, such suit barred when vendee failed to present petition for specific performance to probate court.

Rule of Idem Sonans. See note, 100 Am. St. Rep. 347.

64 Cal. 450–453, 2 Pac. 33, HUERSTAL v. MUIR.

Where Judgment for Plaintiff in Ejectment is fully executed by putting plaintiff in possession, alias writ of possession cannot issue except upon adjudication that person against whom writ is to run is guilty of contempt.

Approved in Rousset v. Reay (Cal.), 31 Pac. 901, following rule.

Mortgage of Growing Crops Pending Action in ejectment is bound by judgment against mortgagor.

Approved in Harrod v. Burke, 76 Kan. 914, 123 Am. St. Rep. 179, 92 Pac. 1129, holding purchaser of growing crop pending action in ejectment bound by judgment; Hartshorne v. Ingles, 23 Okl. 540, 101 Pac. 1047, 23 L. R. A. (n. s.) 531, holding successful plaintiff in action to recover land held adversely entitled to matured crop standing unsevered on land at time of final judgment; Myer v. Roberts, 50 Or. 83, 126 Am. St. Rep. 733, 89 Pac. 1051, 12 L. R. A. (n. s.) 194, holding landlord, who lawfully re-enters leased property, is entitled to crops then growing.

Right as Between Successful Plaintiff and evicted defendant to unsevered crops. See note, 23 L. R. A. (n. s.) 532.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 466.

64 Cal. 455–456, 2 Pac. 31, ANDERSON v. HANCOCK.

Doctrine of Law of Case is Limited to rulings upon questions actually presented and considered on former appeal.

Reaffirmed in Trower v. San Francisco, 157 Cal. 765, 109 Pac. 618.

Distinguished in People's Lumber Co. v. Gillard, 5 Cal. App. 436, 90 Pac. 556, holding where validity of bond was in question on final appeal and bond was held good as common-law bond, such decision is law of case on second appeal where voluntary issue of bond was not in question.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 346.

Omission from Tax Deed of Recital in certificate of sale as to time when purchaser would be entitled to deed renders it void.

Distinguished in Baird v. Monroe, 150 Cal. 564, 89 Pac. 353, upholding tax deed not containing statement of time allowed for redemption after curative act of 1903.

64 Cal. 456–458, 2 Pac. 28, JONES v. SUM.

In Action on Note, Defendant, Under Plea of Payment, may show verbal contract with payee, contemporaneous with making of note, that same should be paid by orders on maker and by payment of premiums on insurance policies.

Approved in McGuinness v. Kyle, 208 Mass. 445, 94 N. E. 701, applying rule where payee was told by maker of note at time note given that payment for services already rendered by maker would be taken out of note.

64 Cal. 461–462, 3 Pac. 108, WILCOX v. HAUSCH.

One Who Conducts Water into Stream from foreign source may take from stream water not greater in amount than he turns in.

Approved in Miller v. Wheeler, 54 Wash. 438, 103 Pac. 644, 23 L. R. A. (n. s.) 1065, following rule.

Rights, as Against Other Appropriators, of one who adds to natural flow of stream. See note, 23 L. R. A. (n. s.) 1066.

Use of Natural Stream to Convey appropriated water. See note, 51 L. R. A. 931.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 677.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 747.

64 Cal. 462–463, 2 Pac. 49, **PATRICK v. MORSE.**

Where Transcript Shows No Objection at time to hearing motion for new trial on ground it was not made in time, it will be presumed time was extended by consent.

Approved in Sheppard v. Sheppard, 15 Cal. App. 617, 115 Pac. 752, applying rule to settling bill of exceptions.

64 Cal. 475–476, 2 Pac. 253, **WILSON v. BAKER.**

Assignee of Attached Property may become party to action for purpose of protecting his interest.

Distinguished in Anderson v. Schloesser, 153 Cal. 223, 94 Pac. 886, holding sale of attached real estate pending suit does not create such interest in action as to allow purchaser to be substituted as defendant.

Prosecution of Suit in One Court cannot be enjoined by another court of co-ordinate jurisdiction.

Approved in In re Burton, 5 Cof. Prob. 237, and Gray v. South & North Alabama Ry. Co., 151 Ala. 225, 43 So. 861, 11 L. R. A. (n. s.) 581, both following rule.

64 Cal. 476–481, 2 Pac. 249, **WEILL v. BALDWIN.**

What Covenants Run With the Land. See note, 82 Am. St. Rep. 684.

64 Cal. 481–485, **SAN FRANCISCO v. LUX.**

General Deposit in Bank is Loan from depositor to bank.

Approved in Smith's Cash Store v. First Nat. Bank, 149 Cal. 34, 84 Pac. 664, 5 L. R. A. (n. s.) 870, holding alleged transfer of money to be held in trust to be in effect merely loan.

Nonresident's Bank Deposit as Subject of local taxation. See note, 26 L. R. A. (n. s.) 1120.

64 Cal. 487–488, 2 Pac. 263, **HOWARD v. STRATTON.**

Where Promissory Note is Given to secure promise of maker to support payee, parol evidence is admissible to show such discharge of instrument.

Approved in Howard v. Stratton (Cal.), 2 Pac. 264, following rule; Sutton v. Griebel, 118 Iowa, 80, 91 N. W. 825, in action on written contract, contemporaneous oral agreement that defendant should be allowed to withdraw at any time before purchase of certain property and fact that defendant did withdraw may be proven.

Parol Evidence to Show Bill or Note delivered upon condition. See note, 18 L. R. A. (n. s.) 289.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 483.

64 Cal. 489–491, 2 Pac. 260, **PAIGE v. CARTER.**

That Promissory Note was Delivered at date other than appearing upon face may be shown by parol.

Distinguished in Bither v. Christensen, 1 Cal. App. 92, 81 Pac. 671, upholding findings to effect that time of payment of note was to be computed from date, when delivery was shown to be after date.

Witness may Refer to Memorandum to refresh memory, although not made at time in question nor by witness himself.

Reaffirmed in People v. Brown, 3 Cal. App. 179, 84 Pac. 671.

64 Cal. 492–493, 3 Pac. 126, KORNAHRENS v. HIS CREDITORS.

Insolvency Proceeding may be Dismissed, upon motion of debtor, for unreasonable delays in prosecution.

Approved in People's Home Savings Bank v. Sherman, 150 Cal. 795, 90 Pac. 134, holding action by insolvent bank to recover unpaid subscription of former stockholder properly dismissed for failure to prosecute for three years.

64 Cal. 493–498, 2 Pac. 270, MOUND CITY LAND ETC. ASSN. v. PHILLIPS.

Conclusiveness of Judgment in partition suit. See note, 124 Am. St. Rep. 714.

Effect of Compulsory Partition. See note, 101 Am. St. Rep. 872.

64 Cal. 498–503, 2 Pac. 393, PEOPLE v. WILLIAMS.

Mere Establishment of Harbor Line does not deprive state of right to control and regulate navigable waters within that line.

Approved in People v. Kerber, 152 Cal. 737, 125 Am. St. Rep. 93, 93 Pac. 880, holding building of seawall by city could not protect private owners of waterfront from action by state; People ex rel. Board of State Harbor Commrs. v. Roberts (Cal.), 25 Pac. 496, upholding wharfage charges imposed by state board of harbor commissioners on barge kept within slip constructed, repaired, and dredged by board.

State and Federal Ownership of Waters. See note, 50 L. R. A. 741.

Establishment of Dock Lines. See note, 14 L. R. A. 499.

Jurisdiction Over Sea. See note, 46 L. R. A. 278.

64 Cal. 503–504, 3 Pac. 129, BLOOM v. SAN FRANCISCO.

Duty and Liability of Municipality with respect to drainage. See note, 61 L. R. A. 701.

64 Cal. 504–511, 2 Pac. 264, SAN FRANCISCO v. FLOOD.

Shares of Stock in Mining Corporation whose tangible property is situated outside state are taxable.

Approved in Chesebrough v. San Francisco, 153 Cal. 564, 96 Pac. 290, upholding assessment on stock when only part of tangible property was within jurisdiction of state.

Complaint of Taxpayer in Regard to description of property assessed cannot be heard when he failed to furnish list to assessor.

Approved in Inland Lumber etc. Co. v. Thompson, 11 Idaho, 514, 114 Am. St. Rep. 274, 83 Pac. 935, holding taxpayer who furnishes list to assessor is estopped to deny ownership of property listed.

Distinguished in Henne v. Los Angeles County (Cal.), 59 Pac. 782, holding refusal of land owner to return mortgage on his land for taxation did not authorize assessor to arbitrarily assess it to him.

Where Property of Corporation is Assessed, assessment of shares of stock thereof is double taxation.

Approved in Stroh v. Detroit, 131 Mich. 117, 90 N. W. 1032, holding taxation of shares of stock of foreign corporation owned in state, where property of corporation is situated in state, is double taxation.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

Miscellaneous.—Cited in San Francisco v. Sharon (Cal.), 2 Pac. 402, San Francisco v. Phelan (Cal.), 2 Pac. 402, San Francisco v. Flood (Cal.), 2 Pac. 409, and San Francisco v. Baldwin (Cal.), 2 Pac. 410, all companion cases.

64 Cal. 512, 2 Pac. 401, DALY v. AH GOON.

Certificate of Tax Sale Reciting That Property was assessed to "A and to all claimants known and unknown," shows invalid assessment.

Distinguished in White Pine Mfg. Co. v. Morey, 19 Idaho, 58, 112 Pac. 676, upholding tax deed made after issuance of prior invalid deed which corrected errors and omissions in first.

64 Cal. 513–515, 2 Pac. 399, TAYLOR v. McLAIN.

Deed Absolute in Form Given to secure debt is mortgage as between parties and purchasers with notice, and parol evidence is admissible to show intent with which such deed was given.

Approved in Halloran v. Holmes, 13 N. D. 420, 101 N. W. 313, following rule; Wagg v. Herbert, 19 Okl. 562, 92 Pac. 264, holding deed from mortgagor to mortgagee to be mortgage where evidence disclosed fraud and undue influence; Murdock v. Clark (Cal.), 24 Pac. 274, holding conveyance to secure debt to be mortgage, though grantee was in possession under agreement for accounting for rents and profits.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 338.

Miscellaneous.—Cited in Taylor v. McClain (Cal.), 2 Pac. 401, companion case.

64 Cal. 515–519, 2 Pac. 397, SOUTHERN PACIFIC R. R. CO. v. GARCIA.

Settler on Public Lands Withdrawn from sale can acquire no rights as against a later railroad patent.

Approved in Williams v. San Pedro, 153 Cal. 48, 94 Pac. 236, holding void certificate of sale of tide lands within city of San Pedro.

Distinguished in Carr v. Quigley (Cal.), 16 Pac. 12, holding lands in question not subject to rule of principal case because not surveyed under act of 1860.

64 Cal. 520–525, 2 Pac. 405, SAVINGS AND LOAN SOCIETY v. GERICHTEN.

Declarations of Agent are not Admissible to prove his agency.

Reaffirmed in Pease v. Fink, 3 Cal. App. 379, 85 Pac. 660.

64 Cal. 525–529, 2 Pac. 402, EX PARTE SONTAG.

On Motion to Set Aside Indictment, grand juror cannot be required to state how he voted upon finding indictment.

Approved in Hall v. State, 134 Ala. 113, 32 So. 757, weight and sufficiency of evidence on which grand jury found indictment cannot be inquired into; Taylor v. State, 49 Fla. 89, 38 So. 387, refusing to inquire into character of evidence which influenced grand jury.

Number of Grand Jurors Necessary to concur in indictment. See note, 28 L. R. A. 36.

64 Cal. 529–632, 2 Pac. 418, EMERIC v. ALVARADO.

Instance of Appeals of Separate Appellants being embodied in single transcript.

Approved in Estate of Bell, 157 Cal. 532, 108 Pac. 498, holding appeals of separate appellants may be united in one transcript, but one appellant cannot compel another to unite with him; Sharon v. Sharon, 68 Cal. 339, 9 Pac. 194, holding record on each of several independent appeals may be in one transcript.

Order Appointing Receiver in Action for partition is not appealable.

Approved in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 486, 114 Pac. 839, dismissing appeal from order refusing to vacate order appointing receiver.

Time Named in Order Extending Time to give notice of intention to move for new trial runs from expiration of statutory time allowed for such notice.

Reaffirmed in Hill v. McKay, 36 Mont. 446, 93 Pac. 347.

Finding on Material Issue will not be disturbed when based on conflicting evidence.

Approved in Clint v. Eureka Crude Oil Co., 3 Cal. App. 466, 86 Pac. 818, holding finding as to consideration of deed supported by evidence.

A Will Takes Effect as Deed, upon proof of execution, when probate is not required by statute.

Approved in Estate of Patterson, 155 Cal. 636, 132 Am. St. Rep. 116, 102 Pac. 944, holding probate is merely authenticated evidence and not foundation of executor's title.

Later Sections in Chapter of Code prevail over earlier unless such construction is inconsistent with meaning of chapter.

Approved in Matter of Roberts, 157 Cal. 477, 108 Pac. 316, holding first clause of section 337, Penal Code, repealed by later clause in same section; State v. Campbell, 3 Cal. App. 604, 86 Pac. 841, holding section 395, Code of Civil Procedure, controls section 433, Political Code, as to place of trial of actions brought by state controller to recover money due.

Limitations in Favor of Adverse Possession commence to run upon final approval of survey by federal district court under act of Congress of June 14, 1860, although patent was not then issued.

Distinguished in Adams v. Hopkins (Cal.), 69 Pac. 230, holding limitations in favor of adverse possession of claim of land under Mexican grant begins to run upon issuance of patent confirming grant.

Party in Partition Suit has Right upon demand to secure from court segregated allotment to him in severalty of land found to be his.

Distinguished in Baldwin v. Foster, 157 Cal. 648, 108 Pac. 716, upholding as against collateral attack judgment awarding to nine cotenants a five acre tract in common.

Decree Altered Without Authority after being made may be attacked in collateral proceeding.

Approved in Keventsky v. Sirovy, 142 Iowa, 392, 121 N. W. 30, holding decree so altered could be attacked in direct proceeding for that purpose.

Effect of Deed in Partition, as distinguished from ordinary deeds. See note, 57 L. R. A. 340.

Admissions and Waivers by Fiduciaries in actions. See note, 32 L. R. A. 684.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 65 CALIFORNIA.

65 Cal. 11–15, 2 Pac. 411, URTON v. WILSON.

Application to Purchase State Land made by nonsettler before adoption of Constitution creates no right to purchase such lands after adoption.

Approved in Messenger v. Kingsbury, 158 Cal. 617, 112 Pac. 67, state could withdraw from sale lands for which application for purchase had been made, but survey not approved nor installments paid.

65 Cal. 19–21, 2 Pac. 491, ESTATE OF LANG.

Declarations of Testator to Sustain, defeat or aid in construction of his will. See note, 4 Cof. Prob. 521.

Effect of Intoxication on Legal Capacity. See note, 1 Cof. Prob. 405, 532.

Power of One Lacking Testamentary Capacity to revoke will. See note, 18 L. R. A. (n. s.) 99.

65 Cal. 28–33, 2 Pac. 414, TYLER v. CONNOLLY.

No Appeal Lies from Judgment imposing fine in contempt.

Approved in Estate of Wittmeier, 118 Cal. 256, 50 Pac. 393, Natoma Water etc. Co. v. Hancock (Cal.), 36 Pac. 100, and Territory v. Baker, 12 N. M. 455, 78 Pac. 532, all following rule.

65 Cal. 33–36, 2 Pac. 728, EX PARTE MOYNIER.

Test of Validity of Municipal Ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 48.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 652.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

65 Cal. 40–42, 2 Pac. 734, CARNEY v. ARIZONA GOLD MIN. CO.

Relocation of Mining Claim as abandoned or forfeited. See note, 68 L. R. A. 848.

65 Cal. 46–49, 2 Pac. 880, SMITH v. COOLEY.

Grant of Undivided Interest in piece of mining ground granting expressly only mining rights vests in vendee only right to take from land minerals contained in it to extent of interest granted.

Approved in Sandford's Appeal, 75 Conn. 595, 54 Atl. 741, holding lessee of land for purpose of mining garnets only thereon had not a taxable interest in land; Robertson Land Co. v. Paull, 63 W. Va. 251, 59 S. E. 1086, undivided interest in mineral rights in land is not subject to partition; Musick Consolidated Oil Co. v. Chandler, 158 Cal. 13, 109 Pac. 615, arguendo.

Cotenancy in Mines. See note, 91 Am. St. Rep. 885, 886.

65 Cal. 49–50, 2 Pac. 736, VANDERFORD v. FOSTER.

Where Facts are Such That Verdict for plaintiff would compel court to set it aside, nonsuit is properly granted.

Approved in Paolini v. Fresno Canal etc. Co., 9 Cal. App. 3, 97 Pac. 1131, reaffirming rule; Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 624, 91 Pac. 116, holding nonsuit properly granted in personal injury case where contributory negligence was conclusively shown.

65 Cal. 50–54, 2 Pac. 741, SANDERS v. SIMCICH.

Where Both Husband and Wife Perish in same disaster, no presumption of survivorship of wife arises from fact that probate court granting letters of administration upon her estate recites that she was "surviving wife" of her husband.

Distinguished in Grand Lodge A. O. U. W. v. Miller, 4 Cof. Prob. 325, where husband and wife perish in earthquake, both being between ages of fifteen and sixty, he is presumed to survive her.

Presumption of Survivorship among those perishing in common calamity. See note, 51 L. R. A. 873.

Presumption of Death. See notes, 104 Am. St. Rep. 212; 2 Cof. Prob. 17.

65 Cal. 57–58, 2 Pac. 878, HAMILTON v. TUTT.

Issuance of Execution by Justice of Peace on judgment originally taken before him is ministerial function only.

Approved in Rabin v. Pierce, 10 Cal. App. 736, 103 Pac. 772, denying certiorari to review issuance of execution by justice of peace on judgment appealed to superior court.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 904.

Mandamus to Compel Inferior Court to enforce its judgment or decree. See note, 24 L. R. A. (n. s.) 887.

65 Cal. 58–63, 2 Pac. 737, COGLAN v. BEARD.

In Election Contest, Where Ballots are Offered to overcome prima facie correctness of returns of election board, it must be shown that they have not been tampered with.

Approved in Chatham v. Mansfield, 1 Cal. App. 306, 82 Pac. 346, holding ballots kept in open desk in office of village clerk, which was open to public, and envelope containing which was partly torn, to be no better evidence of result than returns of judges.

Scope and Effect of Election Law provisions for preserving ballots. See note, 30 L. R. A. (n. s.) 602.

65 Cal. 63–66, 2 Pac. 882, GILLMORE v. AMERICAN CENTRAL INS. CO.

Judgment is not Final Determination of rights of parties when appeal or motion for new trial has been made, although final for purposes of appeal.

Approved in People v. Bank of San Luis Obispo, 159 Cal. 80, 81, 112 Pac. 872, where time for appeal has expired, judgment is final and may be pleaded as res adjudicata, though motion for new trial is pending; Lackmann v. Klauenberg, 3 Cal. App. 185, 84 Pac. 777, holding appeal to superior court vacatee judgment of justice's court.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

65 Cal. 67-71, 2 Pac. 884, MEYER v. PORTER.

Repeal of Municipal Charter Does not Impair Validity of contracts made under its provisions.

Approved in Bates v. Gregory (Cal.), 22 Pac. 684, 685, holding right to sue city on bonds issued by it could not be impaired by subsequent legislature.

Upon Application for Mandamus to compel city treasurer to pay debt out of particular fund, city cannot defend on ground that other creditors of same fund have not demanded payment.

Approved in Ward v. Piper, 69 Kan. 777, 77 Pac. 700, following rule.

Mandamus to Compel Payment of Municipal Debt. See note, 14 L. R. A. 777.

Interest Coupons are not Barred by limitations until bonds to which they belong are barred.

Approved in Hewel v. Hogin, 3 Cal. App. 254, 84 Pac. 1006, Haysmeister v. Porter (Cal.), 3 Pac. 123, and Roeding v. Porter (Cal.), 2 Pac. 888, all following rule; First Nat. Bank v. Park, 37 Colo. 309, 86 Pac. 108, where note with interest payable annually, evidenced by attached coupons, is not barred by limitation, interest is not barred; Hewel v. Hogin (Cal. App.), 84 Pac. 1004, holding court properly refused to allow amendment to answer to set up limitations as defense to action to recover on interest coupons of bonds; dissenting opinion in Bates v. Gregory (Cal.), 22 Pac. 687, majority refusing mandamus to compel issuance of new bonds under Funding Act of 1864, for city of Sacramento, in lieu of former bonds on ground latter were barred by limitations.

Distinguished in California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 693, 694, 112 Pac. 276, limitations run against interest coupons, in absence of any provision in coupons or bonds to contrary, from date they fall due; City of Austin v. Cahill, 99 Tex. 186, 88 S. W. 546, in action by holders of original bonds to compel levy and collection of taxes for payment, holders of refunding bonds not necessary parties, being constructively before court.

As to When Limitation Begins to Run against action upon general municipal bonds. See note, 16 L. R. A. (n. s.) 805.

65 Cal. 71-72, 2 Pac. 887, GREEN v. ODD FELLOWS' ETC. BANK.

Who may Plead Statute of Limitations. See note, 104 Am. St. Rep. 766.

Duties of Savings Banks toward depositors. See note, 105 Am. St. Rep. 735.

65 Cal. 73-76, 2 Pac. 889, ANTHONY v. CHAPMAN.

Presumption That Consideration of Deed was paid by grantee named may be overcome by parol proof, but such proof must be full, clear and satisfactory.

Approved in Copper River Mining Co. v. McClellan, 2 Alaska, 146, holding, in suit to establish trust in real estate based on oral admissions, that such trust would not be enforced unless nature and extent were shown by clear and unambiguous proofs; Windsor v. St. Paul etc. R. Co., 37 Wash. 164, 79 Pac. 615, holding oral testimony admissible to show consideration additional to that expressed in contract.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 109.

Executor Who Represents in His Petition for letters testamentary that certain property belongs to decedent's estate, and files inventory including it, is not thereby estopped from afterward claiming it as his own.

Distinguished in Carruthers v. Whitney, 56 Wash. 330, 134 Am. St. Rep. 1114, 105 Pac. 832, where administratrix included her own property in petition to sell property of estate, and represented to purchaser that he would receive title, she is estopped to deny validity of deed or that property did not belong to estate.

65 Cal. 77–78, 2 Pac. 892, PEOPLE v. WHEELER.

Accusation of Defendant Made by District Attorney during argument held not to justify reversal of judgment of conviction.

Approved in People v. Ye Foo, 4 Cal. App. 742, 89 Pac. 454, holding district attorney not guilty of misconduct in transcending limits of legitimate argument; State v. Waterbury, 133 Iowa, 142, 110 N. W. 330, remark of county attorney directing attention to certain features of defendant, when identity was in issue, held proper, though they had not been referred to by witnesses.

Reversal of Conviction Because of Unfair or irrelevant argument of statements by prosecuting attorney. See note, 46 L. R. A. 653.

Examination and Commitment by Magistrate is sufficient to authorize proceeding by information for assault with deadly weapon.

Approved in People v. Gregory, 8 Cal. App. 741, 97 Pac. 913, applying rule to information for lewd and lascivious act upon child.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 816.

65 Cal. 81–83, 3 Pac. 92, MATZEN v. SHAEFFER.

Redemptioner Who Redeems to Protect his own subsequent interest becomes equitable assignee of mortgage.

Approved in Wemple v. Yosemite Gold Min. Co., 4 Cal. App. 87, 87 Pac. 283, following rule.

Denied in Kuhn v. National Bank, 74 Kan. 460, 118 Am. St. Rep. 335, 87 Pac. 553, holding purchaser of mortgaged land who agrees to pay mortgages and judgments thereon and does pay one of them is not entitled to be subrogated to rights of mortgagee thereunder, for his protection against sale of land under executions on judgments of record when he purchased.

Right of Assignee of Equity of Redemption procuring discharge of mortgage, to subrogation or revival as against junior lien. See note, 16 L. R. A. (n. s.) 472.

65 Cal. 84–87, 3 Pac. 96, LORD v. LORD.

On Death of Husband, Homestead to be set aside for benefit of surviving wife must be selected from community property, if there be any, and not from separate property of husband.

Approved in Estate of Hessler, 2 Cof. Prob. 359, setting apart homestead out of community property to widow though it is worth over eight thousand dollars; Estate of Tate, 1 Cof. Prob. 219, widow without minor children is entitled to probate homestead out of decedent's separate estate where there is no community property.

Where Separate Property is Set Apart to surviving widow as probate homestead, it must be set apart for limited period only.

Approved in Estate of Maxwell, 1 Cof. Prob. 128, reaffirming rule; Estate of Hayes, 1 Cof. Prob. 553, minor child is entitled to have probate homestead set apart out of community property absolutely and not merely during minority, when surviving widow has died.

Limitations on Term of Homestead set apart to widow out of husband's separate estate. See note, 1 Cof. Prob. 220.

65 Cal. 89–90, 3 Pac. 99, BROWN v. MULLIN.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

65 Cal. 93–95, 3 Pac. 101, STOCKTON BUILDING ETC. ASSN. v. CHALMERS.

Miscellaneous.—Cited in Chalmers v. Chalmers (Cal.), 3 Pac. 104, companion case.

65 Cal. 97–99, 3 Pac. 133, SHINN v. CUMMINS.

Summons is not Invalid because attorney's name is found only on face thereof.

Approved in Stanley v. Rachofsky, 50 Or. 475, 93 Pac. 355, holding summons sufficient to give defendant notice of suit, although not literally complying with statutory form; Williams v. Pittock, 35 Wash. 280, 77 Pac. 388, holding summons in action to foreclose delinquency tax certificate sufficiently set forth date of first publication.

Pendency of Motion to Quash Summons does not extend time to answer.

Reaffirmed in Mantle v. Casey, 31 Mont. 414, 78 Pac. 593.

65 Cal. 100–101, 3 Pac. 401, PEOPLE v. MAJORS.

Section 1237, Penal Code, does not contemplate motion for new trial until all issues have been tried.

Approved in People v. Smith, 121 Cal. 359, 53 Pac. 804, following rule; People v. Toal (Cal.), 23 Pac. 203, holding order overruling motion in arrest of judgment not appealable, but may be reviewed on appeal from judgment.

65 Cal. 101–104, 3 Pac. 402, PEOPLE v. FORSYTH.

Instruction That Flight of Accused after act was circumstance to be considered in determining his guilt, held correct.

Approved in Hickory v. United States, 160 U. S. 417, 16 Sup. Ct. 327, 40 L. ed. 474, presumption of guilt from flight of accused is presumption of fact, and is merely circumstance tending to increase probability of defendant's being guilty person.

65 Cal. 106–107, 3 Pac. 495, BODE v. HOLTZ.

Warehouseman is Bound to Give Assessor names of owners of personal property subject to taxation in his possession.

Approved in Title Guaranty etc. Co. v. Los Angeles, 3 Cal. App. 620, 86 Pac. 845, holding trust company bound to return to assessor names of owners of money held in escrow by it.

65 Cal. 107–109, 3 Pac. 413, PEOPLE v. RILEY.

Exception cannot be Taken to Refusal of challenge of juror for actual bias.

Approved in People v. Brown (Cal.), 13 Pac. 223, following rule.

65 Cal. 109–110, 3 Pac. 493, ELLIOTT v. PATERSON.

Judgment Against Party Rendered after his death is not nullity, but may be set aside on motion.

Distinguished in More v. Miller (Cal.), 53 Pac. 1079, holding judgment rendered against one as administrator after his removal is void.

Effect of Judgment Entered against dead person. See note, 49 L. R. A. 160, 170.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 904.

65 Cal. 110–111, 3 Pac. 411, MANUEL v. ESCOLLE.

In Action for Accounting Between Administratrix of deceased partner and surviving partner, latter is entitled to allowance for sums drawn from partnership by deceased without first presenting his demand to administratrix.

Approved in Painter v. Painter (Cal.), 36 Pac. 873, following rule; Franklin v. Trickey, 9 Ariz. 285, 80 Pac. 353, administrator of partner first deceased may maintain suit for accounting against administrator of surviving partner without having presented any demand.

65 Cal. 111–115, 3 Pac. 405, KINSEY v. KELLOGG.

Where Salary is Fixed for One Person for filling three offices, such salary is for all three offices, and when one office is removed, such salary provision, amount not being distributed among the offices, ipso facto fails.

Approved in State v. La Grave (Nev.), 48 Pac. 195, holding office of Secretary of State and supreme court reporter are distinct, though united in one person, who is entitled to salary provided for each.

65 Cal. 116–120, 3 Pac. 408, KIMBALL v. STORMER.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1245.

65 Cal. 121–122, 3 Pac. 466, PEOPLE v. WOODS.

Necessity of Proving Person bore both real name and alias as stated in indictment. See note, 30 L. R. A. (n. s.) 135.

65 Cal. 122–125, 3 Pac. 463, LONGAN v. COUNTY OF SOLANO.

County Government Act of March, 1883, is valid.

Reaffirmed in Cruz v. County of Los Angeles (Cal.), 3 Pac. 672.

Provisions of County Government Act relating to fees and salaries of officers are part of general laws establishing uniform system of county and township government, and not invalid as special and local laws.

Approved in Fleckenstein v. Placer County (Cal.), 37 Pac. 932, holding act of 1893, fixing fees of constables, is not local or special

law; Perry County Commrs. v. Linderman, 165 Ind. 190, 73 N. E. 914, act of 1903, relating to fees of sheriffs and clerks, is not void as being local or special law.

Distinguished in Johnson v. Gunn (Cal. App.), 84 Pac. 372, holding invalid as local or special law, amendment of 1901 to County Government Act providing for compensation of justices of peace in counties of twenty-seventh class.

Under Section 5, Article XI, Constitution, compensation for county officers shall be fixed in proportion to duties, not to population.

Approved in Johnson v. Gunn, 148 Cal. 754, 84 Pac. 668, following rule; Summerfield v. Dow, 5 Cal. App. 682, 91 Pac. 157, holding act of 1907, providing for justices of peace in Los Angeles county, does not violate provision of Constitution relating to payment of officers in proportion to duties.

When Title of Statute Embraces only one subject, and what may be included thereunder. See note, 79 Am. St. Rep. 469.

65 Cal. 126–129, 3 Pac. 461, PEOPLE v. TURCOTT.

If Instructions as Whole correctly presents law, judgment will not be reversed for apparent conflict in isolated parts.

Approved in De Witt v. Floriston Pulp and Paper Co., 7 Cal. App. 781, 96 Pac. 400, and Hayden v. Consolidated Min. etc. Co., 3 Cal. App. 139, 84 Pac. 423, both following rule.

Right to Complain Because Prosecution is conducted or assisted by unofficial member of bar. See note, 24 L. R. A. (n. s.) 564.

65 Cal. 129–135, 3 Pac. 590, PEOPLE v. BUSH.

Defendant may Justify Killing if he in good faith attempts to withdraw from combat before act, even though he was the assailant.

Approved in People v. Button (Cal.), 38 Pac. 202, following rule.

Self-defense Set Up by Accused, who began conflict. See note, 45 L. R. A. 707.

When Sufficient Time Elapses between quarrel and fight resulting in homicide, the killing will be murder.

Approved in In re Fraley, 3 Okl. Cr. 722, 139 Am. St. Rep. 988, 109 Pac. 297, holding court authorized to say cooling time was sufficient to make killing murder when unreasonable time had elapsed between provocation and killing.

Condition of Mind of Slayer which reduces murder to manslaughter. See note, 134 Am. St. Rep. 734.

Evidence of Good Character of Witness is not admissible until his character has been impeached.

Approved in Van Horn v. Van Horn, 5 Cal. App. 721, 91 Pac. 261, rejecting evidence of good character of co-respondent in action for divorce on ground of adultery when character as witness had not been impeached; Title Insurance etc. Co. v. Ingersoll, 153 Cal. 8, 94 Pac. 97, holding defendant, whose character has not been impeached except by evidence contradicting his testimony, cannot introduce evidence of his good character.

Contradiction of Witness' Testimony as warranting introduction of evidence of reputation for veracity. See note, 12 L. R. A. (n. s.) 364.

Where Instructions on Material Point are contradictory, new trial should be granted.

Reaffirmed in People v. Bartnett, 15 Cal. App. 95, 113 Pac. 882.

Homicide in Commission of Unlawful Act. See note, 63 L. R. A. 377.

65 Cal. 135–136, 3 Pac. 606, **PEOPLE v. EHRING.**

Declarations as Part of Res Gestae. See note, 19 L. R. A. 741.

65 Cal. 138–150, 52 Am. Rep. 295, 3 Pac. 597, **PEOPLE v. MAJORS.**

One may be Tried for Murder although at the same time serving life sentence for another offense.

Approved in Huffaker v. Commonwealth, 124 Ky. 118, 98 S. W. 332, prisoner serving life term may be tried, convicted and hanged for murder of fellow-convict; State v. Keefe, 17 Wyo. 252, 98 Pac. 129, holding convict not exempt from trial and sentence for another crime committed before or during imprisonment.

Juror in Murder Case Who Entertains conscientious scruples against death penalty is disqualified.

Approved in Demato v. People, 49 Colo. 149, 111 Pac. 704, juror who on voir dire states that under no circumstances would he impose death penalty is disqualified in murder case.

Identity of Offenses on plea of former jeopardy. See note, 92 Am. St. Rep. 120, 121, 125.

65 Cal. 154–157, 3 Pac. 673, **EX PARTE KELLY.**

On Habeas Corpus, Inquiry is limited to jurisdiction.

Approved in State v. Beaverstad, 12 N. D. 532, 97 N. W. 550, holding on habeas corpus jurisdiction was not exceeded.

On Habeas Corpus Judgment under which prisoner is held is a unit, and if void in part is void in toto.

Distinguished in Matter of Smith, 152 Cal. 567, 93 Pac. 192, holding that void judgment under which prisoner is held does not have effect of vacating other valid process under which he could be held; Ex parte Tani, 29 Nev. 390, 91 Pac. 138, 13 L. R. A. (n. s.) 518, holding when judgment directed imprisonment, imposed as alternative of fine, to be in state prison instead of county jail, the direction as to place of imprisonment is mere surplusage, and does not render judgment void.

Effect of Excessive Sentence. See note, 45 L. R. A. 143.

Right to Compel Prisoners to Labor. See note, 27 L. R. A. 596.

65 Cal. 158–160, 3 Pac. 659, **SCHLUTER v. HARVEY.**

Cancellation of Pre-existing Debt is valuable consideration for purchase of land.

Approved in Kennedy v. Conroy (Cal.), 44 Pac. 796, holding contract for conveyance of railroad lands at agreed price when patent is obtained not without consideration.

Discharge of Antecedent Debt as Consideration entitling bona fide purchaser or encumbrancer to protection of recording acts. See note, 27 L. R. A. (n. s.) 622.

Tenant Against Whom Conflicting Claims for rent are made may file bill of interpleader to determine respective rights of claimants.

Reaffirmed in Spangler v. Spangler, 11 Cal. App. 325, 104 Pac. 997.

Where Party Attempts to Plead Facts showing him to be bona fide purchaser for value, insufficiency in pleading will not be considered on appeal, when no objection was taken in trial court to pleading or admission of evidence thereunder.

Approved in Hollister v. State, 9 Idaho, 660, 77 Pac. 341, holding sufficient complaint in condemnation suit when no special demurrer was made to defects.

65 Cal. 160–161, 3 Pac. 667, WILLIAMS v. SACRAMENTO COUNTY.

Order of Supervisors Creating Swamp Land District is legislative and cannot be reviewed on certiorari.

Approved in Glide v. Superior Court, 147 Cal. 25, 81 Pac. 227, prohibition lies to prevent superior court from proceeding with suit to enjoin supervisors from acting on application for reclamation district on alleged ground that lands were reclaimed; Rico v. Snider, 134 Fed. 957, refusing injunction to restrain board of supervisors from acting upon petition for reclamation district.

Procedure for Establishment of drains and sewers. See note, 60 L. R. A. 225.

65 Cal. 163–168, 3 Pac. 641, EVERSDON v. MAYHEW.

To Entitle Party to Protection as bona fide purchaser, he must aver and prove possession of his grantor, purchase of premises, and payment of purchase price in good faith without notice of equitable title.

Approved in Fulkerson v. Stiles, 156 Cal. 706, 105 Pac. 967, 26 L. R. A. (n. s.) 181, general creditor of married woman who had recovered judgment against her upon debt accruing to him, prior to time when deed of community property was taken in her name, is not encumbrancer in good faith for valuable consideration within Civil Code, section 164; Lindley v. Blumberg, 7 Cal. App. 146, 93 Pac. 897, purchaser not protected when he had notice of unrecorded deed before payment of purchase money; Austin v. Pulschen (Cal.), 39 Pac. 800, holding, under facts of case, mortgagee took mortgage with notice of vendor's lien; Purser v. Cady (Cal.), 49 Pac. 181, holding purchaser took with notice of recorded mechanics' liens; Bryan v. Tormey (Cal.), 21 Pac. 728, holding defendant in quiet title suit who sets up deed to himself took with sufficient notice of plaintiff's title to put him on inquiry.

Distinguished in Austin v. Union Paving etc. Co., 4 Cal. App. 613, 88 Pac. 732, holding purchaser of property with notice of recorded judgment lien thereon was protected when stay bond had been given on appeal from judgment prior to his purchase.

Miscellaneous.—Cited in Town of Red Bluff v. Walbridge, 15 Cal. App. 781, 115 Pac. 81, referring historically to principal case.

65 Cal. 169–173, 3 Pac. 647, HOWELL v. FOSTER.

Property cannot be Attached for debt of one who has lost his power over it or has not yet acquired such interest in it or power over it as to permit him to dispose of it adversely to others.

Approved in Zenda Mining & Milling Co. v. Tiffin, 11 Cal. App. 65, 104 Pac. 12, holding judgment lien did not attach to property conveyed by judgment debtor prior to docketing of judgment; National Bank of the Pacific v. Western Pac. Ry. Co., 157 Cal. 576, 108 Pac. 677, holding transfer of unregistered stock valid as against attaching creditor of vendor; Farnum v. Hefner (Cal.), 16 Pac. 325, holding one purchasing crops under execution against lessee of land acquired no title against lessor whose lease retained title to crops in him until lessee performed certain conditions, which were unperformed.

Distinguished in Stockton Savings etc. Soc. v. Purvis (Cal.), 42 Pac. 442, holding contract between landlord and tenant, giving landlord custody of crop until sold and providing that upon sale landlord should turn over balance above rent to tenant, was pledge to secure rent, and does not give to landlord such lien as to sustain action against sheriff for attachment of growing crop on debt of tenant.

Crops as Personalty for Purpose of levy and sale. See note, 23 L. R. A. 262.

65 Cal. 174–175, 3 Pac. 670, PEOPLE v. MESS.

Judgment in Felony Case pronounced less than two days after verdict is valid where no objection was taken.

Reaffirmed in People v. Sykes, 10 Cal. App. 70, 101 Pac. 22.

65 Cal. 175–178, 3 Pac. 632, ENOS v. COOK.

Legal or Equitable Rights of Persons not parties to foreclosure suit cannot be adjudicated upon application for writ of assistance.

Approved in Fox v. Stubenrauch, 2 Cal. App. 93, 83 Pac. 84, and Hibernia Savings etc. Society v. Robinson, 150 Cal. 142, 88 Pac. 721, both following rule; dissenting opinion in Anderson v. Thompson, 3 Ariz. 69, 20 Pac. 805, majority holding refusal to surrender premises under writ of assistance could not be justified by setting up homestead title.

65 Cal. 179–182, 3 Pac. 625, JOHNSON v. POWERS.

Written Agreement of Sale of Personalty is presumed to express all conditions of sale, and oral evidence is not admissible to modify it.

Approved in Kuhman, Salz & Co. v. Sugar etc. Mfg. Co., 153 Cal. 732, 96 Pac. 371, holding all oral representations and implied warranties merged in written contract of sale and not provable by parol; Germain Fruit Co. v. Armsby Co., 153 Cal. 594, 96 Pac. 322, holding parol evidence inadmissible to show warranty in written contract of sale; Bancroft v. San Francisco Tool Co. (Cal.), 47 Pac. 685, refusing to go beyond written contract to formulate express warranty as to fitness of elevator; Ehrsam v. Brown, 76 Kan. 221, 91 Pac. 184, 15 L. R. A. (n. s.) 877, holding under written contract for sale of machines, there was no implied warranty of fitness for particular purpose for which purchased, or against latent defects.

Right to Show Parol Warranty in connection with contract of sale of personalty. See note, 19 L. R. A. (n. s.) 1191.

If Amended Complaint is Filed, averments of original cannot be used to disprove those of amended pleading.

Approved in Wiley v. Northern Pac. Ry. Co., 60 Wash. 599, 111 Pac. 802, answer stricken out on motion of defendant is incompetent as admission to prove any of facts therein stated.

65 Cal. 187–193, 3 Pac. 628, GOLDEN GATE ETC. MIN. CO. v. YUBA COUNTY.

Commitment for Contempt not Committed in presence of court is not based upon affidavits, but upon evidence introduced on return day of order to show cause.

Approved in dissenting opinion in State v. Harvey, 16 N. D. 162, 112 N. W. 57, majority holding affidavit upon information and belief insufficient upon which to base constructive contempt proceedings.

Right of One Charged With Contempt to notice and hearing. See note, 10 L. R. A. (n. s.) 1101.

Punishment of Corporation for Contempt. See note, 4 L. R. A. (n. s.) 1002.

65 Cal. 193-211, 3 Pac. 661, 802, SANTA CRUZ R. R. CO. v. SPRECKLES.

Money Advanced by Director to corporation in good faith, which is received and used for necessary corporate purposes, is valid claim against corporation.

Approved in Aetna Indemnity Co. v. Altadena Min. etc. Co., 11 Cal. App. 177, 104 Pac. 475, upholding mortgage made by majority of board of directors to minority thereof, who did not participate therein, executed in good faith and without fraud, and satisfied by two-thirds of stockholders; Shively v. Eureka Tellurium G. Min. Co., 5 Cal. App. 244, 89 Pac. 1076, sustaining judgment on quantum meruit against corporation for services of directors.

Implied Power of Corporations to Borrow Money and give evidence of indebtedness and security therefor. See note, 111 Am. St. Rep. 325.

Distinguishing Features of California Law as to calls and assessments on paid-up corporate stock are that each may be collected by forced sale of stock and assessments by personal action at law.

Approved in Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 530, 99 Pac. 995, holding personal action may be had to collect assessment; Turner v. Fidelity Loan Concern, 2 Cal. App. 139, 83 Pac. 69, and Von Horst v. American Hop etc. Co., 177 Fed. 979, and Carter, Rice & Co. v. Hano Co., 73 N. H. 589, 64 Atl. 202, both holding corporations may assess holders of fully paid shares to satisfy corporate debts for which shareholders are individually liable; Wall v. Basin Min. Co., Ltd., 16 Idaho, 326, 101 Pac. 737, 22 L. R. A. (n. s.) 1013, both holding stock fully paid subject to assessment.

Assessments on Paid-up Stock. See note, 45 L. R. A. 648.

65 Cal. 211-215, 3 Pac. 650, PEOPLE v. MUNN.

Distinction Between Murder and Manslaughter discussed, and judgment of conviction reversed because of instruction that defendant was responsible for all possible consequences of his act.

Approved in People v. Mullen, 7 Cal. App. 549, 94 Pac. 868, holding evidence supports verdict of manslaughter, when attack causing death was unjustified and without provocation; State v. John, 172 Mo. 225, 95 Am. St. Rep. 513, 72 S. W. 526, upholding conviction for murder in second degree when death ensued from wanton blow by defendant; State v. Denny, 17 N. D. 523, 117 N. W. 870, criticising instruction to effect that accused is presumed to have intended all possible consequences of wrongful act.

Unintentional Homicide in Commission of unlawful act. See notes, 90 Am. St. Rep. 576; 63 L. R. A. 391.

65 Cal. 223-224, 3 Pac. 809, PEOPLE v. SWAFFORD.

In Absence of Showing as to What Took Place when court made an order, appellate court will presume that defendant assented to order.

Approved in People v. Bell (Cal.), 36 Pac. 95, where record fails to show that defendant objected to numerous continuances, denial of

motion to dismiss, made on ground that suit was not brought to trial in statutory time, will be dismissed.

Court may Exclude from Courtroom all persons except judge, jurors, witnesses and persons connected with case, without violating right to public trial.

Approved in State v. Worthen, 124 Iowa, 410, 100 N. W. 331, holding exclusion of defendant's witnesses during examination of other witnesses did not infringe on right of public trial.

Right to Public Trial in Criminal Case. See note, 14 L. R. A. 809.

Right to Exclude Public During Criminal Trial. See note, 9 L. R. A. (n. s.) 278.

65 Cal. 225–227, 3 Pac. 813, PEOPLE v. YOUNG.

Where Information for Burglary describes room burglarized as "a building, to wit, a ticket office," it is sufficient.

Approved in State v. Ferguson, 149 Iowa, 479, 128 N. W. 842, upholding sufficiency of indictment charging that building broken was an "office" of specified railroad.

65 Cal. 227, 3 Pac. 804, ROUGH v. SIMMONS.

Complaint Alleging That Plaintiff is owner and in possession of land and that defendant claims estate or interest therein, but has none, states cause of action.

Approved in Meyer v. O'Rourke, 150 Cal. 178, 88 Pac. 707, Statham v. Dusy (Cal.), 11 Pac. 606, and Rough v. Booth (Cal.), 3 Pac. 805, all following rule; Estate of Donohue, 1 Cof. Prob. 198, upholding sufficiency of petition to have widow's share of community property set aside to her, to show title and seisin in decedent at time of death and as showing community character of estate; Bryan v. Tormey (Cal.), 21 Pac. 726, where allegations in quiet title suit were that plaintiff was owner and entitled to possession, allegation of ownership is ultimate fact, and finding that plaintiff is owner is sufficient to sustain judgment for him, although defendant was found to be in possession; Woody v. Hinds, 30 Mont. 192, 76 Pac. 2, upholding sufficiency of complaint in action to determine adverse claim on quartz lode.

65 Cal. 228–230, 3 Pac. 849, IN RE ALLGIER.

The Probate Jurisdiction of the Superior Court is separate and distinct from its jurisdiction in ordinary civil matters.

Qualified in Estate of Johnson, 4 Cof. Prob. 500, upholding power of superior court sitting in probate to apply equitable principles to promote justice in all matters pending before it.

Where Guardian Dies Without Making Settlement and long after majority of ward, his executors have no authority to present his account to probate court.

Reaffirmed in Muller v. Ash, 156 Cal. 565, 105 Pac. 608.

Distinguished in Elizalde v. Murphy, 4 Cal. App. 119, 87 Pac. 247, holding probate court could require accounting from administrator of deceased administrator.

When Ward Attains Majority, office of guardian comes to an end.

Approved in In re Schuerer's Estate, 31 Mont. 612, 79 Pac. 246, holding office of guardian of incompetent person terminates ipso facto upon restoration to competency.

Services Rendered by Guardian to Ward after his majority cannot be allowed as claim against estate, but must be recorded in action at law.

Approved in In re Williams' Estate (Cal.), 32 Pac. 242, holding money paid to executor on sale of property of estate, where sale is afterward confirmed to another party, cannot be allowed as claim against estate but must be recovered in action at law.

Criticised in Estate of Boyes, 151 Cal. 151, 90 Pac. 457, holding guardian should be credited on his account with money paid with consent of ward to his use in good faith after his majority.

Distinguished in Lanman v. Lanman, 206 Mass. 491, 92 N. E. 887, when ward allowed guardian to continue in charge of property for thirty years after majority, items of account after majority held properly allowed.

65 Cal. 230–231, 3 Pac. 815, BONNET v. SAN FRANCISCO.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 679.

Miscellaneous.—Cited in In re Buckley, 69 Cal. 2, 16, 25, 10 Pac. 69, 78, 83, referring historically to principal case; Parker v. San Francisco (Cal.), 3 Pac. 816, companion case.

65 Cal. 232–236, 3 Pac. 818, PEOPLE v. KEEPER.

Accessory After Fact cannot be Indicted as principal.

Approved in State v. Jones, 115 Iowa, 119, 88 N. W. 198, accessory after fact is not an accomplice and conviction may be had on his uncorroborated testimony.

However Incredible Testimony of Defendant accused of crime, he is entitled to instruction based on hypothesis that his testimony was entirely true.

Approved in People v. Williamson, 6 Cal. App. 339, 92 Pac. 314, holding charge based on testimony of defendant in murder case improperly refused; State v. Messner, 43 Wash. 212, 86 Pac. 638, holding court improperly refused to give instruction presenting defendant's theory of case.

Defendant Indicted for Murder and convicted of murder in second degree may, on retrial on his own motion, be found guilty in first degree.

Approved in People v. Grill, 151 Cal. 598, 91 Pac. 577, and Turner v. Territory, 15 Okl. 558, 82 Pac. 651, both following rule.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 77.

Homicide in Carrying Out Unlawful Conspiracy. See note, 68 L. R. A. 208.

65 Cal. 240–241, 3 Pac. 817, ESTATE OF PARSONS.

It is No Part of Duty of Administrator to contest probate of will.

Approved in Zimmer v. Saier, 155 Mich. 392, 130 Am. St. Rep. 575, 119 N. W. 435, administrator cannot employ attorney in contest over will.

65 Cal. 244–246, 3 Pac. 859, SERE v. McGOVERN.

Conditional Sale is Valid.

Approved in Liver v. Mills, 155 Cal. 462, 101 Pac. 300, holding bona fide purchaser for value of property subject of conditional sale obtains no rights superior to those of unpaid vendor.

Rights and Liabilities of Parties to conditional sale on default. See note, 32 L. R. A. 460.

65 Cal. 247-250, 3 Pac. 864, SAN JOAQUIN VALLEY BANK v. BOURS.

Miscellaneous.—Cited in San Joaquin Valley Bank v. Bours, 73 Cal. 201, 14 Pac. 673, on another appeal.

65 Cal. 250-252, 3 Pac. 871, BOLGER v. FOSS.

All Roads Used as Such for Period of more than five years are public highways.

Approved in Town of Juliaetta v. Smith, 12 Idaho, 293, 85 Pac. 925, following rule; Barnes v. Davech, 7 Cal. App. 492, 94 Pac. 782, holding long-continued adverse user as road by public established title to easement in public by prescription.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 454.

65 Cal. 252-254, 3 Pac. 870, SCHUYLER v. BROUGHTON.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 107, 112.

65 Cal. 254-256, 3 Pac. 867, REGO v. VAN PELT.

Quitclaim Deeds are as Effectual to pass title as deeds of bargain and sale.

Approved in Myers v. City of Oceanside, 7 Cal. App. 93, 93 Pac. 688, holding quitclaim deed may support action to quiet title.

Quitclaim Deeds. See note, 105 Am. St. Rep. 863.

Complaint in Ejectment Averring that defendants are in possession of lands and withhold same from plaintiff, and exclude plaintiff from same, sufficiently alleges ouster.

Approved in McFarland v. Matthai, 7 Cal. App. 600, 95 Pac. 180, and Victor Power and Mining Co. v. Cole, 11 Cal. App. 500, 105 Pac. 759, both upholding sufficiency of complaint in ejectment.

65 Cal. 259-260, 3 Pac. 872, SAWYER v. SARGENT.

Proceedings for New Trial cannot be initiated by notice of motion to set aside judgment on ground evidence does not sustain judgment, but motion should be directed to decision.

Approved in Haight v. Tryon (Cal.), 34 Pac. 713, holding notice of motion for new trial directed against findings rather than decision is sufficient; Caldwell v. Wells, 16 Idaho, 463, 464, 101 Pac. 813, 814, holding motion for new trial should be directed against verdict or decision and not against judgment.

65 Cal. 263-266, 3 Pac. 878, ROBINSON v. PLACERVILLE ETC. R. R. CO.

Judgment will not be Reversed for failure to find on one of issues when it is apparent judgment would have been same if finding had been in favor of appellant.

Approved in Great Western Gold Co. v. Chambers, 153 Cal. 311, 95 Pac. 153, following rule.

65 Cal. 267-269, 3 Pac. 868, PEOPLE v. BENNETT.

Miscellaneous.—Cited in People v. Bennett (Cal.), 3 Pac. 897, on another appeal.

65 Cal. 269–271, 3 Pac. 894, EX PARTE WILTERS.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

65 Cal. 271–273, 3 Pac. 883, REDMAN v. PURRINGTON.

Covenant in Mortgage That in Case of default in payment of principal or interest whole principal and interest shall fall due at option of mortgagee, inures to benefit of assignee of mortgagee.

Approved in Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 63, 126 Am. St. Rep. 856, 94 Pac. 902, 15 L. R. A. (n. s.) 590, holding assignee of mortgage given to secure several notes due at different times takes all rights of assignor to foreclose on default.

Right of Assignee of Mortgage to enforce option to declare entire mortgage due for default. See note, 15 L. R. A. (n. s.) 590.

Priority of Notes Falling Due at different times secured by same mortgage. See note, 24 L. R. A. 803.

65 Cal. 273–275, 3 Pac. 889, CORREIO v. LYNCH.

Firewood is not Manufactured Article, and vendor does not warrant by its sale that it is reasonably fit for purpose for which ordered.

Approved in dissenting opinion in Benedict Bros. v. Davidson Co., 110 Tenn. 195, 67 S. W. 809, majority holding logs in yard of sawyer were manufactured articles produced in state, exempt from taxation.

Implied Warranty of Quality. See note, 102 Am. St. Rep. 617.

Implied Warranty of Fitness of Property bought for special purpose. See note, 22 L. R. A. 196.

What Constitutes Manufacture. See note, 14 L. R. A. 109.

Taxation of Manufacturing Corporations. See note, 64 L. R. A. 40, 44.

65 Cal. 275–279, 4 Pac. 1, PEOPLE v. BLAKE.

Evidence of Protracted Drunkenness is inadmissible to show faculties of defendant, accused of forgery, were so impaired as to cloud his sense of right and wrong.

Approved in People v. Hower, 151 Cal. 642, 644, 91 Pac. 508, 509, holding instruction as to effect of intoxication on defendant charged with assault to murder is erroneous.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 465.

65 Cal. 280–282, 3 Pac. 881, HIGGINS v. PARSONS.

Contract will be Revised for Mistake where party signed it supposing it to contain correct expression of his intention when other party knew it did not.

Approved in Los Angeles etc. R. R. Co. v. New Liverpool Salt Co., 150 Cal. 27, 87 Pac. 1031, correcting mistake in deed overlooked in reading by party executing it; Togni v. Taminelli, 11 Cal. App. 12, 103 Pac. 901, correcting release in which deed had been inserted through false representation of releasee; Cox v. Beard, 75 Kan. 372, 89 Pac. 672, reforming deed where land intended to be conveyed was omitted therefrom by mistake of one party and fraud of another.

Mistakes for Which Written Instruments may be canceled or corrected in equity. See note, 117 Am. St. Rep. 231.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 860.

65 Cal. 283–285, 3 Pac. 890, CITY OF LOS ANGELES v. WALDRON.

Petition by City for Condemnation of Land for street recited that council "duly passed and adopted an ordinance in writing," directing proceeding, and "that it is now necessary to condemn land for public use agreeable to provisions of said ordinance." Held, a sufficient allegation of necessity of taking land for public use.

Approved in Sanford v. Tucson, 8 Ariz. 254, 71 Pac. 906, holding that complaint by city to condemn land for street that did not show directly or by ordinance set forth therein necessity for such taking was insufficient; Grafton v. St. Paul etc. R. R. Co., 16 N. D. 317, 323, 113 N. W. 600, 602, 22 L. R. A. (n. s.) 1, public necessity for street need not be alleged nor proven in action by city to condemn land for street.

Averment That Ordinance was "Duly Passed and adopted" is sufficient statement that everything necessary to be done by city council to give it legal effect had been done.

Approved in Gurnsey v. Northern California etc. Co., 7 Cal. App. 545, 94 Pac. 863, holding allegation of granting of franchise sufficiently alleges it was done by ordinance; Bituminous Lime Rock Pav. etc. Co. v. Fulton (Cal.), 33 Pac. 1118, holding averment that "city council passed resolution of intention that New High street should be paved" is sufficient averment that such street is open public street.

Under Los Angeles Charter, Street Work may be authorized by resolution of city council, or by ordinance.

Approved in Mulberry v. O'Dea, 4 Cal. App. 387, 88 Pac. 368, following rule; McGilvery v. City of Lewiston, 13 Idaho, 356, 90 Pac. 352, holding resolution passed with same formalities as ordinance has same effect.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 112, 114.

65 Cal. 285–286, 3 Pac. 895, SOTO v. VANNOY.

Decision of Tie Vote at Election. See note, 47 L. R. A. 552.

65 Cal. 287, 3 Pac. 896, ESTATE OF MARREY.

Executor cannot Litigate Claim of one legatee as against another at expense of estate.

Distinguished in Bruning v. Golden, 159 Ind. 208, 64 N. E. 660, suit brought by special administrator for accounting in partnership between testator and defendant is for benefit of estate.

65 Cal. 292, 4 Pac. 14, BUELL v. SAN FRANCISCO SAVINGS UNION.

Injunctions Against Judgments for errors and irregularities. See note, 30 L. R. A. 710.

Injunctions Against Judgments obtained by fraud, accident, mistake, surprise, and duress. See note, 30 L. R. A. 790.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 328.

65 Cal. 295, 4 Pac. 813, CALIFORNIA SOUTHERN R. R. CO. v. SOUTHERN PACIFIC R. R. CO.

No Appeal can be Taken from Order refusing to set aside final order for condemnation of lands, but appeal should be taken from original decision.

Distinguished in Mills v. Smiley, 9 Idaho, 322, 76 Pac. 785, holding one who was not party to action at time writ of assistance was granted may move to set aside order and appeal from order denying motion.

65 Cal. 295–300, 4 Pac. 7, PEOPLE v. BROOKS.

Where Accused is Charged With a Crime and previous conviction and voluntarily confesses previous conviction, jury need not find specially on previous conviction.

Approved in State v. Gordon, 35 Mont. 464, 90 Pac. 175, holding where accused is charged with robbery and former convictions, plea of not guilty puts in issue charge of former convictions.

Enhancing Penalty for Crimes by habitual criminals or prior offenders. See note, 34 L. R. A. 405.

65 Cal. 301–304, 4 Pac. 17, McBRIDE v. FALLON.

Assignee of Judgment Creditor takes judgment with right of setoff of another judgment in favor of judgment debtor existing at time of transfer attached thereto.

Approved in Wabash Ry. Co. v. Bowring, 103 Mo. App. 170, 77 S. W. 109, following rule.

Setting Off One Judgment Against Another. See note, 109 Am. St. Rep. 148.

Setoff Against Judgment in hands of assignee. See note, 23 L. R. A. 335.

Liability of Promissory Note to Attachment or Execution. See note, 14 L. R. A. (n. s.) 1236.

65 Cal. 305–307, 4 Pac. 19, PEOPLE v. WONG AH BANG.

Admissibility of Evidence given through interpreter. See note, 17 L. R. A. 813.

65 Cal. 309–310, 4 Pac. 22, ESTATE OF DAVIS.

When Administrator Agreed Before Appointment to serve without charge, he cannot claim compensation.

Approved in Polk v. Johnson, 160 Ind. 297, 98 Am. St. Rep. 274, 66 N. E. 754, and Polk v. Johnson, 35 Ind. App. 483, 65 N. E. 537, both applying rule to receiver.

Distinguished in Estate of Murphy, 1 Cof. Prob. 16, fact that executor at one time expressed intention to renounce his commissions does not bar right to claim them.

Waiver by Administrator of Right to Compensation. See note, 1 Cof. Prob. 17.

65 Cal. 310–313, 4 Pac. 23, EX PARTE BENJAMIN.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

65 Cal. 316–319, 4 Pac. 28, HYNES v. SAN FRANCISCO ETC. R. R. CO.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 342, 364.

Miscellaneous.—Cited in Hynes v. S. F. & U. P. R. Co. (Cal.), 4 Pac. 31, companion case.

65 Cal. 320–321, 4 Pac. 26, FARRINGTON v. BROWN.

Injunctions Against Judgments for want of jurisdiction or invalidity. See note, 31 L. R. A. 212.

65 Cal. 321–322, 4 Pac. 27, HEALD v. HENDY.

Motion to Retain or Remand Cause on ground of convenience of witnesses cannot be heard until issue is joined.

Reaffirmed in Pascoe v. Baker, 158 Cal. 233, 110 Pac. 816.

65 Cal. 322–326, 4 Pac. 103, LYON v. PETTY.

Demands to be Subject of Counterclaim must be mutual and coexist as separate causes of action at commencement of action upon principal demand.

Approved in Potter v. Lohse, 31 Mont. 98, 77 Pac. 421, holding judgment cannot be set off against action of conversion.

Cross-demand Barred by Limitations cannot be set off against mortgage debt.

Reaffirmed in Moore v. Gould, 151 Cal. 732, 91 Pac. 620.

Setoff on Mortgage Foreclosure. See note, 21 L. R. A. 323.

Miscellaneous.—Cited in Aldrich v. Barton, 153 Cal. 494, 95 Pac. 903, as to collateral attack on certificate of discharge from state hospital.

65 Cal. 326–327, 4 Pac. 33, COCKRILL v. HALL.

Fraudulent Promise Made by Maker of note to payee, by which maker gets possession and retains it until barred, is actionable under sections 1709 and 1710, Civil Code.

Approved in City Deposit Bank v. Green, 138 Iowa, 163, 115 N. W. 896, where agent of seller secured defendant's signature to subscription list and note for purchase of property on misrepresentation that certain responsible persons who had signed list would sign note, knowing they would not sign it, it is actionable fraud.

Future Promise as Fraud. See note, 10 L. R. A. (n. s.) 646, 647.

65 Cal. 327–332, 4 Pac. 106, BANK OF HEALDSBURG v. BAILHACHE.

Delivery of Deed in Favor of Bank to director thereof, with instruction not to deliver to bank until certain matters in dispute were settled, is not delivery to bank.

Approved in Case Threshing Co. v. Barnes, 133 Ky. 333, 117 S. W. 421, delivery of notes in favor of company to agent of company held to be in escrow; Blair v. Security Bank, 103 Va. 772, 50 S. E. 264, holding evidence showed jury should be instructed to find whether bond to indemnify bank was delivered on condition when delivered to bank.

65 Cal. 332–334, 4 Pac. 109, ESTATE OF CROZIER.

Court may Appoint Special Administrator upon appeal from order revoking probate of will.

Approved in Estate of Chadbourne, 14 Cal. App. 485, 112 Pac. 474, holding on appeal from order removing executors, court may appoint special but not general administrator of estate.

Revocation of Probate of Will ends eo instanti functions of executor thereunder.

Approved in Estate of Dalton, 2 Cof. Prob. 104, application for revocation of probate of will may be made within one year after probate though final distribution has been made and executor discharged; More v. Miller (Cal.), 53 Pac. 1079, holding void judgment rendered against administrator after his removal.

65 Cal. 334–336, 4 Pac. 191, **LEARNED v. TANGEMAN.**

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 742.

65 Cal. 336–340, 4 Pac. 197, **FLEMING v. WELLS.**

For Purposes of Judgment on pleadings, averments of answer must be treated as true.

Approved in Kelley v. Sersanous (Cal.), 46 Pac. 299, following rule.

Right of One not a Party to original replevin, to recover property seized. See notes, 8 L. R. A. (n. s.) 220, 224; 5 L. R. A. (n. s.) 496.

65 Cal. 340–342, 4 Pac. 195, **ARATA v. TELLURIUM ETC. MIN. CO.**

Statement in Claim of Mechanic's Lien of name of same person as owner and reputed owner does not affect lien.

Approved in Kelly v. Lemberger (Cal.), 46 Pac. 8, following rule.

65 Cal. 343–344, 4 Pac. 111, **READ v. RAHM.**

Where Land is Conveyed to Wife with consent of husband in consideration of vendor's debt to husband, it becomes her separate property.

Approved in Wright v. Wright (Cal.), 41 Pac. 696, when property purchased with community funds is conveyed to wife with intent to make it her separate property, it operates as gift to her; Estate of Fay, 3 Cof. Prob. 271, arguendo.

What is Community Property. See notes, 126 Am. St. Rep. 107; 4 Cof. Prob. 49.

65 Cal. 345–350, 3 Pac. 467, 4 Pac. 486, **BAYLEY v. MUEHE.**

In Action Against Administrator to foreclose mortgage, heirs of deceased mortgagor are not necessary parties.

Approved in McCaughey v. Lyall, 152 Cal. 617, 93 Pac. 682, Hearfield v. Bridge, 67 Fed. 334, 335, 336, and McClung v. Cullison, 15 Okl. 406, 408, 82 Pac. 500, 501, all following rule.

Mortgage Foreclosure. See note, 113 Am. St. Rep. 332.

65 Cal. 354–356, 4 Pac. 229, **BEARD v. BEARD.**

Contract Facilitating Dissolution of marriage is void as contra bonos mores.

Approved in Pereira v. Pereira, 156 Cal. 5, 134 Am. St. Rep. 107, 103 Pac. 490, 23 L. R. A. (n. s.) 880, holding void as against public policy contract between husband and wife settling property rights in contemplation of possible future delinquency of husband; Benicia Agricultural Works v. Estes (Cal.), 32 Pac. 940, holding void mortgage and note given in consideration of withdrawal of opposition to discharge of mortgagor's father in insolvency proceedings; Davis v. Hinman, 73 Neb. 851, 103 N. W. 668, holding void contract in aid of divorce; Winder v. Winder, 86 Neb. 501, 125 N. W. 1098, setting aside decree in divorce when parties had agreed to suppress material evidence.

65 Cal. 358–359, 4 Pac. 207, SAN JOSE v. WELCH.

Sureties on Bond of County Assessor are not liable for his failure to pay over taxes collected by him which he was not authorized to collect.

Approved in Wilson v. State, 67 Kan. 46, 72 Pac. 518, holding sureties not liable for default of county attorney for failure to pay over money collected on promissory notes given under provisions of chapter 242, page 394, Laws of 1895.

65 Cal. 365–368, 4 Pac. 237, PORTER v. CHAPMAN.

Homestead is not Abandoned by deed absolute on face given as security for money.

Approved in Bull v. Coe (Cal.), 15 Pac. 125, following rule; MacLeod v. Moran, 153 Cal. 99, 94 Pac. 605, holding deed of trust to secure debt not abandonment of homestead.

Homestead is not Abandoned by removal of husband and family with intention to return.

Approved in In re Schulz, 135 Fed. 229, following rule; Gilmore v. Brown, 93 Miss. 67, 46 So. 841, removal from homestead to village to educate children held not abandonment.

Abandonment of Homestead. See note, 102 Am. St. Rep. 410.

65 Cal. 368–372, 4 Pac. 232, BAKER v. O'RIORDAN.

Decree of Probate Court may be set aside in equity proceeding in superior court upon showing it was obtained by fraud.

Approved in Bacon v. Bacon, 150 Cal. 481, 482, 484, 485, 89 Pac. 318, 319, 320, holding decree of distribution of estate reviewable in equity on showing of fraud or mistake; Hanley v. Hanley, 4 Cof. Prob. 479, applying rule to order setting aside probate homestead.

Relief from Decrees of Courts having exclusive jurisdiction over estates of decedents, minors and incompetent persons. See notes, 106 Am. St. Rep. 643; 1 Cof. Prob. 266.

Equitable Jurisdiction in Regard to injunctions against judgments. See notes, 31 L. R. A. 212; 32 L. R. A. 328.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 855.

65 Cal. 385, 4 Pac. 373, CUNNINGHAM v. SKINNER.

Denials upon Information and Belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 778.

65 Cal. 387–388, 4 Pac. 349, BAILEY v. SLOAN.

Ad Damnum Clause is Test of jurisdiction of superior court.

Approved in Lord v. Thomas (Cal.), 27 Pac. 411, superior court may render judgment for less than three hundred dollars, when complaint stated cause of action for restitution of real property; Galloway v. Jones (Cal.), 13 Pac. 714, superior court has jurisdiction of action on several claims joined in one complaint where total exceeded three hundred dollars; Oppenheimer v. Regan, 32 Mont. 119, 79 Pac. 698, holding action against sheriff for two hundred and thirty-nine dollars, with twenty-five per cent penalty and legal interest, is without jurisdiction of justice's court.

Failure to Give Notice of Overruling Demurrer when default is taken for failure to answer can only be reviewed on appeal from order refusing to set aside default on ground of lack of notice.

Approved in Carter v. Paige (Cal.), 20 Pac. 730, irregularity in filing amended complaint after time prescribed can be reviewed only on appeal from order denying motion to set aside judgment.

65 Cal. 389–390, 4 Pac. 350, HAYFORD v. KOCHER.

Declaration of Homestead by Wife of grantor on premises which were by mistake excluded from conveyance by husband does not affect right of grantee to reform deed.

Approved in Smith v. Baugham, 156 Cal. 366, 104 Pac. 692, holding declaration of homestead on land subject to prior option did not affect holder's right to specific performance.

65 Cal. 391–393, 4 Pac. 375, DEAN v. APPLEGARTH.

Under Section 1919, Civil Code, note cannot be made to bear interest upon unpaid interest at greater rate than that agreed upon in principal debt.

Approved in Bell v. San Francisco Savings Union, 153 Cal. 75, 94 Pac. 230, holding such provision renders interest void in entirety.

65 Cal. 394–395, 4 Pac. 344, CALIFORNIA ETC. R. R. CO. v. SOUTHERN PACIFIC R. R. CO.

Action to Condemn Lands must be brought in county where situated.

Approved in State v. District Court, 29 Mont. 155, 74 Pac. 200, following rule; Nelson v. Deming Inv. Co., 21 Okl. 616, 96 Pac. 744, action affecting real estate may be brought in county where situated and service had, in county of his residence, upon resident agent of foreign corporation interested in the real estate.

Miscellaneous.—Cited in California Southern R. Co. v. Southern Pac. R. Co. (Cal.), 4 Pac. 346, companion case.

65 Cal. 396–397, 4 Pac. 348, PEOPLE v. MULLAN.

Motion to Set Aside Judgment in court in which rendered is direct and not collateral attack.

Approved in Hanson v. Hanson (Cal.), 20 Pac. 736, holding court had power to make order setting aside decree on ground of no service of summons, although motion was made more than a year after decree; Brown v. Massey, 13 Okl. 678, 76 Pac. 229, holding petition to set aside default may be made by party to original judgment or by one to whom party has conveyed his interest in subject matter of suit.

As to Who may Proceed to Set Aside Judgments against other parties. See note, 54 L. R. A. 767.

Availability to Privies of Remedy of party to open default judgment. See note, 26 L. R. A. (n. s.) 1066.

Publication of Summons without affidavit and order of court does not confer jurisdiction over defendant.

Approved in People v. Ray (Cal.), 12 Pac. 161, setting aside default judgment obtained on service by publication without affidavit and order.

65 Cal. 397–402, 4 Pac. 385, ROBARTS v. HALEY.

Enhancing Penalty for Crimes by habitual criminals or prior offenders. See note, 34 L. R. A. 400.

65 Cal. 403–406, 4 Pac. 393, PFISTER v. DASCEY.

Where Parties Go to Trial without demanding jury, jury trial is waived.

Approved in Ah Hing v. Ah On, 15 Haw. 60, right to jury trial waived by defendant not demanding jury until assessment of damages was nearly completed.

65 Cal. 407–409, 4 Pac. 389, ESTATE OF HIGGINS.

Real Estate Purchased by Husband in this state after marriage with money accumulated in Illinois during marriage by use of property owned by him at time of marriage is separate property of husband.

Approved in Estate of Pepper, 158 Cal. 623, 112 Pac. 64, where husband had occupied ranch for many years prior to marriage under claim of ownership, perfecting title from paramount source after marriage did not make it community property.

What is Community Property. See notes, 126 Am. St. Rep. 105; 4 Cof. Prob. 47.

65 Cal. 409–410, 4 Pac. 388, CALIFORNIA SOUTHERN R. R. CO. v. SOUTHERN PACIFIC R. R. CO.

Action to Condemn Land for Use of corporation must be begun in county where land is situated.

Approved in Santa Rosa v. Fountain Water Co., 138 Cal. 580, 71 Pac. 1124, following rule.

65 Cal. 410–411, 4 Pac. 408, WATROUS v. CUNNINGHAM.

Books of Account of Third Person not party to action are inadmissible.

Approved in State v. Carpenter, 129 Wis. 188, 108 N. W. 644, 8 L. R. A. (n. s.) 788, in fixing fair cash value of corporate stock belonging to decedent's estate for purpose of inheritance tax, court cannot compel corporation to produce its books and papers.

Use of Person's Books of Account as evidence upon issues between other parties. See note, 53 L. R. A. 534.

65 Cal. 411–417, 4 Pac. 404, KERNS v. McKEAN.

Where Findings are Contradictory, judgment will be reversed.

Approved in Learned v. Castle, 78 Cal. 460, 21 Pac. 13, following rule.

Where Defendant Entered into Possession of land under contract with vendor, his holding cannot be adverse, unless hostility has been manifested by unequivocal acts brought expressly or by legal implication to vendor's knowledge.

Approved in Fountain v. Lewiston Nat. Bk., 11 Idaho, 467, 83 Pac. 509, holding possession adverse and hostile when entry was made by consent with understanding that title had been transferred.

Where Contract for Sale of Land provides for forfeiture for nonpayment of installment, upon recording of notice by vendor, mere delay in recording notice does not avoid forfeiture.

Distinguished in Cughan v. Larson, 13 N. D. 381, 100 N. W. 1090, refusing to sustain forfeiture of contract on other grounds than those specified in contract.

Miscellaneous.—Cited in Kerns v. Dean (Cal.), 4 Pac. 408, companion case; State v. Carpenter, 129 Wis. 188, 108 N. W. 644, 8 L. R. A. (n. s.) 788, for preceding case.

65 Cal. 417–419, 4 Pac. 413, WALTHER v. MUTUAL LIFE INS. CO.

In Action on Life Insurance Policy, record of proceedings of coroner's jury is admissible as records of judicial tribunal.

Approved in Metropolitan Life Ins. Co. v. Wagner, 50 Tex. Civ. 239, 109 S. W. 1122, willful omission from proofs of death of coroner's record as provided for in policy held ground for its admission in evidence on trial in suit on policy; dissenting opinion in Craiger v. Modern Woodmen, 40 Ind. App. 287, 80 N. E. 432, majority holding inadmissible coroner's record to establish affirmative defense of suicide.

Distinguished in Aetna Life Ins. Co. v. Milward, 118 Ky. 729, 82 S. W. 367, 68 L. R. A. 285, holding verdict of coroner's jury not admissible in action on accident insurance policy.

Findings at Coroner's Inquest as evidence. See notes, 95 Am. St. Rep. 764, 765; 68 L. R. A. 294.

Verdict of Coroner's Jury that deceased committed suicide is prima facie evidence of fact.

Approved in Mittelstadt v. Modern Woodmen of Am., 143 Iowa, 190, 136 Am. St. Rep. 765, 121 N. W. 804, following rule.

In Action on Insurance Policy, plaintiff may introduce evidence tending to show death was not result of suicide.

Approved in Supreme Tent Knights etc. v. Stensland, 206 Ill. 131, 99 Am. St. Rep. 137, 68 N. E. 1100, following rule.

Conclusiveness of Proof of Loss as against insured or his beneficiaries. See note, 44 L. R. A. 853.

Incorporation of Extrinsic document into will. See note, 68 L. R. A. 391.

65 Cal. 419–421, 4 Pac. 409, NEWBILL v. THURSTON.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 858, 885, 886.

65 Cal. 421–422, 4 Pac. 399, BROOKS v. HASLAM.

In Action for Damages for Killing Person, denial in answer that shooting was unlawful, followed by averment that it was done in self defense, puts burden of proving self-defense on defendant.

Approved in Suell v. Derricott, 161 Ala. 267, 49 So. 899, 23 L. R. A. (n. s.) 996, following rule.

Justifiable Killing as Defense in action for death intentionally inflicted. See note, 23 L. R. A. (n. s.) 996.

65 Cal. 422–425, 4 Pac. 529, BULL v. HOUGHTON.

Demand for Repayment of Money paid by insolvent in fraud of creditors need not be made by his assignee before commencing action for its recovery.

Approved in Goldberg v. Harlan, 33 Ind. App. 475, 67 N. E. 711, following rule; Jackman v. Eau Claire Nat. Bk., 125 Wis. 475, 104

N. W. 101, where chattel mortgage converted mortgaged property and applied proceeds to payment of mortgage debt, demand is not necessary before action by trustee in bankruptcy of mortgagor to recover value of property.

Relation of Bankrupt Law to Assignments and insolvent proceedings under state laws. See note, 45 L. R. A. 180.

65 Cal. 431–432, 4 Pac. 415, WEIDERKIND v. TUOLUMNE COUNTY WATER CO.

Instruction Considered and Held improper as instruction on matter of fact.

Approved in Manning v. App. Cons. Gold Min. Co., 149 Cal. 41, 84 Pac. 660, and Ryan v. Oakland Gas Light etc. Co., 10 Cal. App. 491, 102 Pac. 561, both holding instruction improper as being in regard to matter of fact.

Liability for Escape of Dangerous Substance stored on premises. See note, 15 L. R. A. (n. s.) 543.

65 Cal. 432–434, 4 Pac. 414, MONTGOMERY v. MERRILL.

Where Mortgage Included "Rents, issues, and profits," and sum bid on land at foreclosure was insufficient to satisfy mortgage, proceeds of sale of crops by receiver in foreclosure must be applied to deficiency.

Approved in Moncrieff v. Hare, 38 Colo. 232, 87 Pac. 1086, 7 L. R. A. (n. s.) 1001, holding where mortgage covered rents and profits, court could appoint receiver to recover rents and profits accruing after bringing of foreclosure suit and apply same to deficiency.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 467.

65 Cal. 434–436, 52 Am. Rep. 303, 4 Pac. 433, CITY OF VISALIA v. JACOB.

Private Citizen cannot Acquire Title by adverse possession to land dedicated as public street.

Approved in Shaw v. Sebastopol, 159 Cal. 626, 115 Pac. 215, right to divert surface water from one's land and discharge on public road cannot be acquired by prescription; People v. Kerber, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 879, holding tide lands in San Francisco could not be acquired by adverse user as against public; Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 724, 84 Pac. 241, holding lapse of time does not create prescriptive right for electric light company to maintain its poles at original location on streets.

Distinguished in San Francisco v. Grote (Cal.), 47 Pac. 940, holding city cannot maintain ejectment for recovery of possession of street dedicated to public by user, without showing ownership in fee.

Rights Acquired as Against Public by adverse possession of highway or street. See note, 18 L. R. A. 148.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 452, 453.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 580.

What Title or Interest will support ejectment. See note, 18 L. R. A. 786.

Ejectment for Public Easement. See note, 11 L. R. A. (n. s.) 130.

Prescriptive Right to Maintain public nuisance. See note, 53 L. R. A. 898.

65 Cal. 437–438, 4 Pac. 418, BANK OF STOCKTON v. JONES.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 778.

65 Cal. 439–443, 4 Pac. 443, ROSS v. EVANS.

Party Relying on Adverse Possession for title to land must show payment of all taxes thereon.

Approved in Crane v. Judge, 30 Utah, 55, 83 Pac. 567, rejecting claim based on adverse possession when claimant admitted other party had paid taxes thereon.

Distinguished in Rio Grande W. Ry. Co. v. Salt Lake Inv. Co., 35 Utah, 538, 101 Pac. 590, considering circumstances of payment of taxes on lot claimed by railroad and holding it not to be such payment during adverse possession as to give title.

65 Cal. 443–445, 4 Pac. 419, SPECT v. HAGAR.

Miscellaneous.—Cited in Spect v. Hagar (Cal.), 4 Pac. 421, companion case.

65 Cal. 445–447, 4 Pac. 421, PEOPLE v. McFADDEN.

What Weapons may be Considered Deadly under law of homicide and assault. See note, 21 L. R. A. (n. s.) 500.

65 Cal. 447–455, 4 Pac. 426, LYTLE CREEK WATER CO. v. PERDEW.

Agreement Between Appropriators of Water as tenants in common for separate use at different periods is valid.

Approved in Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 237, 110 Am. St. Rep. 986, 79 Pac. 28, 70 L. R. A. 341, holding deed under which appropriators covenant to permit use of all water to which parties to deed are entitled on alternate weeks is enforceable as against subsequent appropriator.

Right of Prior Appropriator of water. See note, 30 L. R. A. 677.

65 Cal. 456–466, 52 Am. Rep. 305, 4 Pac. 435, COTTLE v. SPITZER.

Meaning of Word "Crop" Discussed.

Approved in State Mut. Ins. Co. v. Clevenger, 17 Okl. 51, 87 Pac. 583, holding "crop" includes growing cotton.

Passing of Crops by Deed, devise or descent of lands. See note, 131 Am. St. Rep. 618.

Power of State Legislature to exempt from taxation. See note, 19 L. R. A. 79.

65 Cal. 474–476, 4 Pac. 449, EX PARTE DONAHUE.

Accusation of Greater Offense which includes lesser allows conviction of lesser offense.

Approved in Becker v. Superior Court, 151 Cal. 317, 90 Pac. 690, holding superior court in suit on mechanic's lien could, on finding against lien, give personal judgment against defendant for amount claimed in lien although such amount is less than three hundred dollars.

65 Cal. 476–480, 4 Pac. 453, COUNTY OF LOS ANGELES v. CITY OF LOS ANGELES.

Miscellaneous.—Cited in County of Los Angeles v. Morgan (Cal.), 4 Pac. 456, companion case.

65 Cal. 481, 4 Pac. 464, HIATT v. BOARD OF TRUSTEES.

Defective Denial, not Objected to in trial court, will be treated as sufficient on appeal.

Approved in Ennor v. Raine, 27 Nev. 216, 74 Pac. 3, following rule.

65 Cal. 481–482, 4 Pac. 463, JOHNSON v. SACRAMENTO COUNTY.

Right to Go Behind Judgment against county or municipality on mandamus to enforce. See note, 9 L. R. A. (n. s.) 1005.

65 Cal. 489–491, 4 Pac. 491, TAYLOR v. BIDWELL.

In Action Charging Conspiracy to prosecute plaintiff for crime, and malicious prosecution in pursuance of conspiracy, alleged malicious prosecution is gist of action.

Approved in Dowdell v. Carpy (Cal.), 61 Pac. 949, holding bad on demurrer complaint in malicious prosecution which showed defendant had recovered judgment in former action, although reversed on appeal; Fox v. Hale etc. Silver Min. Co. (Cal.), 53 Pac. 36, in charging fraud, complaint must state facts with sufficient distinctness to enable adverse party to come prepared with evidence; Marten v. Holbrook, 157 Fed. 717, holding unlawful restraint of person is gist of complaint alleging conspiracy to deprive plaintiff of liberty and property.

Subornation of Witnesses to Swear falsely against defendant in criminal prosecution does not constitute cause of action by him for damages.

Approved in Godette v. Gaskill, 151 N. C. 53, 134 Am. St. Rep. 964, 65 S. E. 612, 24 L. R. A. (n. s.) 265, action for damages does not lie against witness for willful false swearing at trial which caused party's defeat.

Perjury and Subornation of Perjury as ground for civil actions. See note, 24 L. R. A. (n. s.) 267.

65 Cal. 494–495, 4 Pac. 492, KETCHUM v. SUPERIOR COURT.

On Appeal from Justice's to Superior Court on questions of law and fact, when issues have been made in court below, superior court may allow amendments to pleadings, and such allowance cannot be reviewed on certiorari.

Approved in Armantage v. Superior Court, 1 Cal. App. 134, 135, 81 Pac. 1034, 1035, on appeal from justice's court on questions of law and fact, superior court has original jurisdiction to try case, regardless of trial of issues in justice's court.

Where Trial Court has Jurisdiction, allowance of amendments to pleadings will not be reviewed on certiorari.

Approved in Kapp v. District Court, 31 Nev. 454, 103 Pac. 239, refusing on certiorari to amend order for alimony pendente lite.

65 Cal. 496–498, 4 Pac. 489, MORTON v. SUPERIOR COURT.

Judgment Fully Paid and Satisfied will not be reviewed on certiorari.

Approved in Churchill v. More, 7 Cal. App. 771, 96 Pac. 110, holding surety company which paid judgment without exercising its right to move to set aside cannot have judgment reviewed on certiorari although void as to judgment debtor; Signor v. Clark, 13 N. D. 46,

99 N. W. 72, holding satisfaction of judgment extinguished right of appeal.

Distinguished in Null v. Superior Court, 4 Cal. App. 211, 87 Pac. 394, holding judgment improperly rendered in superior court and paid under legal compulsion may be reviewed on certiorari.

65 Cal. 498–500, 4 Pac. 502, CHANDLER v. PEOPLE'S SAVINGS BANK.

Where Judgment is Reversed and cause remanded for further proceedings in accordance with views of appellate court, retrial should be had subject to directions given in opinion.

Distinguished in Jacobs v. Walker (Cal.), 33 Pac. 92, where on appeal new trial is ordered without limitation for specified reason, such trial should not be limited to the one issue discussed.

Reversal of Judgments. See note, 96 Am. St. Rep. 129.

65 Cal. 500–501, 4 Pac. 500, SLAVONIC ETC. ASSN. v. SUPERIOR COURT.

Special Order Made After Final Judgment is appealable.

Approved in Shumake v. Shumake, 17 Idaho, 658, 107 Pac. 45, order vacating final judgment is appealable.

65 Cal. 502–504, 4 Pac. 507, BLISS v. KAWEAH CANAL ETC. CO.

President of Corporation has No Authority, by virtue of his office, to purchase or sell real property of corporation at his discretion.

Approved in Black v. Harrison Home Co., 155 Cal. 127, 99 Pac. 497, holding corporation not estopped to deny unauthorized contract executed by president when it had accepted no benefits thereunder; Northwestern Packing Co. v. Whitney, 5 Cal. App. 108, 89 Pac. 982, holding invalid unauthorized executory contract of president of corporation; Elkhart Hydraulic Co. v. Turner, 170 Ind. 460, 84 N. E. 814, in action against corporation on corporate notes drawn by president, in which defense is non est factum, notes cannot be admitted in evidence where no proof is made that president was authorized to execute notes.

Powers of President and Vice-president of corporation. See note, 14 L. R. A. 356, 358.

65 Cal. 505, 4 Pac. 506, KETTLEMAN v. TREADWAY.

Submission to Arbitration under section 1283, Code of Civil Procedure, is void if no note of submission is entered by clerk in register of actions.

Approved in Readdy v. Tampa Electric Co., 51 Fla. 297, 41 So. 537, holding award void when record fails to show rule of court and proper filing of statement and award.

65 Cal. 506–507, 4 Pac. 510, McCUE v. TUNSTEAD.

Farmer is One Who Resides on Farm with family and cultivates same, mainly deriving his support from it, although he has also other occupations.

Distinguished in In re Johnson, 149 Fed. 868, holding farmer's wife not a farmer within meaning of statute providing that "persons en-

gaged chiefly in farming or tillage of soil" cannot be adjudged involuntary bankrupts.

Purpose for Which Horses are Used as affecting exemption under statute specifically exempting horses. See note, 3 L. R. A. (n. s.) 693.

65 Cal. 508–510, 4 Pac. 511, DAY v. COHN.

Subsequent Purchaser from Vendor with notice of vendor's agreement to convey title holds title in trust for vendee, and must convey to him upon payment of purchase price.

Approved in Barton v. Dunlap, 8 Idaho, 92, 66 Pac. 836, holding enforceable oral agreement to purchase realty when valuable improvements had been placed thereon by vendee.

65 Cal. 512–517, 4 Pac. 531, PORTER v. MULLER.

Grantee of Land Subject to Mortgage is necessary party to suit to foreclose mortgage.

Reaffirmed in Wilson v. Dahler, 9 Cal. App. 502, 99 Pac. 723.

There can be but One Action for Debt secured by mortgage, and proceeds of sale of mortgaged premises constitute primary fund out of which mortgage must be paid.

Approved in Kinsel v. Ballou, 151 Cal. 761, 91 Pac. 623, holding personal judgment could not be entered against mortgagor until funds derived from sale of mortgaged premises were exhausted; Crisman v. Lanterman, 149 Cal. 651, 117 Am. St. Rep. 167, 87 Pac. 90, mortgagor may insist that mortgagee shall not, by releasing land from mortgage, cast upon him personal liability for mortgage debt.

65 Cal. 519–521, 4 Pac. 542, MOORE v. KERR.

Where Parties to Building Contract agree upon agent, who is authorized by agreement to accept or reject work when completed, his acceptance is binding and conclusive in absence of fraud or mistake.

Distinguished in Ryan v. Curlew Irr. & Reservoir Co., 36 Utah, 387, 104 Pac. 220, holding person agreed upon not authorized to bind owner by acceptance of work not done in accordance with contract.

65 Cal. 525–529, 4 Pac. 534, WRIGHT v. WARD.

Seizure, Sale, and Delivery of Possession of partnership property on execution against one party is not conversion of other partner's interest.

Approved in Leedom v. Ham (Cal.), 48 Pac. 222, holding partner in crop sold on execution against other partner may demand accounting of partnership interests against purchasers at execution sale.

Levy on Partnership Property for debt of partner. See note, 46 L. R. A. 481, 484.

Partner Whose Interest has Been Sold on execution is necessary party to action of accounting between remaining partner and purchaser of interest sold.

Approved in Mitau v. Roddan, 149 Cal. 7, 84 Pac. 147, 6 L. R. A. (n. s.) 275, holding in action to enforce trust deed securing debt to individual beneficiary and also to firm of which he is member, which involves accounting between beneficiaries, such firm, although not party to deed of trust, is necessary party to action.

Distinguished in Dryden v. Sewell, 2 Alaska, 186, arguendo.

65 Cal. 529–531, 4 Pac. 540, SWEETSER v. DOBBINS.

When Verdict is not Binding on Court, instructions will not be reviewed on appeal if court disregards verdict and finds facts for itself.

Approved in Apland v. Pott, 16 S. D. 197, 92 N. W. 23, following rule; Lellman v. Mills, 15 Wyo. 177, 87 Pac. 994, holding misdirection of jury trying issues of fact in equity case not ground for reversal unless such misdirection shows that conclusion of court was based on misconception of law as applied to evidence under issues; Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah, 572, 83 Pac. 676, holding error cannot be predicated or instructions given in equity suit where verdict was merely advisory.

65 Cal. 532–537, 4 Pac. 545, PEOPLE v. MOAN.

One Who Unlawfully Wounds Another and thereby hastens death by reason of some disease with which wounded party is afflicted, is guilty of homicide.

Approved in Hopkins v. Commonwealth, 117 Ky. 945, 80 S. W. 157, following rule; McCahill v. N. Y. Transportation Co., 201 N. Y. 227, 94 N. E. 618, where injury precipitated attack of delirium tremens, resulting in death, it was proximate cause of death.

Court may Refuse to Allow Witness to answer question as to defendant's general reputation for peace and quiet if witness has never heard such reputation discussed.

Reaffirmed in People v. McSweeney (Cal.), 38 Pac. 744.

Right to Testify to Character from personal knowledge. See note, 22 L. R. A. (n. s.) 670.

65 Cal. 538–540, 4 Pac. 555, PEOPLE v. WASSON.

Party Against Whom Witness is called may show his hostility and prejudice.

Approved in Fields v. State, 46 Fla. 90, 35 So. 186, holding evidence of personal difficulty between defendant and witness improperly excluded.

Admissibility of Dying Declaration. See notes, 86 Am. St. Rep. 651; 56 L. R. A. 379.

65 Pac. 540–544, 4 Pac. 553, PEOPLE v. TURNER.

Question to Witness Considered and held to lay proper foundation for impeachment.

Approved in Lanigan v. Neely, 4 Cal. App. 777, 89 Pac. 448, holding ground for impeachment of defendant properly laid by questions in regard to testimony in former deposition.

65 Cal. 544–548, 4 Pac. 549, OHLEYER v. BUNCE.

Where Transcript Recites That Creditors' Petition in involuntary bankruptcy was in evidence in action to recover debt due insolvent, but does not state contents, it will not be presumed that debts therein stated did not accrue subsequently to passage of Insolvency Act.

Approved in La Dow v. National Bldg. etc. Co., 11 Cal. App. 309, 104 Pac. 839, holding on appeal from order refusing to vacate attachment for failure of surety to justify, it must be presumed that new bond given but not in record was in due form and complied with all legal requirements.

Complaint Against Purchaser of property of insolvent on ground of fraud against creditors considered and held to sufficiently allege fraudulent transfer.

Approved in Salisbury v. Burr (Cal.), 44 Pac. 462, holding allegations of fraudulent transfer as against creditors sustain verdict against purchaser.

Participation in Fraud of Vendor which will invalidate transfer for good consideration as against creditors. See note, 32 L. R. A. 58.

Effect of Insolvency Statutes upon mortgage or sale preferring creditors. See note, 37 L. R. A. 466.

65 Cal. 548–553, 4 Pac. 557, **HEATH v. SCOTT.**

When Depositions have Been Taken, failure to use them at trial is not ground of surprise for which new trial should be granted.

Approved in Smith v. Shook, 30 Mont. 34, 75 Pac. 514, refusing to grant new trial when newly discovered evidence could have been known with reasonable diligence.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 33.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 698.

65 Cal. 555–559, 4 Pac. 562, **DU PRAT v. JAMES.**

Failure of Locator of Mining Claim to perform required labor subjects claim to relocation, and peaceable entry in good faith may be made for that purpose, although claim is occupied by original locator.

Approved in Hanson v. Craig, 170 Fed. 65, 95 C. C. A. 338, where locators of two association claims, which overlap, are sinking shafts at same time, first to discover mineral has priority of right although his claim was staked after other, if done openly and peaceably.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 410, 415.

Discovery of Mineral in Mining Claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 185.

Relocation of Mining Claim as abandoned or forfeited. See note, 68 L. R. A. 837.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 860.

65 Cal. 564–567, 4 Pac. 570, **PEOPLE v. BIGGINS.**

Omission of Name of County in title of information is technical defect not affecting substantial rights of defendant where name of county appears in body of information.

Approved in State v. Stickney, 29 Mont. 528, 75 Pac. 203, fact that concluding phrase in information "against peace and dignity of state" modifies only last sentence preceding such words does not render information insufficient.

65 Cal. 572–574, 4 Pac. 578, **CURTISS v. CURTISS.**

Accounts of Deceased Executrix who was also devisee can be adjusted only in court of equity.

Distinguished in Elizalde v. Murphy, 4 Cal. App. 119, 87 Pac. 247, holding probate court in administration of estate can adopt form of bill of equity to settle account of deceased administrator.

65 Cal. 575–577, 4 Pac. 580, **MORRELL v. MORGAN.**

Witness may Testify as to his own age.

Reaffirmed in State v. Miller, 71 Kan. 202, 80 Pac. 51.

Proof of Age of Persons. See note, 111 Am. St. Rep. 584.

65 Cal. 583–591, 4 Pac. 25, 625, **MEYER v. BROWN.**

Where Statute Abolished Old Municipal Corporation and created new one and provided for funding bonds, subsequent statute making new corporation successor of old could not impair rights of bondholders.

Approved in Bates v. Gregory (Cal.), 22 Pac. 684, holding right to sue city on bonds not affected by subsequent legislation providing city could not be sued.

65 Cal. 591–592, 4 Pac. 628, **SILVA v. GARCIA.**

Entry upon Land and Digging Up and removing fruit trees thereon is waste and injury to inheritance, and will be enjoined in equity.

Approved in Hatton v. Gregg, 4 Cal. App. 545, 88 Pac. 595, enjoining entry and cutting down trees and brush on plaintiff's land; dissenting opinion in Pavkovich v. Southern Pacific R. R. Co., 150 Cal. 50, 87 Pac. 1100, majority holding owner of contingent future interest in land may have injunction to restrain waste.

Injunctive Relief as to Fences or Gates. See note, 7 L. R. A. (n. s.) 69.

65 Cal. 593–595, 4 Pac. 639, **ESTATE OF BILLINGS v. HAUVER.**

Effect of State Constitutions and Statutes upon inheritance by or from alien. See note, 31 L. R. A. 86.

65 Cal. 596–600, 52 Am. Rep. 310, 4 Pac. 629, **WILCOXSON v. STITT.**

Contract for Sale of Land held to give vendor, on failure of vendee to pay, option to enforce contract and recover purchase price, or to avoid it.

Approved in Freeman v. Griswold (Cal.), 34 Pac. 329, and Central Oil Co. v. Southern Refining Co., 154 Cal. 167, 97 Pac. 178, both holding where contract for sale of land provides for forfeiture of contract upon violation of terms by either party, contract will yet remain in force so as to protect rights of innocent party; Reed v. Hickey, 13 Cal. App. 151, 109 Pac. 44, under contract of sale of gold mine, vendor is not confined to his remedy of repossessing mine after vendee had taken much gold from it; Stewart v. Griffith, 217 U. S. 329, 30 Sup. Ct. 529, 54 L. Ed. 786, contract for purchase and sale of real estate, tenor of which imported mutual undertakings, held to be absolute contract and not option to purchase; Meagher v. Hoyle, 173 Mass. 579, 54 N. E. 348, contract providing that it shall be void on default in payment of installments when due is voidable only at option of vendor; Maffet v. Oregon & Cal. R. Co., 46 Or. 452, 80 Pac. 492, holding terms of contract making time of essence to be inserted wholly for benefit of vendor.

Time as of Essence of contract for sale of land. See note, 104 Am. St. Rep. 267.

65 Cal. 600–603, 4 Pac. 641, **THOMAS v. PLACERVILLE ETC. MIN. CO.**

Foreign Corporation Doing Business within state has no residence here but may be sued in any county designated by plaintiff.

Approved in Waechter v. Atchison etc. Ry. Co., 10 Cal. App. 73, 101 Pac. 42, following rule; Pittman v. Carstenbrook, 11 Cal. App. 229, 104 Pac. 701, arguendo.

Distinguished in Buck v. Eureka, 97 Cal. 139, 31 Pac. 846, holding municipal corporation is resident of county wherein its territory lies, and may demand transfer of action against it to county of its residence.

Locality of Jurisdiction of State Court over foreign corporation. See note, 70 L. R. A. 693, 697.

Who may be Served With Process in suit against foreign corporation. See note, 23 L. R. A. 497.

65 Cal. 603–605, 4 Pac. 646, FREEHILL v. CHAMBERLAIN.

Where Interest Coupons on Bonds are payable from special fund in city treasury, limitations cannot begin to run against interest until fund comes into treasury.

Approved in Burleigh County v. Kidder County, 20 N. D. 36, 125 N. W. 1066, following rule; Hewel v. Hogin, 3 Cal. App. 254, 84 Pac. 1004, 1006, holding limitations could not run against reclamation bonds when fund from which they were payable had not come into being; Barnes v. Turner, 14 Okl. 293, 78 Pac. 110, 10 L. R. A. (n. s.) 478, limitations do not run against obligations of city evidenced by warrants until fund has been provided by city for their payment.

Distinguished in Schoenhoeft v. Kearney County, 76 Kan. 887, 92 Pac. 1098, 16 L. R. A. (n. s.) 803, rule that limitations does not begin to run in favor of municipality on outstanding warrants until money to redeem is in treasury does not apply to ordinary bonded indebtedness represented by negotiable bonds and interest coupons.

Beginning of Statute to Run Against Action upon obligations of municipal or quasi-municipal body payable out of particular fund. See note, 10 L. R. A. (n. s.) 480.

Bonds of City of Sacramento Issued under act of 1858 are not barred by limitations, since act of 1863 deprived holder of right to sue thereon.

Approved in dissenting opinion in Bates v. Gregory (Cal.), 22 Pac. 687, 689, majority holding such bonds barred by limitations since act of 1864 providing for refunding bonds issued under act of 1858.

Miscellaneous.—Cited in Davis v. Porter (Cal.), 4 Pac. 647, companion case.

65 Cal. 605–609, 4 Pac. 643, RUSSELL v. BROSSEAU.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 406.

Relocation of Mining Claim as abandoned or forfeited. See note, 68 L. R. A. 838.

65 Cal. 609–611, 4 Pac. 648, EX PARTE HEILBRON.

City may Prohibit Maintenance of slaughter-house within city limits.

Distinguished in City of Elkhart v. Lipschitz, 164 Ind. 673, 74 N. E. 528, holding city could not prohibit location of slaughter-houses outside city but within two mile limit.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 649.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

65 Cal. 613–615, 4 Pac. 649, PEOPLE v. LE ROY.

Admissions or Statements Made by defendant which do not amount to confession of guilt are admissible against him although involuntary.

Approved in People v. Wilkins, 158 Cal. 534, 111 Pac. 614, and People v. Stokes, 5 Cal. App. 211, 89 Pac. 999, both following rule; People v. Willard, 150 Cal. 550, 89 Pac. 127, upholding admission of testimony of defendant on habeas corpus, bearing only on his sanity; People v. Ward, 5 Cal. App. 39, 89 Pac. 875, independent statements of defendant not amounting to confession may be proved against him as admission without requiring preliminary proof.

65 Cal. 616–618, 4 Pac. 662, STEIN v. HOWARD.

Corporation may Issue New Stock to be sold at less than par value to supply fund actually required by corporation, and such issue is not fictitious.

Approved in McKee v. Title Ins. etc. Co., 159 Cal. 218, 113 Pac. 145, upholding issue of bonds for payment of bonuses to subscribers to stock; O'Dea v. Hollywood Cemetery Assn., 154 Cal. 67, 97 Pac. 6, only creditors of corporation can attack its action in issuing new stock which was sold for less than par value; Smith v. Ferries etc. Ry. Co. (Cal.), 51 Pac. 715, holding valid issue of stock in consideration of property alleged to be of much less value than face of stock; Scott v. Abbott, 160 Fed. 578, 87 C. C. A. 475, upholding increase in stock when actually paid for at time of issuance, although statement made by corporation to Secretary of State to secure certificate of increase falsely stated that at that time it had been fully paid; Speer v. Bordeleau, 20 Colo. App. 422, 79 Pac. 335, upholding issue of stock as fully paid in consideration of transfer of certain bonds and mining leases where value was not shown.

Fraudulent and Over-issued Corporate Stock. See note, 87 Am. St. Rep. 850.

Power to Increase Capital Stock of corporations. See note, 38 L. R. A. 618.

Implied Power of Corporations to borrow money and give evidence of indebtedness and security therefor. See note, 111 Am. St. Rep. 328.

Miscellaneous.—Cited in Weed v. Gainesville etc. R. R. Co., 119 Ga. 596, 46 S. E. 894.

65 Cal. 619–620, 4 Pac. 666, YIK HON v. SPRING VALLEY WATER-WORKS.

Water Company is Liable for Injury to goods damaged in adjacent building caused by escape of water while company was repairing water-pipe.

Approved in Aschoff v. City of Evansville, 34 Ind. App. 33, 72 N. E. 282, holding city liable for damages for flooding adjacent cellar caused by neglect in keeping water-pipes in repair.

Right to Free Use of One's Property cannot be curtailed by fear that neighbor will make negligent use of his.

Approved in Helphand v. Independent Tel. Co. of Omaha, 88 Neb. 544, 130 N. W. 112, 33 L. R. A. (n. s.) 369, where damage is caused

by surface water negligently collected in trench in alley and thence soaking through sewer into adjacent basement, defective construction of sewer is not contributory negligence.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 60.

65 Cal. 621–622, 4 Pac. 664, PEOPLE v. SOTO.

Section 134, Code of Civil Procedure, authorizing discharge of jury on legal holiday is valid.

Approved in Diepenbrock v. Superior Court, 153 Cal. 599, 600, 95 Pac. 1122, holding section 5, article VI, Constitution, allows legislature to provide for transaction of any or all judicial business on legal holidays; Matter of Smith, 152 Cal. 569, 570, 93 Pac. 193, holding judgment cannot be pronounced on holiday; People v. Heacock, 10 Cal. App. 458, 102 Pac. 546, suggesting trials should not be held on Saturday afternoons.

65 Cal. 623–624, 4 Pac. 667, McKAY v. RILEY.

In Action for Failure to Deliver Goods under contract of sale, where goods have no market value, measure of damages is difference between price agreed to be paid and advanced price for which purchaser had agreed to sell to third party on faith of contract.

Approved in Californian Canneries Co. v. Pacific Sheet Metal Works, 144 Fed. 895, measure of damages on breach of contract to furnish daily supply of cans to cannery is actual loss in fruit thrown away and labor wasted due to such failure.

Damages for Breach of Contract on sale of article that has no market price. See note, 57 L. R. A. 193, 199.

Objection to Evidence, Which Might have been removed if taken in court below, cannot be taken for first time on appeal.

Approved in Davey v. Southern Pac. Co. (Cal.), 45 Pac. 171, holding objection to variance between allegations and evidence could not be taken for first time on appeal.

65 Cal. 625–626, 4 Pac. 675, PEOPLE v. SCHENICK.

Cross-examination as Proper Mode of proving conviction of crime for purposes of impeachment. See note, 30 L. R. A. (n. s.) 847.

65 Cal. 626–629, 4 Pac. 672, BLAND v. SOUTHERN PACIFIC R. R. CO.

Passenger is Bound to Exercise only ordinary care as to his safety.

Approved in Clerc v. Morgan's La. & T. R. Co., 107 La. 376, 90 Am. St. Rep. 319, 31 So. 889, holding passenger whose arm was struck by freight-car while thrust out of window not contributorily negligent.

65 Cal. 629–634, 4 Pac. 669, ANDREWS v. RUNYON.

Married Woman Deserted by Husband may sue alone to recover damages for personal injuries.

Approved in Duncan v. Duncan, 6 Cal. App. 406, 92 Pac. 311, holding wife living apart from husband can sue alone to recover her separate property without joining husband.

Liability for Acts of Independent Contractor where injury is direct result of work contracted for. See note, 65 L. R. A. 755.

65 Cal. 635–644, 4 Pac. 676, RECLAMATION DISTRICT NO. 3 v. GOLDMAN.

Trifling Deviation from Plans for reclamation district improvement does not vitiate proceedings.

Approved in Reclamation District v. Hershey, 160 Cal. 695, 117 Pac. 905, fact that reclamation commissioners through mistake did not include cost of acquiring certain private levees in estimate of work did not prevent supervisors from ordering assessment based on cost, including such levees.

Procedure for Establishment of drains and sewers. See note, 60 L. R. A. 188, 216.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 327.

65 Cal. 644–651, 4 Pac. 683, PEOPLE v. JORDAN.

Appellate Court has Inherent Power to establish procedure for determining cases of which it has jurisdiction but for which legislature has provided no procedure.

Approved in Commonwealth v. New York Cent. etc. R. R. Co., 206 Mass. 429, 92 N. E. 772, summons served on proper officers of corporation held correct means of bringing corporation into court on indictment.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 628.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 34.

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